Towards a Win-Win EU-China Bilateral Investment Treaty: Challenges and Prospects

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Abstract

Bilateral investment between China and the EU has accelerated rapidly, with both sides seeking a mutually beneficial yet sustainable relationship. Limitations remain however, given that the current legal framework governing EU-China investments are restricted in terms of its regulatory scope. Taken together, the fragmented patchwork of investment agreements between the individual EU Member States and China, most of which were concluded back in the 1980s, is in need of a comprehensive review. As such, the developments that were facilitated during the EU-China CAI and the US-China BIT will be addressed with consideration of the conflicting perspectives. Given that Europe remains the most favourable destination for Chinese investors, a comprehensive agenda on existing and future investments and access to local markets is critical towards maintaining a progressive economic environment.

Keywords: Bilateral investment treaty, Mutual relationships, Investment agreements EU-China CAI, US-China BIT

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Part I.1 Introduction

Despite the rapid growth of the bilateral investment flow between China and the EU, the current legal framework governing EU-China investments remains limited in regulatory scope and remains fragmented by a patchwork of investment agreements between the individual EU Member States and China. To provide new opportunities and improved market access for the EU and Chinese investors and to address key structural challenges, which have long plagued the establishment of a more mutually beneficial foreign investment environment, the EU and China negotiated a comprehensive Bilateral Investment Treaty (BIT) from November 2013. They are committed to conclude it by 2020. Six years on, the negotiation moved on to a more concrete stage: the market negotiations in 2019.[1] The EU-China BIT can no longer be viewed as a theoretical possibility. It is a modern globalisation phenomenon, which sets out to replace the much-criticised existing investment agreements between individual EU Member States and China.[2]

The EU-China BIT is touted as being of high standard, balanced, and potentially almost as a significant international investment treaty in the world as the US-China BIT.[3] It aims to provide a comprehensive investment agreement which encompasses the elements raised by both parties, in particular improved investment protection and market access.[4] It promotes and facilitates foreign investments in both directions[5] to meet the needs for the rapid growth of investment activities between the EU and China. From the EU's perspective, the EU-China BIT pursues the goal of building a Europe

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[1]EC, 'Report of the 20th round of negotiations for the EU-China Investment Agreement' (2019) Brussels, 1 March 2019 Trade, B2/

[2] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and third countries.

[3] Lifeng Tao & Wei Shen, 'The Gap between the EU and China on the ISDS Mechanisms in the Context of the EU-China BIT Negotiations: Evolving Status and Underlying Logic' (2018) 48, Hong Kong L.J. 1159, 1160

[4] EC, 'Recommendation for a Council Decision, Authorising the Commission to open negotiations on an investment agreement between the European Union and the People's republic of China' (2013) Brussels, Com (2013) 297 Final, 2

[5] Ibid

with a smart, sustainable and inclusive growth[6] when China becomes the second biggest economy in the world and the second biggest trading partner with the EU.[7] China exuberantly pursued its economic reforms and opening-up policy since 1978. It became an important destination for foreign direct investments in the world in the 2000s.[8] No doubt, this importance intensified in more recent years in line with its huge success in the international investment and trade arena. From China's perspective, concluding an effective BIT inevitably constitutes a strategic move for its global economic development in modern times as Europe remains the favourite destination for Chinese investors too.[9] While China has showed fresh momentum with rapid-economic growth, the market for Chinese Foreign Direct Investments (FDIs) with the EU still has huge room for growth. A comprehensive BIT would work to improve legal protection and certainty for Chinese investors.[10] It would stimulate the flow of China's outward as well as inward FDIs among the EU countries, particularly at a time when China's economy started to show a sign of slowing down and the amount of European FDIs in China stagnated before 2015 and further declined in 2016 and 2017.[11]

This paper seeks to examine critically the long-drawn EU-China BIT negotiations with a focus on identifying major sticking points that pose threats to an even stronger EU-

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[6] EC, 'Europe 2020, A strategy for smart, sustainable and inclusive growth' (2010) Com (2010) 2020 final, 5

[7] EC, 'Impact assessment report on the EU-China investment relations, Accompanying the document—Recommendation for a Council Decision, Authorising the opening of negotiations on an investment agreement between the European Union and the People's Republic of China' (2013) SWD (2013) 185 final, 6 (Thereafter 'The impact assessment report'); Eurostat, 'EU-China economic relations' (2017) online available at: https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/EDN-20170601-1, accessed on 14/06/2019;

[8] Jessica Zoe Renwald, 'Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution' (2006) 16 Ind. Int'l & Comp. L. Rev. 453, 454

[9] Thilo Hanemann, Rhodium Group and Mikko Huotari, Mercator Institute for China Studies, 'EU-China FDI: Working towards reciprocity in investment relations' (2018) Merics papers on China No 3, 9

[10] EC, 'Impact assessment report, supra n 7, 20

[11] Qianwen Zhang, 'China's 'New normal' in international investment agreements' (2016) Columbia FDI Perspectives on topic foreign direct investment issues, No 174, May 23, 1; Thilo Hanemann et al, supra n 9, 9

China investment relationship and assessing to what extent these issues may be successfully addressed. Part II examines the current legal framework governing EU-China investment relationships and argues that the existing BIT regime between China and the EU Member States are not fit for purpose in light of a robust EU-China bilateral investment relationship and China's ambitious Belt and Road Initiative (BRI). Instead, a comprehensive modern EU-China BIT will serve the best interest of both the EU and China. Part III examines the key issues that so far have impeded a successful conclusion of the EU-China BIT negotiations. These issues include the lack of a level playing field, a limited access to the Chinese market, a lack of legal certainty and transparency and lastly, the threat of 'takeover' and national security issues. Part IV examines China's recent investment law reforms and assesses how these reforms contribute to bridge the difference between the two parties. Part V concludes the chapter, which provides an outlook of the on-going EU-China BIT negotiations and outlines the policy recommendations for the major roadblocks which proved to be challenging in tackling the negotiations.

Part I.2 The Case for a comprehensive EU-China BIT

The establishment of a unified BIT to replace the patchwork of existing BITs is a favoured option for both the EU and China. The main objectives of the new BIT consist of improving legal certainty and investors' protection for both sides and to reduce trade barriers for foreign investments.[12] On the EU side, it has an exclusive competence to abolish restrictions on FDIs.[13] The European Commission highlighted the goal to abolish the existing Member State BITs but to establish a EU-China BIT negotiation,[14] particularly to promote the inner consolidation within the EU.[15] This Policy emphasised the need to strengthen the EU's competence in Foreign Direct Investments (FDIs), to

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[12] EC, 'Impact assessment report', supra n 7, 20
[13] Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union
[14] European Economic and Social Committee, 'Towards a comprehensive European International Investment Policy' (2011) COM(2010) 343, 2011/C 318/25, S 1.4
[15]Tao & Shen, supra n 3, 1160

achieve better access to the key third country markets, to protect investors and to enhance the EU's international competitiveness.[16]

China has always been at the forefront of encouraging foreign investment since its opening-up policy in 1978 and throughout its accession to the WTO in pursuit of a market economy in 1992. Its most recent Five-Year Plans, 2011-2015 and 2016-2020 and the 18th Party Congress in 2013 reiterated this agendum, calling for a further promotion of economic reform and opening-up, the reduction of the limitations on foreign investments in China and a unification of its Foreign Investment Law.[17] China set a high priority to achieve the highest standard of legal protection and certainty for Chinese investors.[18]

The trading relationship between China and the EU is strategic for the global business community. China became an attractive country for FDIs because much production moved to China, but at the same time China's outward and inward FDIs remained significantly low (see figure 3).[19] China's FDI stocks increased by an annual average rate of 23% between 2004 and 2010.[20] In 2014, China hosted the highest amount of

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[16] European Economic and Social Committee, 'Towards a comprehensive European International Investment Policy', supra n 14, S 1.1

[17] Xiang Gao and Huiqin Jiang, 'Foreign Investment Laws and Policies in China', *Deepening Reform for China's long-term Growth and Development*, (2014, ANU Press, First) Policies; China Brain, 'Blueprint for the 13th Five-Year Plan for 2016-2020', (2015) online available at: http://www.china-brain.com/Resources/Blueprint-for-the-13th-Five-Year-Plan-for-2016-2020-/195.html#.XRH7Ey-ZNp8, assessed on 25/06/2019; Central Committee of the Communist Party of China, 'The 13th Five-Year Plan for economic and social development of the People's Republic of China 2016-2020', 《中华人民共和国国民经济和社会发展第十三个五年规划纲要》 (2016) online available: http://www.gov.cn/xinwen/2016-03/17/content_5054992.htm, accessed on 25/06/2019, Part 3.

[18] EC, 'Impact assessment report', supra n 7, 20

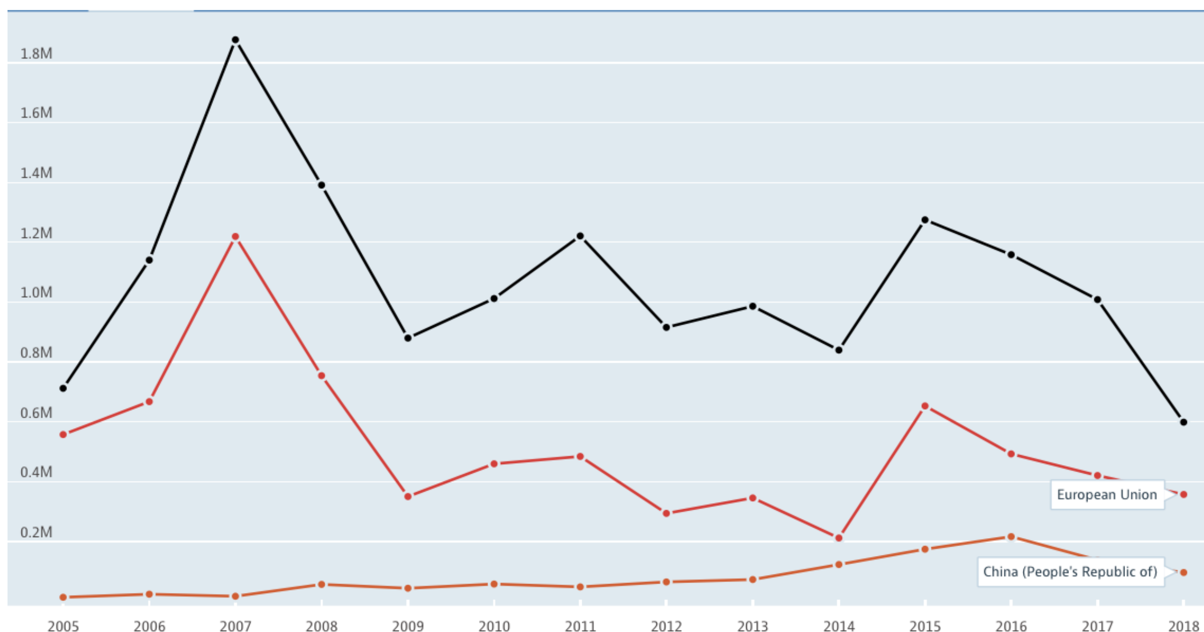
[19] European Economic and Social Committee, 'Towards a comprehensive European International Investment Policy', supra n 14, S 3.3

[20] EU, DG Trade, Copenhagen Economics, 'EU-China Investment study-final report' (2012) online available at: https://www.asktheeu.org/en/request/1352/response/5832/attach/2/44%2024%20EU%20China%20Final%20Report%2011JUN2012.pdf, accessed on 17/06/2019, 10

FDIs at $129 billion.[21] China is the second largest trading partner to the EU, the EU being the largest trading partner to China in 2018.[22] However, the total of the EU FDI positions in China (€168 bn at the end of 2015) was much higher than that of China in the EU (€35 bn).[23] The total FDI investments of China and the EU peaked between 2014 and 2016 before they declined significantly in 2018 (see Figures 1 and 2). The relatively low EU-China FDI flows compared to the rapid economic growth in China suggests that the EU-China investment is far from reaching its full potential. The FDIs in both directions anticipatively headed for a rapid increase in the coming years.[24] Hence, the EU-China BIT is strategic in order to achieve an improved foreign investment environment, which can match up China's economic growth.

Figure 1 FDI Flows (outward, million US dollars, 2005-2018)[25]

*------ OECD-Total (35 OECD member countries), ------ EU 28, ------ China



[21] Ecorys & TNO, 'Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People's Republic of China, Final report' (2017) B-1049 Brussels, 20

[22] European Council, 'infographic-The EU and China are strategic trading partners' (2018) Sources: Eurostat, World Bank

[23] Eurostat, 'EU-China economic relations', supra n 7

[24] Tao & Shen, supra n 3, 1160

[25] OECD Data, 'FDI flows' (2018) https://data.oecd.org/fdi/fdi-flows.htm#indicator-chart, accessed on 14/06/2019

Figure 2 FDI Flows (inward, million US dollars, 2005-2018)[26]

*------ OECD-Total (35 OECD member countries), ------ EU 28, ------ China

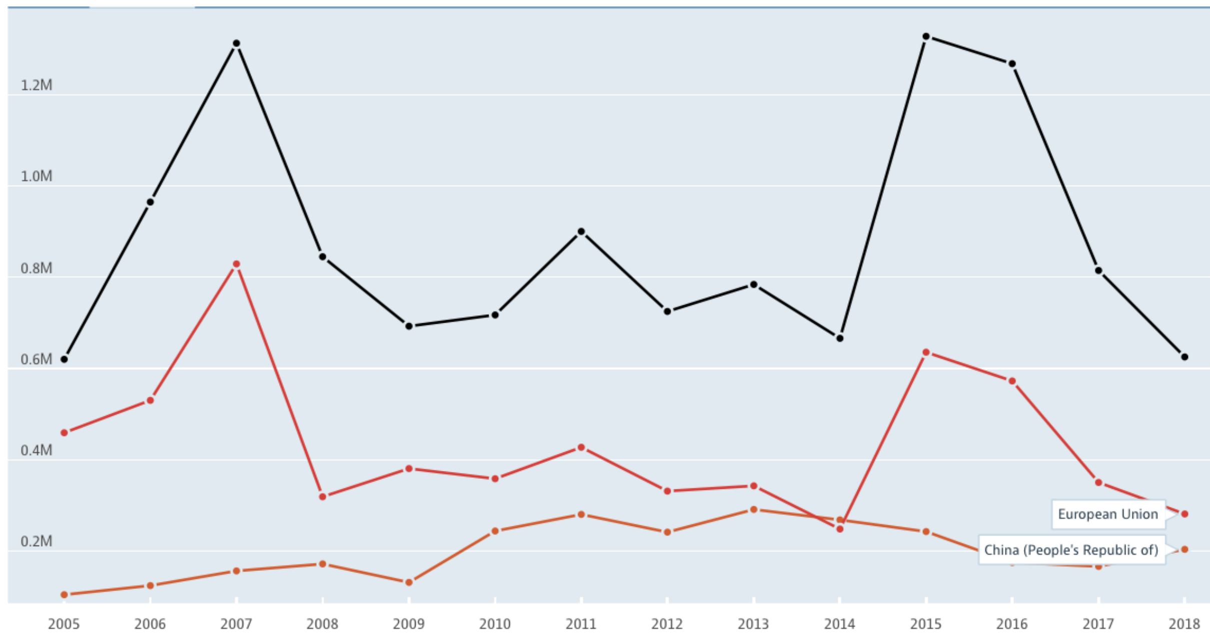
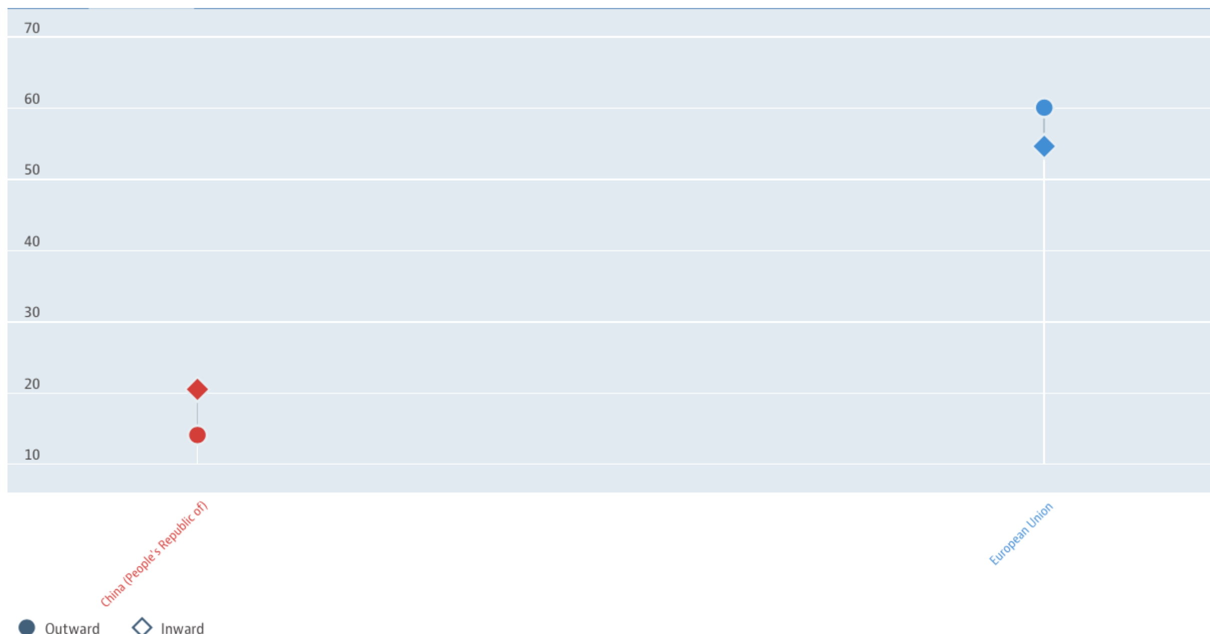


Figure 3, FDI stocks (outward/inward, % of GDP, 2018)[27]



26 Ibid

27 OECD Data, 'FDI stocks' (2018) online available: https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart, accessed on 17/06/2019

Part II: Potential Benefits of EU-China BIT and China Belt and Road Initiative

Part II.1 Potential Benefits of EU-China BIT

First, a new BIT offers better protection for investors and encourages investment flows between the two regions.[28] The existing new generation BITs (15 out of 26 BITs) signed after 1998 improved investors' protection to a certain degree compared to the BITs signed before 1998. Nonetheless shortcomings still exist. The new generation BITs post-1998 allow foreign investors to rely on both the national treatment provisions and the investor-to-state dispute settlement (ISDS) for substantive protections, such as the International Centre of Settlement Investment Disputes (ICSID).[29] In general, the usage of ISDS was criticised for impeding the host state's right to regulate for public interest, resulting in a call for the establishment of other mechanisms, such as the appeals mechanism, a permanent international investment court, the state-to-state dispute settlement or the alternative dispute resolution methods.[30] Prior to the late 1990s, China did not favour the recourse of ISDS as a mechanism for investment disputes for reasons such as China's suspicions on international law and international institution, ideological differences and China's overtly emphasised 'national sovereignty'.[31] Moreover, the level of protection afforded by the current BITs depend on the interpretation of each arbitration court, eg, the courts took a different interpretation with regard to disputes which involved compensation for expropriation when awarding jurisdiction and compensation.[32] Therefore, the EU-China BIT would offer an opportunity to address this issue. To some extent, an international

[28] EU, DG Trade, Copenhagen Economics, supra n 20, 36
[29] Ibid, 37
[30] Tao & Shen, supra n 3, 1160, 1161; UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, (June 2013) IIA Issues Note No 2, 3 & 5-9
[31] Dilini Pathirana, 'A look into China's slowly increasing appearance in ISDS cases' (2017) online available at: https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/, accessed on 10/07/2019; Tao & Shen, supra n 3, 1160, 1164
[32] EU, DG Trade, Copenhagen Economics, supra n 20, 44; Pathirana, supra n 31; *Señor Tza Yap Shum v. The Republic of Peru,* ICSID Case No. ARB/07/6, 5-9; *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia,* UNCITRAL, PCA Case No. 2010-20.

independent dispute mechanism arguably should be more viable compared to any other domestic court systems and the mechanisms agreed under the BITs for reasons of avoiding the influence of the political bias and the rule of law in the host state.[33]

China embraced a positive approach and allowed investors to resort to international arbitrations from 1995.[34] China increased its international presence for using the ICSID arbitration to resolve claims both for cases brought by Chinese investors and cases against China since 2010.[35] Some existing BITs imposed limitations on foreign investment enterprises (FIEs), such as the need to exhaust local remedies before the pursuit of international arbitration,[36] only allowing such a recourse over disputes of compensation resulting from expropriation and nationalisation[37] or only when there is a mutual consent.[38] The most modern BITs do not require the exhaustion of local remedies. FIEs can bring a case either to the domestic court system or to the international arbitration after the stipulated waiting time, usually being six months.[39] Where there is an absence of a clear agreement, disputes concerning foreign investments may face the local or national adjudication system, which was criticised

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[33] Tao & Shen, supra n 3, 1160, 1162

[34] Tao & Shen, supra n 3, 1160, 1164; Zhang, supra n 11, 1

[35] Zhang, supra n 11, 1

[36] An Chen, "Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled? - Comments on Provisions Concerning Dispute Settlement in Model US and Canada BITs" (2006) 7(6) Journal of World Investment & Trade, 899-933.

[37] Belgium-China BIT, Art. 10(3), a dispute 'which arises from an amount of compensation for expropriation, nationalisation or other similar measures and has not been settled within six months from the date of notification' to be referred to an international arbitration without resort to any other type of resolution; Poland-China 1998, Art. 10(1) Investors must seek recourse in the domestic courts first before a dispute on the amount of expropriation is permitted;

[38] EU, DG Trade, Copenhagen Economics, supra n 20, 38; Greece-China BIT, Art. 10(2); Pathirana, supra n 31; Greece-China BIT, Art. 10(2), 'Any other dispute between an investor and a Contracting Party may be submitted to an international arbitration tribunal, only by mutual consent.'

[39] Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) para 42; Tao & Shen, supra n 3, 1160, 1166

for being weak and inadequate to protect foreign investors.[40] Additionally, the administrative review can be more problematic and fails to provide a level playing field for the European investors. The new generation BITs variably require investors to complete a local administrative review which lasts at least three month or to withdraw their case prior to the delivery of a judgment at a national court before resorting to international arbitration.[41] Hence, a new single BIT should bring all EU Member States to the same level of protection with added certainties and clarity on questions such as whether a local judication or administrative review is mandatory or not and what the conditions are if a FIE were to resort to international arbitration.

Secondly, a consolidation of the current 26 BITs with a focus only on investment protection is unlikely to have a significant positive impact on FDI flows according to the Copenhagen Economics study in 2012. This study provided an empirical study on the correlation between the current BITs and the FDI flows at a global level and the importance of the EU-China BIT. The study concluded that the current 26 BITs had only a negligible impact on FDI flows and the investors had limited familiarity with the provisions of EU-China BITs.[42] In contrast, the EU's Sustainability Impact Assessment (SIA) in 2017 provided an update and comprehensive evaluation on the new BIT currently under negotiation. This study covered a much wider scope, including market access, investor protection, a regulatory framework for investment,

[40] Pitman B Potter, 'The Chinese Legal System: Continuing Commitment to the Primacy of State Power' (1999) The China Quarterly, No. 159, Special issue: The People's Republic of China after 50 years, 673-683, 673
[41] Czech Republic-China BIT, Art. 9(3), 'China will require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulation of that contracting party before the submission of the dispute to the international arbitration. Such a procedure shall not exceed a period of three months'; Latvia-China BIT 2004, Art. 9(2), The investors may lose his right to resort to international arbitration if he fails to withdraw the case before national court's delivery of judgment; Finland-China BIT 2004, Art. 9(3), The investor must withdraw his case before the local court's judgment had been delivered on the subject matter in order to resort to international arbitration; Portugal-China BIT 2005, Ad Art. 9, The investors has to go through the local administrative review process before an international arbitration and only resort to international arbitration after the three-month period elapsed.
[42] EU, DG Trade, Copenhagen Economics, supra n 20, 45

transparency issue, licencing and authorisation procedures, sustainable development and dispute settlement.[43] The SIA concluded that a BIT with better market access and investor protection in general has a greater impact on the economy, social aspects, human rights and environmental standards.[44] The positive economic impact derived from the reduced investment cost and improved economic growth and employment from market access spill-overs.[45] For social impact, the BIT is expected to increase international exposure, to improve transparency on labour and sustainability in the host countries and to improve governance and social dialogues.[46]

Part II.2 China Belt and Road Initiative

The Belt and Road Initiative (BRI) constitutes a strategy for promoting an all-round opening up policy and win-win cooperation with all participating countries in a wide range of fields, such as economic, social, political and technological development.[47] Given the size and potential implication of the BRI, it is important that the EU-China BIT negotiation seizes the opportunity to address the challenges as well as prosperities sprouting from the BRI. The BRI is a historically big project from Asia with some significance for improving the linkages and cooperation with 70 other countries along the routes of the BRI.[48] This initiative aims to advance the development of international economic cooperation corridors, including the new Eurasian Continental

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[43] ECORYs & TNO, supra n 21, 12

[44] Ibid, 10

[45] Ibid, 12

[46] Ibid, 13

[47] Xinhua, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road' (2015) National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, III

[48] C. T. Shehzad, 'BRI and the effect of trade and financial integration on output volatility', in J. Syed, Y.-H. Ying (eds.), *China's Belt and Road Initiative in a Global Context*, (2019) Palgrave Macmillan Asian Business Series, 34; Martin Hart-Landsberg, 'A critical look at China's One Belt, One Road initiative' (05/10/2018) online available: http://www.cadtm.org/A-critical-look-at-China-s-One-Belt-One-Road-initiative, accessed on 07/07/2019

Bridge.[49] China committed itself to build an infrastructure connection with Asia, Europe, Africa and Oceania and to support the development of international container shipping services and postal train routes.[50] Since this initiative links up East Asia and Central Asia with Europe, it should constitute another form of connectivity and trade access among these three regions alongside the formal EU-China BIT.[51] The trade integration offered under the BRI can increase growth, bring stability to economies by reducing output volatility in developing and advanced countries.[52] Apart from its economic impact, the BRI aims to enhance the openness and inclusive cultural exchanges in pursuit of the role of the Silk Road.[53] Hence, it has a wide economic and social impact on the countries or economic areas under the cooperation mechanism and multilateralism. It should facilitate EU-China foreign trade with a better network to energy, resources, production chains and financial systems.

Moreover, the BRI carries China's ambition to reshape the world. China increasingly pursues an aggressive strategy to expand its global influence economically, socially and politically. Besides the economic benefits, the BRI fulfils the goal of expanding China's geopolitical influence to redesign international institutions and rules.[54] Some suggested that China's BRI aimed to deliver strong economic growth to secure energy supply through pipelines in Eurasian countries and to reinforce the international stature of the Renminbi as a global reserve currency.[55] In the case of Africa, the BRI

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[49] Central Committee of the Communist Party of China, 'The 13th Five-Year Plan for economic and social development of the People's Republic of China 2016-2020', supra n 17, Chapter 51, S 2

[50] Ibid; Hart-Landsberg, supra n 48

[51] M. Yildiran, 'The Chinese vision of BRI and its effects on Turkey and West Asia', J. Syed, Y.-H. Ying (eds.), *China's Belt and Road Initiative in a Global Context*, (2019) Palgrave Macmillan Asian Business Series, 213

[52] Shehzad, 'BRI and the effect of trade and financial integration on output volatility', supra n 48, 34

[53] Central Committee of the Communist Party of China, 'The 13th Five-Year Plan for economic and social development of the People's Republic of China 2016-2020', supra n 17, Chapter 51, S 3

[54] BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?' (January 2019) policy paper/China, 5

[55] I. Rechberg and S. Guo, 'The interpersonal challenges of BRI: Developing people-to-people bonds', in J. Syed, Y.-H. Ying (eds.), *China's Belt and Road Initiative in a Global Context*, (2019) Palgrave Macmillan Asian Business Series, 179

projects and China's increased foreign investment over the last decades were criticised for meeting China's need for raw materials and oil supplies and the need of a new export market for China's low-cost manufactured goods.[56] From a political perspective, policymakers should be mindful that BRI does not become a mechanism to 'insert [China] into an existing bilateral relationship between Africa and the West' and to fulfil a neo-colonial motivation particularly in the less developed regions.[57] Noticeably China had used its political and economic weight to influence EU Member States.[58] An un-reined BRI could lead to a 'political blowback' since China would have had opportunities to gain ownership control over key infrastructures of the participating countries.[59] Conversely, many of these criticisms can be derived from the fear of the rising of China and its new vision of globalisation, the challenges imposed to the dominance of the US and the dollar together with the need for a balanced influential power between the developed countries and emerging economies.[60] Given the potential challenges within the BRI, the EU-China BIT should be a strategic instrument to reconstruct a clear balance between the economic and social-political power of both parties, especially to safeguard the stability of the EU and other countries, with which China has a close social and eco-political ties under the BRI.

Part III Key Impediments for a Successful EU-China BIT

The current foreign investment framework is fragmented with 26 different BITs between China and the EU Member States except Ireland.[61] China began signing BITs with the EU countries in 1982. It conducted BIT renegotiations and updates with some

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[56] R. Kamal and O. Haroon, 'China in Africa', in J. Syed, Y.-H. Ying (eds.), *China's Belt and Road Initiative in a Global Context*, (2019) Palgrave Macmillan Asian Business Series, 250-252
[57] Ibid
[58] BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?', supra n 54, 5
[59] Hart-Landsberg, supra n 48
[60] M. M. Du, "China's 'One Belt, One Road' Initiative: Context, Focus, Institutions, and Implications' (2016) The Chinese Journal of Global Governance, 2(1), 30–43. 'Implication for Global Governance'
[61] ECORYs & TNO, supra n 21, 11-12

EU member states from 2001.[62] The existing BITs have inconsistent rules and are inadequate because they only dealt with investment protection but not the market access.[63] Since the EU has the mandate to update and build a comprehensive international investment policy, which covers the key aspects,[64] the conclusion of the EU-China BIT in general should bring a positive outcome in both ways. The EU-China BIT negotiations must deal with the challenges existing in the current EU-China investments, such as the lack of a level playing field, limited market access, a lack of transparency and certainty, threats of 'takeover' and the national security impediment.[65]

III.1 Lack of a Level Playing Field

The lack of a level playing field existing between China and the EU has long been a recognised problem for China and EU investments. The restrictiveness for FDIs in the EU remained persistently low from 1997 to the present day at an average of 0.035.[66] In contrast, China is the most restricted country being the least open regime for foreign investments in every single sector except the real estate (see Figure 4).[67] Restrictions existed not only at the market entry level but also at post establishment level. For the latter, China has different rules and regulations for the FIEs and a wide range of administrative practices which restrain foreign investors at post-establishment.[68] Noteworthily, China's restrictiveness gradually reduced from 0.613 in 2008 to 0.251 in 2018.[69] Nevertheless, the imbalance between these two regimes is still significant, resulting in an unlevelled playing field for EU-China investors.

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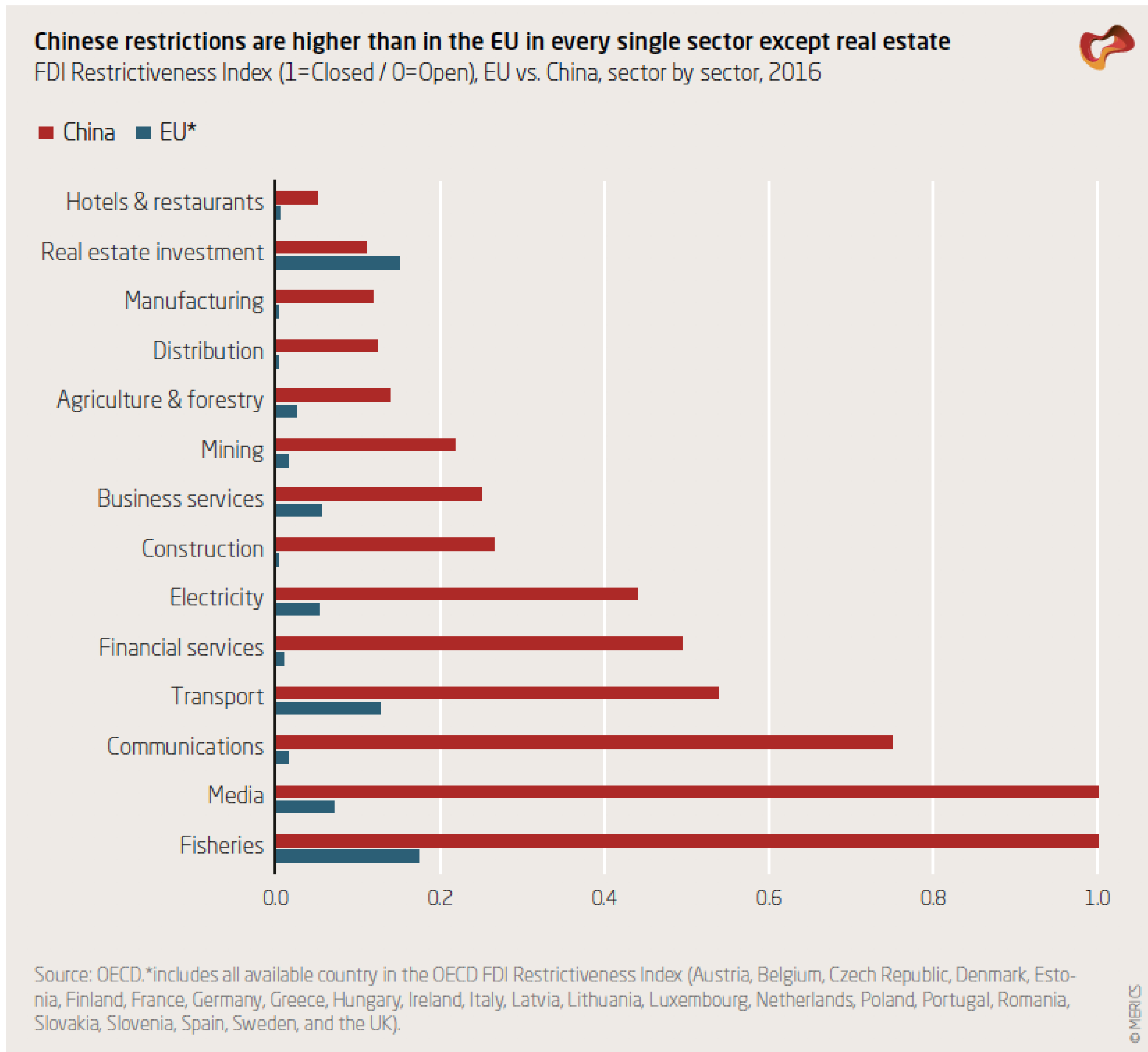
[62] Tao & Shen, supra n 3, 1160, 1163
[63] ECORYs & TNO, supra n 21, 11
[64] European Economic and Social Committee, 'Towards a comprehensive European International Investment Policy', supra n 14, S 4.1 & 4.4.1
[65] EC, 'Impact assessment report', supra n 7, 5; European Commission, 'Report on the protection and enforcement of intellectual property rights in third countries', (2018) SWD(2018) 47 final, 9
[66] OECD.stat, 'OECD FDI Regulatory Restrictiveness Index' (2018) online available at: https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#, accessed on 16/06/2019
[67] Thilo Hanemann et al, supra n 9, 11-13
[68] Ibid; Thilo Hanemann et al, supra n 9, 13
[69] OECD.stat, 'OECD FDI Regulatory Restrictiveness Index,' supra n 66

This condition exacerbated in recent years, which resulted in more than half of European companies complaining about unfair treatment and the non-reciprocity for EU foreign investments.[70] Evidence showed that the Chinese FDI flowing to the EU soared three times higher than that of the EU to China in 2017 under various restrictive practices against the EU foreign investment in China driven exclusively by the M&A activities.[71] Three quarters of these investments could not have happened in the other direction because of the prohibition and restriction under Chinese law or because they would not be approved by the Chinese State between 2000 and 2017.[72] One cause for this sharp rise should be attributed to the Chinese government's promotion of outward investment overseas in recent years.[73] This imbalance of FDI flows lead to the non-reciprocity complaint from EU investors. In contrast, Chinese investors already recognised the advantages of an open EU investment market so as to emphasise the importance of the EU maintaining this openness.[74] The existing bilateral and multilateral frameworks did not successfully address the uneven regulatory rules for investors and led to a compromise of the competitiveness of European investors.[75]

Figure 4 FDI Restrictiveness Index 2016, China vs EU[76]

[70] Thilo Hanemann et al, supra n 9, 16
[71] Ibid, 13 & 20
[72] Ibid
[73] Ken Davies, 'Inward FDI in China and its policy context, 2012', (2012) Columbia FDI Profiles, 7
[74] Ibid
[75] EC, 'Impact assessment report', supra n 7, 11
[76] Thilo Hanemann et al, supra n 9, 13



III.2 Limited Market Access

Previously the Chinese government placed strict control over foreign investment projects through the processes of approval, supervision, targeting economic sectors for foreign investments, and finance and tax supervision.[77] The restrictive screen policy for foreign investments constitutes an important reason for the limited market access to the China market in general. The controls over FDIs included limitations on size, duration and scope of business.[78] Prior to the new BIT negotiation, the National

[77] Potter, 'The Chinese Legal System: Continuing Commitment to the Primacy of State Power,' supra n 40, 680
[78] Ibid

Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) promulgated several versions of the Catalogue of Industries Guiding Foreign Investment (the Catalogue) since 1995 as the main guidelines for reviewing, evaluating and approving foreign investment projects and enterprises.[79] The guidelines have four categories for foreign investments, i.e., the prohibited, restricted, encouraged and permitted, all of which were defined under the Interim Provisions on Guiding Foreign Investment Direction.[80] All foreign investments were subject to administrative approvals before entry into the market.[81] Among these categories, the prohibited category is not open to foreign investments, while the restricted category only permits foreign investments if they can satisfy certain requirements, such as the requirements for a joint venture or equity limitations. The earlier version of the Foreign Investment Law was said to be fragmented and restrictive, providing wide latitude for administrative discretion in deciding whether to approve foreign investment.[82]

Despite the damning criticism from the EU investors' perspective particularly in MERICS's study, arguably China continued to liberalise the FDI framework. China raised the ceiling on provincial examination and approval authority over foreign investment projects in 2010.[83] China's merger control review under the 2008 Anti-Monopoly Law abolished discrimination against foreign investors and did not prevent major global multinational enterprises from continuing to invest in China.[84] China reduced the restrictions over the years with many sectors becoming 'encouraged' sectors for FDI participations and removed some equity ratio limitations.[85] Compared

[79] Gao & Jiang, supra n 17, Guiding catalogues; 《外商投资产业指导目录》Catalogue for the Guidelines of Foreign Investment 1995
[80] The Interim Provisions on Guiding Foreign Investment Direction, 1995, Article 4
[81] Ruihua Lian, 'Further opening-up to foreign investment: the new Negative Lists' (2019) Tsinghua China Law Review, Vol. 12:143, 146
[82] Weihuan Zhou, Huiqin Jiang and Qingjiang Kong, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution' (2020) 54(3) Journal of World Trade [2019] UNSWLRS 59, 7; Li Mei Qin, 'Attracting Foreign Investment into the PRC: The Enactment of Foreign Investment Laws' (2000) 4 *Singapore Journal of International and Comparative Law* 159, 160.
[83]Davies, supra n 73, 5
[84] Ibid
[85] Gao & Jiang, supra n 17, supra n 17, Guiding catalogues

to the 2007 Catalogues, the 2012 version reduced the restricted and prohibited categories by 8 items. Nonetheless, the 2012 catalogues did not substantially reduce the market access barriers.

The Copenhagen Economics 2012 survey still identified 214 investment barriers.[86] The top five were the licensing requirements/procedures, foreign ownership limitations, regulatory approval procedures, prohibition to invest, limited scope of business and joint venture requirements.[87] Under the joint-venture ownership, the foreign partners cannot be the controlling party.[88] These barriers can increase the entry and operation costs, limit companies' activities, reduce investments and increase investment risks for EU companies.[89] Additionally, compared to the State-Owned-Enterprises (SOEs) foreign companies are the disadvantaged group as the SOEs and private Chinese enterprises can access subsidies, loans, or enjoy an unfair advantage for public procurements or bidding procedures.[90] Elimination of these barriers would benefit both Chinese and foreign country economies.

The subsequent Gang et al's 2013 study evaluated the degree of preferential treatment for China's SOEs. On the point of the SOEs' privileged access to low-interest rate bank loans, it is unclear whether Chinese SOEs received preferential interest rates from domestic banks compared to the US firms because the US firms' deferral funds rates is close to zero.[91] The foreign-invested enterprises (FIEs) in China enjoyed various 'super-national treatments' before 2008, such as lower profit tax rates and exemptions from duties on imports of machinery and equipment.[92] The Chinese government eliminated these 'super-national treatments' in its equal treatment for all

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[86] EU, DG Trade, Copenhagen Economics, supra n 20, 70
[87] EC, 'Impact assessment report', supra n 7, 12
[88] Fan Gang and Nicholas C Hope, 'Chapter 16, The roles of State-Owned Enterprises in the Chinese Economy,' *US-China 2022: Economic Relations in the Next 10 Years*, (2013) China-United States Exchange Foundation, 13
[89] EU, DG Trade, Copenhagen Economics, supra n 20, 71
[90]Ibid; BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?', supra n 54, 8
[91] Gang and Hope, 'The roles of State-Owned Enterprises in the Chinese Economy', supra n 88, 12
[92]Ibid, 12; Gao & Jiang, supra n 17, Super-national treatment phases out

enterprises' reforms.[93] By 2010, foreign investments operated under the unified tax system like other domestic enterprises.[94]

Nonetheless, the market access barriers still exist for foreign investments under the promotion of the China State monopolies and national champions in seven strategic industries and five 'pillar industries', in which the SOEs have a significant role to play.[95] Foreign investments would have to face discriminatory treatments or discouragement from participation in these ear-marked industries.[96] Foreign investments face challenges from local protectionism, such as government procurements, market regulations and subsidies for indigenous enterprises.[97] In January 2019, the problem of unlevelled competition and a high degree of asymmetry in market access between China and the EU existed in areas such as the high industrial tariffs, the protection of the SOEs' market shares, unequal access to licenses, financing, subsidies and legal remedies, forced technology transfer and the lack of intellectual property rights.[98] Various market access barriers pose a challenge for EU foreign investments in China while the lack of a level playing field inevitably created a high barrier to entry and lowered competitiveness for EU companies.

Although the complaint of a limited market access mainly came from EU investors, market access barriers also exist for Chinese investors when entering into the EU market. The barriers include unequal licensing, authorisation or application standards, the lack of legal transparency, a high administrative burden[99] and the lack of levelled

[93] Gang and Hope, 'The roles of State-Owned Enterprises in the Chinese Economy', supra n 88, 12
[94] Gao & Jiang, supra n 17, Super-national treatment phases out
[95] Gang and Hope, 'The roles of State-Owned Enterprises in the Chinese Economy', supra n 88, 13
[96] Ibid, 13; OECD Economic Survey of China (2010) Product market regulation and competition', p 120-21
[97] Gang and Hope, 'The roles of State-Owned Enterprises in the Chinese Economy', supra n 88, 14
[98] BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?' supra n 54, 3
[99] EC, 'Impact assessment report', supra n 7, 19

investment protection.[100] Therefore, reducing market access and streamline legal rules are objectives desired by both parties.

III.3 Lack of Legal Certainty and Transparency

China's current legal system poses a challenge for investors for reasons such as a lack of legal certainty, transparency and sufficient protection.[101] The modern Chinese legal system has a relatively short history compared to EU countries. China's legal reform started in 1979 under the Chinese Communist Party (CCP) leadership. The reform was in general swift and covered a wide spectrum of legal sectors. Nonetheless, its development was criticised for being the mechanism of maintaining the Party's monopoly on political power and promoting economic development.[102] Hence, the degree of legal certainty, transparency and investors' protection would largely be swayed according to the Party leadership's directions and priorities. One aspect of its legal reform focused on strengthening the judicial institutions' power for civil dispute resolution. Notwithstanding, the Chinese court system is still weak and unable to compel production of evidence and to enforce awards.[103] Corruption, poor training and abuse of power and political connections continue to jeopardise the effectiveness of the Chinese Court system.[104] This could lead to a fear of insufficient protection for foreign investors.

Inevitably, the Party leadership used the legal system to pursue economic reforms concerning FDIs and foreign investment relationships, which had high priority during the post-Mao era.[105] The implementation of the Foreign Economic Contract Law of 1985 and the dispute resolution system under China's International Economic and Trade Arbitration Commission showed China's great willingness to establish a sound internal legal system for foreign investors. The EU-China investment relationship was

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[100] EU, DG Trade, Copenhagen Economics, supra n 20, 10
[101] EC, 'Impact assessment report', supra n 7, 14
[102] Potter, 'The Chinese Legal System: Continuing Commitment to the Primacy of State Power,' supra n 40, 673
[103] Ibid
[104] Ibid
[105] Ibid, 678; EU, DG Trade, Copenhagen Economics, supra n 20, 11

strengthened for at least two to three decades after the 'opening-up' policy. However, a comprehensive framework to cover investment relationships is still lacking under the existing BITs.[106] In the absence of a unified BIT, this patchwork framework cannot provide an adequate and unequivocal protection for foreign investors.

The existing BITs improved investors' protection in many ways. They contain standard provisions, such as the principle and equitable treatment, full protection and security, non-discrimination and the investor-to-state dispute settlement.[107] Even with the enhanced protection the current provisions contain discrepancies. For example, the BIT between China and Cyprus is the only BIT which contains an unconditional national treatment commitment.[108] The unlimited 'Most Favoured Nation' treatment is only guaranteed in eight agreements.[109] Apart from these discrepancies, they did not contain any provisions for the prevention of the lowering of standards, the issues of corporate social responsibility and questions over SOEs, subsidies and forced technology transfers.[110] For the interests of Chinese investors, establishing a set of unified agreements should be an optimal approach for simplifying procedures, reducing cost and enhancing protections. Therefore, a new comprehensive BIT should provide an up-to-date legal framework and cover these aspects.

III.4 Threat of 'Takeover' and National Security Issue

First, the western world accused China of using strategic mergers and acquisitions (M&As) in order to acquire advanced technologies and knowhow in recent years. The EU's impact assessment in 2012 suggested this concern did not materialise because the FDI flows and stocks remained marginal even when the SOEs or companies were under the indirect control of the Chinese government.[111] Notwithstanding, the threat of 'takeover' by Chinese investments in the EU sparked new alerts in recent times with the fear of compromising national security issues. The SOEs took 73% of the Chinese

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[106] EC, 'Impact assessment report', supra n 7, 15
[107] Ibid
[108] Ibid
[109] Ibid
[110] Ibid, 16
[111] Ibid, 15

investment projects in the EU from 2006 to 2011.[112] China was criticised for supporting its large central SOEs or even private companies under the ‘go global’ strategy to purchase natural resources, to develop overseas markets and to acquire the much-needed technologies.[113] China targeted ten key industries and increased the State’s support in technological know-how companies and overseas acquisitions by ways of tax reduction, low-cost loans and direct project-based financing in pursuit of the ‘Made in China 2025’ policy.[114] A detailed analysis on the ‘technology transfer’ issue is set out in Part IV.

Secondly, the EU-China inflow FDIs highlighted a national security issue.[115] The criticism of national security threats from China deepened in recent years, which led to a call for imposing stringent national security screening policies in the EU. The UK government alerted the challenges when facing continued and broad-ranging hostile activities through acquisitions or imposing influence over UK entities or assets by Chinese SOEs.[116] These incidents included the Hinkley Point Nuclear Power Station purchased by the State-controlled China General Nuclear and the takeover of Imagination Technologies of a UN chipmaker.[117] Likewise, the German government identified the threat of advanced technology and critical infrastructure being taken over by the Chinese government, leading to national security being compromised.[118] The more balanced view is that Germany traditionally benefited from a transfer of innovation and knowledge.[119] At the EU level, safeguarding over advanced technology, intellectual property and critical infrastructure is a growing sentiment, resulting in more stringent rules being imposed on the FDI inward investments by the EU Member

[112] Ibid, 15
[113] Gang and Hope, ‘The roles of State-Owned Enterprises in the Chinese Economy’, supra n 88, 15; ECORYs & TNO, supra n 21, 12
[114] BDI, ‘Partner and Systemic Competitor-How do we deal with China’s State-Controlled Economy?’, supra n 54, 7
[115] EC, ‘Impact assessment report’, supra n 7, 19
[116] Jim Pickard, Arash Massoudi and Tom Mitchell, ‘Tighter rules on foreign investment have China in their sights’ (2018) Financial Times, 25/07/2018
[117] Ibid
[118] Guy Chazan, ‘Germany plans further foreign investment curbs’ (2018) Financial Times, 07/08/2018
[119] BDI, ‘Partner and Systemic Competitor-How do we deal with China’s State-Controlled Economy?’, supra n 54, 8

States in recent times. Although any BITs would need to address the national security issue, both parties should take a consensus approach to secure an open investment environment and to avoid unnecessary setbacks.

Part IV: The 2019 New Chinese Foreign Investment Law: A Catalyst for EU-China BIT

IV.1 The Old Foreign Investment Law Regime and Its Critics

Prior to Deng's open-door economic reform in 1979, China had a relatively narrow window of interaction with the rest of the world in many aspects, which were not only limited to the international commerce and investment sectors.[120] This was massively reversed after Deng's policy reform. China began to gradually establish a foreign investment legal system which promotes foreign investments and protects the stakeholders' legal rights and interests. While adding more legal certainty and protection to foreign investors, this legal reform aimed to acquire foreign capitals, management skills, advanced technologies and business know-how', all of which were desperately needed for the development of China's new socialist economy.[121] The basic legal framework, namely the 'Three Investment Laws', consists of the Laws of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, on Chinese-Foreign Contractual Joint Ventures and on Foreign-Capital Enterprises.[122] This framework became the high-principled foundation for three types of enterprises

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[120] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82; Chung Chen, 'The role of foreign direct investment in China's post-1978 economic development' (1995) World Development, Vol. 23, No. 4, pp. 691-703, 691

[121] Henry R. Zheng, 'Foreign Investment Law in the People's Republic of China: A 1986 Update' (1987) 19 N.Y.U. J. Int'l L. & Pol. 269, 270; Jian Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective' (2000) 10 Touro Int'l L. Rev. 39, 43

[122] Gao & Jiang, supra n 17, Legislation; 《中华人民共和国中外合资经营企业法》Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (1979) (Hereafter EVJ Law); 《中华人民共和国中外合作经营企业法》, Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, 1988; 《中华人民共和国外资企业法》，Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, 1986

operating in China, ie, the Equity Joint Ventures (EJVs), the Contractual Joint Ventures (CJVs) and the Wholly Foreign Owned Enterprises (WFOEs). The EJV was encouraged mostly by the Chinese government while the CJV was the most popular.[123] The State Council gradually promulgated other correspondent Regulations to implement the 'Three Investment Laws,' such as the 'Three Regulations', which provided detailed rules governing the labour, tax, financing and foreign exchange of currency.[124]

This legal framework gradually standardised the Chinese Foreign Investment Law[125] while at the same time, it continually evolved in order to match up with the rapid expansion of foreign investments and the economic development needs of China. In its earliest version, the Law of the People's Republic of China on Foreign Enterprises (LFE) imposed onerous requirements particularly for the WFOEs and CJVs, which intended to establish themselves in China.[126] These provisions included the length application and strict approval system for foreign investment enterprises under the competent authorities since 1979.[127] The FIEs must apply an official approval both from the local authorities and central government by submitting detailed documentation.[128] Before commencing any business activities, the FIEs must file a

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[123] Zheng, supra n 121, 271

[124] 《中华人民共和国中外合资经营企业法实施条例》, Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures 1983, (hereafter EJV Regulations); 《中华人民共和国外资企业法实施细则》, Regulations for the Implementation of the Law of the People's Republic of China on Foreign-Capital Enterprises 1990, 《中华人民共和国中外合作经营企业法实施细则》, Regulations for the Implementation of the Law of the People's Republic of China on Chinese-foreign Contractual Joint Ventures 1995; Zheng, supra n 121, 272

[125] Gao & Jiang, supra n 17, Basic Framework of China's Foreign Investment laws and policies

[126] Law of the People's Republic of China on Foreign Enterprises (1986) [hereinafter LFE]; Zheng, supra n 121, 279

[127] LFE Article 6; Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, 1988, Articles 5-8; Law of the People's Republic of China on Foreign-Capital Enterprises 1986, Articles 6-8; EVJ Regulations, Art. 13

[128] George White, 'Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R. C.' (2003) 29 N.C. J. INT'L L. & COM. REG. 35,36-39, 44

final application for the relevant license following the central government's approval.[129] The administration of industry and commerce can also revoke the license if the foreign enterprises failed to comply with the law or if their purposes were inconsistent with the goals of the 'expansion of foreign economic cooperation, the technological inter-exchange and the promotion of the Chinese national economy'.[130]

A number of provisions under this system which were overtly incompatible with the international standards included the following: the Chinese courts can extend a WFOE's liabilities to the assets of their investors if it was undercapitalised, in contrast to the concept that the legal entity's liability is limited by investors' registered shares;[131] the WFOEs must also carry out their business in accordance with the approved charter of association to avoid any government interference;[132] the Chinese Courts had the right to repatriate the lawful profits, salaries of foreign employees and overseas capital investments upon liquidation from the WFOEs.[133] Noticeably, the Chinese government kept a strict control over the business operation of the WFOEs, some of which would impose incompatible standards in comparison to the well-recognised international norms to the WHOEs. This approach, nevertheless, was largely followed by the Chinese government in order to strengthen its supervisory power and managerial role over foreign investment enterprise.[134]

Besides these restrictions imposed on FIEs, the government on the other hand enacted inducement measures to steer foreign investments towards the targeted industrial sectors, particularly for industries which are export and advanced technology related.[135] For example, the Provisions on Encouragement of Foreign Investments provided tax benefits and preferential treatments for high technology and export

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[129]EVJ Regulations, Art. 11
[130] LFE, Art. 1
[131] Zheng, supra n 121, 279
[132] LFE, Art. 11
[133] LFE, Art. 19
[134] Pitman B. Potter, 'Foreign Investment Law in the People's Republic of China: Dilemmas of State Control' (1995) China Q. 155, 167
[135] Ibid, 166; Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment (1986), Art 3; Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, 1988, Art 4

enterprises and reduced administrative procedures to increase independent business management.[136] The foreign investment could receive a full refund of tax if it reinvested the profits to enterprises that are export-orientated or technologically advanced.[137] A reduced income tax rate of 15% is applied to foreign enterprises if they are export or advanced technology orientated companies or if they are set up in an 'Economic and technical Development Zone'.[138] In terms of tax benefits, foreign enterprises enjoyed a more advantageous income tax at a rate of 17% in average in comparison to the domestic enterprises at 33%.[139] The approval for WFOEs was also based on their use of advanced technologies and products export.[140]

These various provisions delineated a key feature of the Chinese foreign investment legal framework for the proliferation of its national export revenues and advanced technology acquisition. Noteworthily, the technology transfer became a thorny issue for the cross-border foreign direct investments between China and other western countries in modern days. With the regulatory effort, among other reasons, the foreign investments received the first wave of growth from an annual average of just over US$2 billion to $122.7 billion between 1979 and 1993.[141] In 1998, the foreign-funded enterprises contributed to 56% of China's imports total value and 44% of exports.[142] China received $563.8 billion in FDIs in 2004.[143] Generally speaking, the foreign investment had a substantial positive effect on China's economy development and its

[136] Zheng, supra n 121, 301; Provisions on Encouragement of Foreign Investments (1986), Artt. 5-10
[137] Renwald, supra n 8, 468
[138] Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (1991), Articles 7-8; Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (2007) Article 73
[139] Renwald, supra n 8, 468
[140] The Law of the PRC on Wholly Foreign-Owned Enterprises 1986, Article 3
[141] China Economic News, 'Statistical Communique of the State Statistical Bureau of the PRC on the 1993 National Economic and Social Development' (1994) Supplement No. 3, 14; cited in Potter, 'Foreign Investment Law in the People's Republic of China: Dilemmas of State Control', supra n 134, 5
[142] BBC Summary of World Broadcasts, 'Export Trade Increasingly Dominated by Foreign funded Firms', November 25, 1998
[143] Renwald, supra n 8, 453

market economy reform.[144] The FDIs increased the competitiveness of the Chinese domestic enterprises, although their impact on the technology transfer was less satisfactory in the 1990s.[145] These statistics confirmed that the relevant foreign investment legal system constituted the most important reason to push the growth of the foreign investment.[146] While the foreign investment legal system enabled the Chinese State to exert a controlling power on foreign investment enterprises' business operation, it irrefutably became a vehicle to pursue the national development goals.[147]

The legal framework prior to 2015 had many defects, such as being cumbersome and inconsistent.[148] Zhao's study revealed that the Chinese FDI legal system had more than 200 laws and regulations being enacted before 2000, nevertheless, it remained far from being well-established.[149] From a macro social-economic perspective, several obstacles impeded the establishment of a legal system in order to serve the needs of an unprecedented socialist market economy country like China. These obstacles include China being a social market economy with a strong state-plan element and a socialist-state control. Under this phenomenon the Chinese legal system can impose requirements on foreign enterprises which contradicted the international norms. Zhao identified that 'corruption and a lack of transparency hinder the establishment of an independent and impartial legal system.[150] This problem shall in no doubt continue to exist even in the modern Chinese legal system.

[144] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective', supra n 121, 45; Renwald, supra n 8, 453

[145] Chen, 'The role of foreign direct investment in China's post-1978 economic development,' supra n 120, 699

[146] Pat K. Chew, 'Political Risk and U.S. Investment in China: Chimera of Protection and Predictability?' (1994) 34 VA. J. INT'L L.615, 638; Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective', supra n 121, 45

[147] Potter, Foreign Investment Law in the People's Republic of China: Dilemmas of State Control', supra n 134, 167

[148] Gao & Jiang, supra n 17, Cumbersome and inconsistent legislation

[149] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective', supra n 121, 45

[150] Ibid

From the legal system's perspective, the previous framework regulated all foreign investments by types, resulting in huge discrepancies of requirements for different entities, eg, different approval periods and different rules for the board of directors.[151] The approval system was heavily criticised for its onerousness and strictness, ie, any subsequent material changes, such as capital changes, amendment of articles of association and M&As requiring a governmental approval.[152] The other problems include the lack of well-developed intellectual property law in China and the lack of certainty with the government policies towards FDIs, both of which had the effect of impeding the flow of the FDIs in China previously.[153]

Notably, these legislative obstacles were subsequently alleviated to some extent, such as the local government could carry out the approval process and the Chinese government strengthened its law to protect IP rights.[154] The leading up to and after China's accession to the WTO, the Chinese government took several steps to reform the foreign investment law and embraced a more inclusive approach towards the FIEs compared to the earlier legal framework. For example, it started to open up more sectors for foreign investors, including electric vehicles and financial services and foreign ownership in the financial services sectors.[155] The other alleviations and modifications for WFOEs consisted of the requirements of advanced technology, the product export percentages,[156] the prohibition on a direct sale of products to the

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[151] Gao & Jiang, supra n 17, Cumbersome and inconsistent legislation

[152] De Brauw, Blackstone, Westbroek, 'New law brings big changes to foreign investments in China' (2015) online available at: https://www.debrauw.com/newsletter/new-law-brings-big-changes-foreign-investments-china/?output=pdf, accessed on 24/06/2019, 1; Chen, 'The role of foreign direct investment in China's post-1978 economic development,' supra n 120, 693

[153] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121, 46; Chen, 'The role of foreign direct investment in China's post-1978 economic development,' supra n 120, 692

[154] Chen, 'The role of foreign direct investment in China's post-1978 economic development,' supra n 120, 693

[155] Regulations on Foreign Investment Guidelines, promulgated by the State Council on February 11, 2002; Renwald, supra n 8, 487; Thilo Hanemann et al, supra n 9, 16

[156] George White, 'Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape-Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China' (2003) 3 RICH. J. GLOBAL L. & Bus. 95,98 (2003), 107

domestic market without government approval,[157] the requirement of all raw materials and fuel being purchased within China unless it is unobtainable from domestic sources[158] and the compliance to China's price control rules and the restriction of WFOE investment to certain business lines.[159] By 2017, President Xi promised post-entry national treatment to foreign companies and guaranteed to tackle a range of policies which imposed informal discriminate restriction on the FIEs' post establishment.[160] The reformed legal framework indicated China's willingness to cultivate a more friendly and inclusive investment environment towards the FIEs, in particular the WFOEs. This is a trend seen in China's subsequent foreign investment law reforms.

IV.2 The New 2019 Foreign Investment Law

In 2015, China initiated a reform proposal on Foreign Investment Law, although it did not adopt this proposal in its entirety in the end. The 2015 proposal gave a wide definition for foreign investors which could effectively bring many foreign investors and Chinese businesses into the prohibited category, i.e., making them either prohibited outright or subject to specified restrictions.[161] It would also discourage foreign companies, which operate through investments in a domestic company in the prohibited category from entering into the Chinese market.[162] The new reform proposal aimed to improve transparency and certainty for foreign investors, to reduce

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[157] Ibid, 108
[158] Ibid, 108
[159] White, 'Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R. C,' supra n 128, at 41
[160] Ministry of Commerce of the People's Republic of China, 'Circular of the State Council on Several Measures to Promote the Growth of Foreign Investment' （国务院关于促进外资增长若干措施的通知）2017； Thilo Hanemann et al, supra n 9, 16
[161] Department of Treaty and Law, 中华人民共和国外国投资法草案征求意见稿 (Foreign Investment Law of the People's Republic of China, draft version to solicit opinions) (promulgated by the Ministry of Commerce), Ministry of Commerce of the People's Republic of China (2015), (2015 Draft) Artt. 15 & 18; Meichen Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors' (2018) Nw.J.Int'L L.&Bus, winter, 300-01, 294
[162] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 293

administrative costs and to create a level playing field for foreign companies.[163] Without leaving the much-desired reform of the foreign investment law in limbo for too long, China finally enacted the new Chinese Foreign Investment Law (the New Law) in March 15, 2019, which took effect on January 1, 2020. It adopted a narrow definition for foreign investments that the investment must be made within the territory of China by foreign investors.[164] This would effectively eliminate the group of foreign investors who use foreign investment mechanisms or variable interest entity organisational structures, such as offshore holding companies like the Cayman Islands to invest in sectors which would be otherwise subject to prohibitions or restrictions under the 2015 proposed Foreign Investment Law.[165] From this perspective, the new law provided a more relaxed investment environment for a wider group of foreign investors who would be otherwise barred from investing more profitable sectors. These sectors are usually well protected by the Chinese State with special access to the national resources and land usage and the permission for development and infrastructure construction and operation.[166] To continually allow this practice, the Chinese domestic companies, particularly for those which cannot access capital from China's state-owned banking system or from its undersized bond market, are in a better position to raise capitals overseas, such as the internet and media companies, by launching public offerings on the international stock exchange market.[167]

The New Law made several substantive changes and gave a big emphasis on the protection and promotion for foreign investments in China. It reshaped Chinese

[163] ECORYs & TNO, supra n 21*, 21;* Brauw et al, 'New law brings big changes to foreign investments in China', supra n 152, 1

[164] Foreign Investment Law of the People's Republic of China 2019 (Foreign Investment Law 2019), Article 2; 'Interpretation on several issues regarding the application of the "People's Republic of China Foreign Investment Law"' Adopted at the 1781th meeting of the adjudication committee of the Supreme People's Court on December 16, 2019, to take effect on January 1, 2020.

[165] 2015 Draft, Artt. 15 & 18; Foreign Investment Law of the People's Republic of China 2019, Article 2

[166] 2015 Draft, Artt. 15

[167] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 285; David Schindelheim, 'Variable Interest Entity Structures in the People's Republic of China: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan' (2012) 21 Cardozo J. Int'l & Comp. L. 195 (2012), 196

Foreign Investment Law in several major ways, including providing a level playing field for all entities operating in China and enhancing investors' protection and national security scrutiny. The New Law was praised as a 'landmark achievement' in China's pursuit of market liberalisation and economic reform; it streamlined the previously fragmented regime.[168] In order to encourage foreign investments, China vowed to build a market environment with stability, transparency, predictability and fair competition.[169] The enactment may be a reaction to the recent criticism against China, such as a lack of openness, a forced technology transfer and IP theft.[170] Since it provided only a high-level regulation, foreign investors and critics remain sceptical about the substance and the effectiveness of the new law.[171] A detailed analysis is as follows.

IV.2.1 A 'Negative List' Approach to Market Access

The 2019 reform replaced the previous 'Three Investment Laws'[172] and established the 'pre-establishment national treatment plus the negative list' management scheme.[173] Article 28 states that 'fields not included in the negative list shall be managed under the principle that domestic investment and foreign investment shall be treated uniformly.[174] Article 29 states that 'during the process of foreign investment, where verification and record-filing of a foreign investment project are required

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[168] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 12

[169] Foreign Investment Law 2019, Article 3

[170] Alexander Chipman Koty, China Briefing, 'China's New Foreign Investment Law' (2019) online available: https://www.china-briefing.com/news/chinas-new-foreign-investment-law/, accessed on 26/06/2019; Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 12

[171] A. Alex Zhang and Vivian Tsoi, 'China adopts new foreign investment law' (2019) White & Case; NPC Observer, 'Summary of China's New Foreign Investment Law' (2019) online available: https://npcobserver.com/2019/03/15/summary-of-chinas-new-foreign-investment-law/, accessed on 26/06/2019

[172] Foreign Investment Law 2019, Art. 42

[173] Ibid, Art. 4

[174] Ibid, Art. 28

relevant provisions of the State shall be followed'.[175] In essence, the foreign investments, including all foreign investors and foreign invested enterprises would receive equal treatment like the domestic entities unless they fall into the 'Negative list'.[176] The 'Negative list' system was initiated in the 2015's reform proposal, which led to its implementation in October 2016,[177] although the concept of national treatment and the negative list had already been widely accepted and adopted in other BITs and Free Trade Agreements since the 1980s.[178] It operates only through two categories, the 'prohibited' category and the 'restricted' category. This means that the relevant procedures, standards and approvals would still apply to industries which are on the 'Negative Lists',[179] while other foreign investments would enjoy national treatment like any other Chinese domestic investments. The 'pre-establishment national treatment plus the negative list' abolished the Approval system but created a much-simplified record filing procedure for market entry, resulting in less burden for foreign investors but high efficiency in the administrative procedures.[180]

Chapter II of the New Law specified several areas of national equal treatments for foreign investments. It signified that China's inclusive attitude towards 'national treatment' for FIEs, which was already adopted in the US-China BIT negotiation and in China's Pilot Free Trade Zion in Shanghai, Fujian, Guangdong and Tianjin.[181] In allowing national treatments, the Chinese regulators changed their approach from being restrictive to more accessible for FDIs, the latter approach of which was

[175] Ibid, Art. 29
[176] Ibid, Art. 1
[177] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 287.
[178] Lian, supra n 81, 144; North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, Chapter 3
[179]Dorcas Wong, 'China's New Negative List Targets Unified Market Access' (2019) https://www.china-briefing.com/news/chinas-new-negative-list-targets-unified-market-access/, accessed on 26/06/2019
[180] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 153; Conventus Law, 'Interpretation of the new implementing regulations of the Foreign Investment Law of the People's Republic of China', (30/January, 2020) online available: http://www.conventuslaw.com/report/foreign-investment-in-china-has-entered-into-the/, accessed on 21/04/2020
[181] Zhang, supra n 11, 13

historically unfavoured by the Chinese government in BITs.[182] The foreign investment enterprises can now enjoy the preferential treatment for special sectors, industries and regional investments like any domestic enterprises.[183] The FIEs can participate through fair competition and enjoy equal treatment as the domestic enterprises in governmental procurement activities.[184] All local governments and relevant departments should simplify the procedure and improve efficiency and transparency when handling investment affairs and services.[185] Besides the national treatment, Article 30 allows foreign investments to enjoy the same conditions and procedures when obtaining licenses.[186] The national treatment for foreign investments was the same sentiment carried through various policy development in China since 1994 in some limited areas, such as the elimination of the super-national treatment (e.g., the preferential tax treatment for foreign investments) and the sub-national treatment (e.g., the higher capital requirement for foreign investments).[187] Its reiteration under the New Law indicates China's endeavour to bring a level playing field for foreign investments, to standardise its foreign investment rules and to unify market access.[188]

Previous discussion suggested that the 2012 Catalogue erected high barriers for foreign investments under its prohibited and restricted Catalogues. Compared to all predecessors, the 2017 Catalogue provided much-simplified lists, 19 'encouraged', 35 'restricted' and 28 'prohibited' sectors.[189] The significant reduction reflected China's open policy in international economic affairs, especially in the high-end manufacturing, high technology, environmental friendly industries, modern service industries and new clean energy industries under Xi's presidency.[190]

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[182] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121; Zhang, supra n 11, 2
[183] Foreign Investment Law 2019, Art, 14
[184] Ibid, Art. 16
[185] Ibid, Art. 19
[186] Ibid, Art. 30
[187] Gao & Jiang, supra n 17, Sub-national treatment reduced
[188] Dorcas Wong, 'China's New Negative List Targets Unified Market Access', supra n 179
[189] ECORYs & TNO, supra n 21, 21
[190] Ibid, 20-21

In 2018, the NDRC and the MOFCOM promulgated two negative lists applicable at a national level and at the Free Trade Zones (FTZs). Both lists, which retained their legal effect under the 2019 reform outlined the prohibited and restricted industries for foreign investments. The Special Administrative Measures on Access to Foreign Investments 2018 (the AM Negative List) revised the 2017 Catalogue and reduced the number of restrictive and prohibited measures from 63 to 48 and for the FTZ Negative List from 95 to 45 respectively (see Figure 5).[191] By 2019, the Negative List only contained 37 for FTZs and 40 nationwide. In order to further liberalise the domestic market as well as to promote competition, the 2019 Negative List removed some restrictions for FIEs in the mining sectors, value-added telecommunication services sectors, the transportation sector, culture and entertainment sector, which are strategic and sensitive sectors and used to be dominated by the Chinese SOEs.[192] National treatment applies to foreign investments falling outside these Negative Lists.

Figure 5 Restricted and Prohibited Items Negative List (2013-2019)[193]

	2013 Shanghai FTZ	2014 Shanghai FTZ	2015 FTZs	2017 FTZs	2018 FTZs	2018 Nationwide	2019 FTZs	2019 Nationwide
Restricted	152	110	85	60	20	21	17	17
Prohibited	30	29	37	35	25	27	20	23
Total Items	190	139	122	95	45	48	37	40

[191]Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 17

[192] Lian, supra n 81, 146-48, The WFOEs can freely access the mining sector; The 50% limit on foreign shares in multi-party communication, store-and-forward and call centre business were lifted in the value-added telecommunication service sector; The 51% equity cap on foreign investment in domestic marine shipping agencies was removed in the transportation sector; The controlling shares of movie theatres and performance managing agencies held by the Chinese party in the culture and entertainment sector was also removed.

[193] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 17

The New Law retained the record filing system;[194] it replaced the approval-based system with a much simplified registration/reporting-based system.[195] The 'case-by-case' approval system was onerous as any establishment and subsequent changes of FIEs or foreign investments through M&As must first obtain an approval from the MOFCOM.[196] The requirement of filing-for-records should streamline the registration process for FIEs outside the 'Negative Lists' and reduce the administrative hurdles. The 'Negative List' approach indicates China's strengthened commitment to the EU-China BIT negotiation.[197] Nevertheless, critics were sceptical about market access liberalisation that the new Negative Lists would bring about because the Lists had removed industries where foreign investments were unlikely to exist and specialised licenses or approvals may still be required.[198] By comparing the 2019's Negative Lists to the NAFTA-inspired Negative List, the former still lacks transparency and relevant supporting laws and regulations.[199] As a result, a mere free-stand 'Negative List' does not substantially change the landscape of the Chinese foreign investment environment. The enactment of the Foreign Investment Law 2019 filled the regulatory gap and substantiated the Negative List's impact because it extended the national treatment at an entry level as well as to many post-establishment activities.[200] The New Law should set a free path for the EU-China BIT to include the pre-establishment national treatment.[201]

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[194] Foreign Investment Law 2019, Art. 34

[195] Foreign Investment Law 2019, Art. 31; Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 13

[196] Jie Zhang & Katherine Yang, 'China amends its Foreign-Investment Laws, officially reforming its more than three-decade-old foreign-investment approval regime' (2016) Reed Smith Client Alerts

[197] Xingxing Li, 'National Security Review in Foreign Investments: a comparative and critical assessment on China and US laws and practices' (2015) 13 Berkeley Bus. L.J. 255, 268

[198] Dorcas Wong, 'China's New Negative List Targets Unified Market Access', supra n 179

[199] Lian, supra n 81, 149

[200] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 13

[201] Lian, supra n 81, 154

IV.2.2 Enhanced Protection of Foreign Investment

The New Law set a goal to protect the legitimate rights and interest of foreign investors.[202] First, it specified that the Chinese State will not expropriate or nationalise the FIEs' investments except for public interest reasons.[203] This position remains unchanged compared to China's previous approach towards foreign investments.[204] Any nationalisation or expropriation must adhere to legal procedure and the amount of compensation must be just and reasonable, though the New Law did not spell out the legal procedure and the standard of just and reasonableness.[205] It is possible that the area of law concerning expropriation would have to rely on bilateral agreements or international standards, such as the 'Hull Formula' under which the host countries guarantee a 'prompt, adequate and effective compensation' instead of national treatment.[206] This gives rise to the important role of the EU-China BIT negotiation to set the appropriate standards.

Second, Under the New Law, the FIE can use either RMB or other foreign currencies for cross border transfers.[207] The FIEs previously had an obligation to maintain their own foreign exchange balance under the old legal regime.[208] This requirement supported the Chinese government's tight control on the foreign exchange in order to avoid the RMB's devaluation while encouraging the inflow of foreign exchanges.[209] This commitment was largely abolished through the new Foreign Exchange

[202] Ibid, 150
[203] Foreign Investment Law 2019, art 20
[204] LFE, Article 9
[205] Foreign Investment Law 2019, Art 20
[206] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121, 84
[207] Foreign Investment Law 2019, Art 21
[208] Regulations for the Implementation of the Equity Joint Venture Law of the People's Republic of China, 1983, Art. 14(8) (hereafter EJV Regulations); the Wholly Foreign Owned Enterprise Law of the People's Republic of China, 1986, Art. 18; The Law on Contractual Joint Venture of the People's Republic, 1988, Art. 20
[209] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121, 61 & 132; Rules of the People's Republic of China on Foreign Exchange Control 1997, (Hereinafter Foreign Exchange Regulations), Artt. 6, 9, 10 and 11

Regulations in 1997.[210] Instead, the FIEs were required to use RMB as the standard currency for general purposes, such as the financial accounting reports, registered capital and foreign exchange control.[211] The New Law should relieve the FIEs' obligation from using RMB as a standard currency, resulting in more competitiveness for the FIEs in the international market with a freedom to trade with other foreign currencies.

Thirdly, the New Law enhanced the protection of IP rights and commercial secrecy for foreign investors and prohibited forced technology transfer.[212] IP right infringements in China presented a critical problem for foreign investors. Both the US and the EU placed China on their priority watch list for IP infringements and 70% of European Companies doing business in China complained of IP right infringement.[213] In March 2018, the US, the EU and 16 other countries and regions jointly initiated proceedings against China concerning certain measures pertaining to the protection of IP rights.[214] Chinese courts received 40,000 cross-border IP related litigations in 2017.[215] Notwithstanding, the development of the Chinese IP Law system was relatively recent since 1979 and failed to match up with the demand from foreign companies. The enhanced protection of IP rights by reforming the legislation framework and perfecting the judicial system no doubt was a welcome move on the part of the Chinese State, especially to keep up with the fast transformation of the IP development around the world.

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[210] Ibid, Foreign Exchange Regulations, Artt. 9-18

[211] Regulations for the Implementation of the Law on Sino-foreign Equity Joint Ventures, 2003, Artt. 18, 23, 74, 75

[212] Foreign Investment Law 2019, Chapter III and Article 22

[213] USTR, '2017 Special 301 Report', (2017) online available: https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF, accessed on 18/05/2020, 28-30; European Commission, 'Report on the protection and enforcement of intellectual property rights in third countries', supra n 65, 6; Zheng Tang, 'Judicial enforcement of intellectual property rights in China-From technical improvement to institutional reform'(2019) Asia Pacific Law Review, volume 27, 2019 - Issue 2, 2

[214] WTO, 'China-Certain measures concerning the protection of intellectual property rights' (23 March 2018) DS542

[215] Tang, supra n 213, 2

In 2019, the Chinese government amended several key statutes to enhance IP protection for foreign investors, including the Trademark Law, Patent Law and the Anti-competition Law. Previously, IP protection was largely hampered by the inadequate damages rewarded by the Chinese courts' judgment with only 35% of claimant's damages being awarded.[216] Bridging the damage cap, strengthening the protection of IP rights and implementing the punitive damages for IP right infringements became the pressing objectives of the government working plan.[217] The recent amendments in the Trademark Law 2019 imposed punitive damage of up to five times of any actual damages or up to RMB 5 million if the damages are uncertain.[218] For parties maliciously infringe a trade secret, the fine can be up to RMB 1 million or up to RMB 5 million in serious circumstances.[219] The Standing Committee of the National People's Congress issued a draft to amend the Patent Law in 2019. If this draft were implemented, it would impose punitive damage against malicious infringement and the requirement of a good-faith principle for the application of a patent.[220]

Beside the legislative reform, the Supreme People's Court established an Appellate-Level IP Tribunal operating as the court of final appeal for cases involving patent infringements, invalidation and other high-technology or antitrust IP disputes in

[216] Handong Wu, 'Market Foundation and Judicial Principles for IP Infringement Damages' (知识产权损害的市场价值基础与司法裁判规则) (2016) 28 Peking University Law Journal1480, 1483

[217] Li Keqiang (李克强), Government Working Report (政府工作報告), The 13th NPC the 1st meeting, 5 March 2018, http://www.xinhuanet.com/politics/2018lh/2018-03/22/c_1122575588.htm, accessed on 5 Feb 2020, Chapter 3.3

[218] Trademark Law of the People of China (2019 Amendment), Article 63

[219] Anti-Unfair Competition Law of the People's Republic of China (2019 Amendment) (中华人民共和国反不正当竞争法(2019 修正) , Article 21

[220]The National People's Congress of the People's Republic of China, 'Patent Law Amendments to stipulate punitive compensation system for patent infringement,' (2018) Xinhua (24th November, 2018)；Ai-Leen Lim and Xiaofan Chen, 'China establishes framework for advanced IP regime' (03 Oct, 2019) iam, online available: https://www.iam-media.com/china-establishes-framework-advanced-ip-regime, accessed on 22/04/2020; Tang, supra n 213, 15

2019.[221] This Appellate Tribunal constituted a major breakthrough of China's protection of IP rights.[222] This system updated China's IP law by creating a legal environment to better facilitate scientific and technological innovation. The protection offered by the New Law should be read together with the recent IP law legislation reforms, which indicated China's clear intention to curb the substandard practice concerning IP infringements and to create a fair and efficient investment market for foreign enterprises. The structural weakness and institutional deficits of China's judicial system would still remain in the foreseeable future, such as concerns on the CCP's policy influence and potential direct intervention in high profile cases.[223] This means further refinement of the system are needed.

The New Law strictly prohibited a forced technology transfer. It took the approach of technical cooperation based on voluntary principles and business rules freely negotiated between the investors and host countries.[224] The technology transfer has been a major drive for China's promotion of FDIs from the very beginning of China's 'Opening-Up' Policy, Economic Reform and its subsequent Five-Year Plans.[225] While the foreign inward FDIs in China were largely steered by the advantage of low cost production, low labour costs and access to policy incentives and capital offered by the Chinese government, empirical studies in the 1990s showed that the level of technology transfer into China through inward FDIs were limited and at an expected level.[226] Not only the foreign investors, from countries including the Western Countries

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[221] SPC, 'Regulations on Several Issues regarding IP Tribunal' (最高人民法院关于知识产权法庭若干问题的规定), Fa Shi [2018], 22; Tang, supra n 213, 6; Lim & Chen, supra n 220

[222] Meng Lin, 'Unifying technical IP adjudication: The launching of Intellectual Property Tribunal of Supreme People's Court' (2019) Tshinghua China Law Review, Vol. 11:439, 440

[223] Tang, supra n 213, 4

[224] Foreign Investment Law 2019, Art. 22

[225] 中国共产党第十一届中央委员会第三次全体会议(公报) (Report of the Third Plenary Session of the 11th Central Committee of the Communist Party of China in 1978) These Five-Year Plans include the Sixth Five-Year Plan (1981-1985), the Seventh Five-Year Plan (1986-1990), the Eighth Five-Year Plan (1991-1995) and the Ninth Five-Year Plan (1996-2000);

[226] Stephen Young and Ping Lan, 'Technology transfer to China through foreign direct investment' (1996) Regional Studies, Vol. 31.7, 669-679, 677; Chen, 'The role of

and Japan were reluctant to transfer know-how for fear of losing control, the technology brought by foreign investment was not highly advanced in general with only two years ahead, in contrast to the technological gap between China and Western countries was over 20 years in the 1990s.[227]

The US, EU and Japan have accused China of 'forced' technology transfer, the highlight of which was a series of joint or unilateral actions to compel China to change its law and practices. The US's accusation is based on China's foreign investment policies which promote the technology transfer while imposing restrictions and discriminatory treatment on foreign investment.[228] Nonetheless, the promotion of technology transfer without formally requiring it does not lead to a 'forced' technology transfer itself as a sovereign country should be free to prioritise its development strategies and policies,[229] particularly as China was a less developed country with a 20-year technology gap in the early years of its 'opening-up'. Most importantly, the WTO imposed an obligation on the member countries to maintain a minimum level of protection and enforcement of IP rights and not to constrain cross-border technology transfer.[230] In fact, the WTO required the developed member countries to promote and

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foreign direct investment in China's post-1978 economic development,' supra n 120, 699

[227] D. F. Ball, R. Zhang and A. W. Pearson, 'Perceptions of United Kingdom exporters in transferring technology into People's Republic of China,' (1993) R&D Mgmt. 23, 29-41; Young and Lan, supra n 226, 673

[228] USTR, 'Findings of the Investment into China's Acts, Policies and Practices related to Technology Transfer Intellectual Property and Innovation under Section 301 of the Trade Act of 1974,' (Section 301 Report I), (22 March 2018); USTR, 'Update concerning China's Acts, Policies and Practices related to Technology Transfer, Intellectual Property and Innovation,' (Section 301 Report II), (20 November 2018); USTR, '2017 Report to Congress on China's WTO Compliance' (December 2017), at 107-17

[229] Przemyslaw Kowalski, Daniel Rabaioli and Sebastian Vallejo, 'International Technology Transfer Measures in An Interconnected World: Lessons and Policy Implications' (20 November 2017) OECD Trade Policy Papers No 206, online available: www.oecd-ilibrary.org/trade/international-technology-transfer-measures-in-an-interconnected-world_ada51ec0-en, 5

[230] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), (15 April 1994), Article 7: '[T]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and

to encourage a technology transfer to the least-developed countries and to provide technical and financial assistance for these countries.[231] Therefore, the protection of IP rights should be balanced up with the economic growth and the technology advancement worldwide. On the flip side the licensing fees for foreign technology, paid by China, soared in the last few years and reached almost $30 billion in 2017.[232] Therefore, simply promoting technology transfer does not necessarily constitute a breach of WTO agreement as long as the technology transfer fees are adequately compensated by the receiving countries in accordance with the freely negotiated contracts.

The advancement of technology was a key component in China's Foreign Investment Law in the 1980s and 90s to meet the State's need and economic development. This was shown in the approval of foreign investments which were largely steered towards the importation and diffusion of advanced technology for China's long-term economic interests.[233] This approach was relaxed in the 2000s as some restrictions were eliminated, such as a narrower scope of import technologies which were subject to review.[234] Nonetheless, more high-tech industries were added to the 2002 and 2007 Catalogues.[235] Noticeably the FDIs would continually benefit from preferential treatment for bringing high and new technology into China.[236] During the last decade,

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dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

[231] TRIPs, Artt. 66.2 & 67;

[232] Nicholas R Lardy, 'China: Forced Technology Transfer and Theft?' (*Peterson Institute for International Economics*, 20 April 2018) online available at: https://piie.com/blogs/china-economic-watch/china-forced-technology-transfer-and-theft, accessed on 18th/04/2020

[233] 《中国人民共和国技术引进合同管理条例》 Regulation of the People's Republic of China on the Administration of Technology Import Contracts 1985, Art. 9

[234] Ibid

[235] 《外商投资产业指导目录》 Catalogue for the Guidelines of Foreign Investment 2002; 《外商投资产业指导目录》 Catalogue for the Guidelines of Foreign Investment 2007

[236] 《关于设立外商投资创业投资企业的暂行规定》Interim Provisions on the Establishment of Foreign-Invested Start-up Enterprises 2001, Art 1;《创业投资企业管

China had exuberantly promoted the technology advancement in its national development policies and strategies.[237] More industries of advanced technology and know-how were added to the latest Catalogue Encouraged Industries for Foreign Investment 2019.[238]

In contrast, by 2018, both the US and EU,[239] joined by Japan, requested a consultation with China concerning the issues surrounding technology transfer through the WTO's Dispute Settlement Body. The issues raised were mainly related to provisions of the Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures ("EJV Regulation"), the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures and the Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies ("TIER") and the conduct of the administrative authorities which compelled technology transfers. These included the terms limiting the protection of transferred technology to 10 years;[240] the provisions treating foreign IP right holders less favourably than Chinese ones;[241] the Chinese authorities pressurising the disclosure of sensitive company information and technology transfer;[242] the requirement of technology advancement by the foreign investors to suit the needs of

理暂行办法》(Interim Measures for the Administration of Start-up Enterprises], Order No. 39 of National Development and Reform Commission 2006

[237] 《中华人民共和国国民经济和社会发展第十二个五年规划纲要》Twelfth Five-Year Plan for Economic and Social Development of the People's Republic of China 2011-2015, 14 March 2011; 《中华人民共和国国民经济和社会发展第十三个五年规划纲要》Thirteenth Five-Year Plan for Economic and Social Development of the People's Republic of China 2016-2020; 《国务院关于印发'中国制造 2025' 的通知》 Notice on the Printing and Release of 'Made in China 2025' 2015, promulgated on 17 March 2016

[238] 《鼓励外商投资产业目录 2019》 Catalogue of Industries for Encouraging Foreign Investment 2019

[239] USTR, Section 301 Report I, at 36-43; WTO, 'China – Certain Measures on the Transfer of Technology, Request for Consultations by the European Union,' (6 June 2018) WT/DS549/1; European Commission, 'EU Steps up WTO Action against China's Forced Technology Transfers,' (20 December 2018)

[240] EJV Regulations, Art. 43(3) & (4)

[241] Ibid, Artt. 24, 27 & 29(3)

[242] USTR, Section 301 Report I, at 36-43.

China,[243] the submission of transferred technology to Chinese authorities for administrative approval purposes[244] and the formality and registration requirements on the importation of technology.[245]

In response to these accusations, the New Law implemented several prohibitions on the part of the administration authorities, such as the prohibition of 'forced' technology transfer and the imposition of criminal penalties on IP right infringers.[246] Alongside these new provisions, the Chinese Regulators repealed the old FIE law system. It removed the most controversial provisions, Article 24(3), 27 and 29 under the TIER 2019 and brought the treatments for foreign investors to national standards under the principles of fair, reasonable and parties' contractual autonomy.[247] It added more protection to foreign investors that they are now not responsible for IP infringement complaint by a third-party. The removal of these controversial provisions was plausible for effectively addressing the challenges instigated by the US and EU in the WTO disputes with regard to the 'forced' technology transfer issue.[248] The administrative bodies must not disclose the business secrets of foreign investors to others.[249] This should deal with the problem of administrative authorities disclosing any technology to other parties.

Lastly, the New Law requires the Chinese government to set up a FIE Complaint Mechanism which can deal with any problem of the FIEs or situations where the administrative agencies and staff breach the FIEs' legitimate rights on the bases of coordination and mediation. If this mechanism failed to deal with the administrative

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[243] Articles 5, EJV Law; EJV Regulations, Art. 41
[244] Artt. 7, 11, 26 and 27 of the EJV regulations
[245]《中国人民共和国技术进口管理条例》The Regulation on the Administration of Import and Export of Technology (2001）('TIER') Order No. 331 of the State Council, issued on 10 December 2001, effective on 1 January 2002, as amended by Order No. 588 of the State Council on 8 January 2011, and Order No. 709 of the State Council on 2 March 2019, Artt. 18-21
[246] Foreign Investment Law 2019, Artt. 22, 23 and 39
[247] TIER, 2019, Art 3
[248] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 15
[249] Foreign Investment Law 2019, Art. 23

agencies and staff breaches, the FIEs can apply for an administrative review or bring an administrative lawsuit.[250] The complaint mechanism based on coordination and mediation coincides with the well-recognised inclination in the Chinese legal system, ie, the consultation or mediation are much favoured ways in settling a dispute between parties.[251] In some cases, mediation would be a compulsory phase before re-coursing an arbitration or litigation in China.[252] Although the language used in the New Law does not impose a mandatory obligation for the parties to engage in the Complaint Mechanism, it certainly suggests that foreign investors should first and foremost try to settle the dispute before instigating a court litigation or calling on an administrative review. While this mechanism can be effective and minimises the cost and negative impact on businesses, the Chinese state authorities should diligently safeguard this system from bias and corruption.[253]

In terms of the lack of certainty and transparency in the Chinese's judicial system, the New Law specified that the governments, local governments and their relevant departments should comply with the relevant laws and regulations for the promotion of foreign investments; the relevant operative authorities should also prepare and publish foreign investment guidelines to provide services and facilities for foreign investors and foreign-invested enterprises.[254] This requirement would add some certainty and transparency to the lawful operation of the Chinese government and its relevant operative authorities. Nonetheless, it did not directly address the institutional issues existing in the current Chinese judicial system, such as the issues of corruption, poor training and abuse of power, political connections and the inability to compel production of evidence and to enforce awards. Henceforth, the EU-China BIT must continue to address these problems.

The FIEs are likely to be subject to the national treatment and the jurisdiction of China's domestic legal system with regard to their right to call for an administrative review or court litigation against administrative agencies' or relevant staff's breaches.

[250] Foreign Investment Law 2019, Art. 26
[251] Renwald, supra n 8, 471
[252] Ibid
[253] Ibid
[254] Foreign Investment Law 2019, Artt. 18 & 19

FIEs and the WFOEs were considered domestic bodies in China or not sufficiently international by the Chinese Court with litigations.[255] Should the FIEs decided to take a court action, the Chinese court system is a less favoured option because of the concerns over the rule of law in China. China being a socialist country under the people's democratic dictatorship,[256] the CCP has substantial influence over the law-making bodies and the court system, while the supreme court does not have the power to interpret the law.[257] With these characteristics, the Chinese court system does not provide sufficient certainty for FIEs as it is likely to give priority to the CCP's political objectives and the economic needs of the country.[258] The position of the EU investors' rights to bring an administrative review at the international tribunals should be clarified in the EU-China BIT negotiation given that inconsistent, nonetheless, restrictive rules existed in the current BITs.

Notably the FIEs can also use the mechanism of arbitration or have access to the China International Economic and Trade Arbitration Commission (CIETAC) as an international arbitration commission.[259] Compared to the domestic arbitration commission, such as the CIETAC, the use of other international reputable arbitration commissions, such as the ICC, ICSID, UNCITRAL and Stockholm Chamber of Commerce to resolve a dispute was a favourable option for FIEs for political neutrality and arbitration expertise considerations in the 21st century.[260] The new law is less clear on whether the Chinese government would freely approve any international arbitration commission chosen by the FIEs since the domestic arbitration commission is likely to offer more familiarity to the domestic parties. Hence, the EU-China BIT should clarify this position as to whether FIEs can freely access international arbitrations and if so, which arbitration commission to use. In addition to these legal routes to challenge an illegal practice concerning the 'forced' technology transfer, the WTO's Dispute

[255] Renwald, supra n 8, 471
[256] 《中华人民共和国宪法》Constitution of People's Republic of China, Art. 1
[257] Peter Howard Come, 'Creation and Application of Law in the PRC', (2002) 50 AM. J. COMP. L. 369 (2002), 409; Constitution of People's Republic of China, Art. 67
[258] Come, 'Creation and Application of Law in the PRC', supra n 257, 375
[259] CIETAC Rules, Art. 3.
[260] Tao & Shen, supra n 3, 1160, 1162

Settlement Mechanism should also be an effective avenue to address this issue.[261] The New Law and the other existing international legal system should work together to safeguard the legal rights of the FIEs, particularly the IP rights and the rights existing in the innovative technologies. China welcomed a new approach which provided more flexibility and choice for FIEs to resolve a dispute in the most recent BITs. China should avoid pushing for a local resolution with regard to the FIE's disputes in the EU-China BITs in pursuit of the Confucius culture and ideology.[262]

IV.2.3 National Security Review

Article 35 gives the Chinese State the power to conduct a security review on foreign investments.[263] This means all foreign investments would be subject to national security review if they affect or may affect national security. However, the New Law does not prescribe clear criteria and trigger events for the review processes. The lack of detail in the review scope, criteria and processes created uncertainties for the FIEs and the government authorities.[264] Previous foreign investment law allowed the government to conduct a national security review on transactions relating to acquiring control over Chinese companies by foreign investors, ie, the 50% ownership threshold adopted by the Chinese State Council in 2011.[265] The 2015 proposed reform adopted a categorical list approach which largely resembles the US categorical list.[266] Under the 2015 draft, China had a broad review power, which covered the impact on China's

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[261] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 16
[262] Tao & Shen, supra n 3, 1160, 1172
[263] Foreign Investment Law 2019, Article 35
[264] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 17
[265] State Council, Circular of the General Office of the State Council on the Establishment of National Security Review Regime Pertaining to the Mergers and Acquisitions of Domestic Companies by Foreign Investors <国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知>, (Feb. 3, 2011); ECORYs & TNO, supra n 21, 21-22
[266] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 300-01

capacity and leadership in the research and development of key technologies.[267] If this scope were adopted, academics suggested security review may lead to 'forced' technology transfer.[268] Compared to any previous version, the New Law is extremely vague as to which approach to take. Notably both approaches, the categorical list approach and the ownership control approach have their defects. The former is too broad and ambiguous, and the latter would automatically exclude a subset of critical sectors in which foreign ownership is restricted to minority interest.[269]

The implementation of a robust national security system became a prevalent regulatory phenomenon globally following several alleged compromises on national security by Chinese companies through M&As. The US enacted the Foreign Investment Risk Review Modernisation Act in 2018, which provided a comprehensive framework to scrutinise foreign investments on the national security ground and to protect critical technologies. Some suggested that this Act was a response to China's recent policies and practices relating to technology transfer, intellectual property, foreign investments and innovation that are unreasonable, discriminatory and unfair.[270] Under this Act, the US President or the Committee on Foreign Investments in the US has the power to suspend transactions that potentially pose a national security risk.[271] It extends the scope of review to cover all investments which relate to critical technologies and critical infrastructure.[272] Hence, the review scope under US law is not much different compared to the 2015 draft in term of reviewing the critical technologies.

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[267] Article 57 of the 2015 Draft

[268] Zhou et al, 'Technology transfer under China's foreign investment Regime: Does the WRO provide a solution,' supra n 82, 17

[269] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 300-01

[270] Eversheds Sutherland, 'The Foreign Investment Risk Review Modernisation Act of 2018-impact on real estate investments' (2018) online available at: https://www.jdsupra.com/legalnews/the-foreign-investment-risk-review-56176/, accessed on 27/06/2019

[271] Foreign Investment Risk Review Modernisation Act in 2018, S 1718, amending the Defense Production Act of 1950 (50 USA 4565(1)(3)(1))

[272] Foreign Investment Risk Review Modernisation Act in 2018, S 1703(4)(D) Other Investment (i)(III)(bb)&(cc)

The EU implemented an EU framework, Regulation (EU) 2019/452 to screen foreign direct investments into the EU on the grounds of security or public order in March 2019. This Regulation authorises Member States to implement their own screening mechanisms and to be responsible for protecting their essential national security interests.[273] 14 Member States implemented security screen mechanisms.[274] The Regulation prescribes a list of factors for consideration in determining whether a FDI is likely to affect security or public order, such as the investment involving critical infrastructure and technologies or being controlled by a government.[275] At present, the sectors which are most commonly scrutinised include military and defence sectors and data-intense emerging and foundational technologies in M&A projects.[276]

This growing global tension over foreign investments for a national security reason constitutes an obstacle for the EU-China BIT and contradicts the objective of further increasing market access. A robust security screening framework is the first protocol for a positive economic engagement with China and vice versa.[277] No country would open up all industries to foreign investors while the sectoral restrictions and screening hurdles would be standardised policies for national security reasons.[278] The foreign investment risk scrutiny is a necessity in order to improve the fairness and security of international foreign investments. A balance test should provide some guidance on how countries adopt their national security review mechanisms. Regulators must pay

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[273] Regulation (EU) 2019/452 of the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the Union 2019, Article 1

[274] Hogan Lovells, 'List of screening mechanisms notified by Member State' (2019) Online available at: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf, accessed on 27/06/2019

[275] Regulation (EU) 2019/452, Art. 4

[276] Hogan Lovells, 'Foreign Investment Control on the Rise-New list of EU Member States' FDI screening mechanisms' (2019) online available at: https://www.hoganlovells.com/en/blogs/focus-on-regulation/foreign-investment-control-on-the-rise-new-list-of-eu-member-states-fdi-screening-mechanisms, accessed on 26/06/2019

[277] Thilo Hanemann et al, supra n 9, 23

[278] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121, 83

close attention to the balance between maintaining an open foreign investment market and protecting national security.[279] In terms of the EU-China BIT, a balanced approach is essential in order to encourage the freedom of contract and competition for an open liberal market.

An effective legal framework must consist of a clear definition of 'national security' and the review scope and standards.[280] States should also have the right to intervene when economic activities compromise national security and technology protection. Notably the EU Member States, especially Germany, which has a large stake in the EU-China trade relationship, rejected the disengagement and distortion arising from trading protectionism.[281] Hence, when coordination and cooperation during the EU-China BIT negotiations can achieve the optimal outcome, disengagement and distortion must be avoided.

IV.3 Addressing the Sticking Points in EU-China BIT Negotiations

Previous sub-sections analysed three main achievements of the new Foreign Investment Law. These achievements include levelling up the playing field for FIEs and the enhancement for the protection of foreign investments and national securities. This sub-section serves as a short summary of how effectively the new legal framework addresses the sticking points in the EU-China BIT negotiations.

First, it increased the market access and helped to level up the playing field for foreign investors. This was done by repealing the old foreign investment law system as well as implementing the 'pre-establishment national treatment plus the negative list' management scheme. The most straightforward function of the New Law is to

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[279] Liu, 'The new Chinese Foreign Investment Law and its implication on foreign investors,' supra n 161, 298; Li, 'National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices', supra n 197, 309; BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?', supra n 54, 7

[280] Li, 'National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices', supra n 197, 309

[281] BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?', supra n 54, 7

effectively eliminate various unequal treatments for FIEs, which do not fall into the 'Negative list'. The introduction of national treatments for the qualified FIEs dealt with the problems that the FIEs were subject to much restrictive rules and requirements when entering and operating in the Chinese markets, such as the lengthy application and approval system, government strict control, local protectionisms and restrictive access to certain industries. The government further refined the 'Negative list' and reduced the items on the list. This reduction substantively released more industries, of which the FIEs can enjoy national treatments and a much faster and simpler registration system.

Secondly, the New Law endeavours to secure more protection and certainty for the legitimate rights of foreign investors in China, although this protection mainly focused on the inward investments from foreign countries. The provisions include the non-compulsory expropriation or nationalisation of the FIEs' investment except for public interest reasons. It abolished the mandatory use of RMBs. Alongside the certainty of protection, these provisions should increase the FIEs' competitiveness in the international markets. The other protection offered by the New Law covers the FIEs' IP rights and the advanced technologies to address the voluminous complaints from China's international counterparties. The Chinese government engaged its legislative power and amended several key statutes to enhance IP protection for FIEs prior to the enactment of the 2019 Foreign Investment Law. The imposition of punitive damages on IP rights infringers and the establishment of the Appellate-Level IP Tribunal showed China's tough stance of the deterrence of the IP right infringement so as to create a fair and efficient investment environment for FIEs.

The New Law strictly prohibits the practice of 'forced' technology transfer. This was reinforced by the imposition of criminal punishment. When the situation does not involve 'forced' technology transfer, the New Law supports the technical cooperation under the principle of free negotiations between the parties. This approach should balance the WTO's objectives of economic growth and technology advancement. The Chinese legislators repealed the old foreign investment law system and removed the sections of the TIER which imposed less favourable terms on FIEs concerning technology transfer. This new legal system mainly applies to foreign investment in the

territory of China,[282] ie, inward FDIs. The New Law applied to a wider range of foreign investment activities, the definition of which is close to the broad asset-based definition that had already been widely adopted in BITs.[283] Nonetheless, it does not specifically cover outward FDIs, such as the China's overseas investments through merging and acquisition, which specifically targeted the key technologies and industries. Hence, the sticking points of the threat of 'takeover' with regard to the acquisition of advanced technologies and know-how by Chinese investment in the EU remains a problem for the EU-China BIT.

Thirdly, the New Law implemented provisions which drastically addressed the issues of the lack of legal certainty and transparency of the Chinese legal system as well as the investment environment between the EU and China. The FIEs can try to settle a complaint using the FIE Complaint Mechanism or to instigate an administrative review and lawsuit. This provision should help to swiftly settle the FIEs' dispute at a low cost. The New Law required the Chinese government and relevant authorities to carry out the laws and regulations and to publish foreign investment guidelines, although it did not address the institutional issue of the Chinese legal system. The FIEs are likely to receive national treatments under the national court system, nonetheless, the Chinese court system is less preferred for the lack of political mutuality and certainty. Where the national legal system falls short in resolving the FIEs' dispute, international dispute mechanisms would be made available for the FIEs, such as the international arbitration commissions or the WTO Dispute Settlement Mechanism. Hence, the EU-China BIT should delineate a clear dispute resolution framework in this regard.

Lastly, the New Law reinforced the power of the Chinese government to review all foreign investments for national security reasons. This did not deal with the complaints of FDIs from the other countries with regard to the threat to national securities from the Chinese outward FDIs in the EU. Likewise, many EU member states already took an action unilaterally to tighten their laws to safeguard national securities, inevitably at an unequal footing. The New Law did not prescribe clear scope, criteria, and processes for review. Given the national security is such a sensitive issue for any

[282] Foreign Investment Law 2019, Article 2
[283] Lian, supra n 81, 150-151

sovereign countries, the EU-China BIT must address this issue under a balanced approach, i.e., facilitating an open and liberal market within the sphere of safe and secure environment.

Part V: Conclusion

V.1 EU-China BIT outlook

In 2016, the ninth-round negotiation set out an ambitious scope for the EU-China BIT, including the investment market access and protection, a regulatory framework for investment, sustainable development, a dispute settlement, rules on environment and labour.[284] For investment protection, the EU set out several high-level principle objectives, some of which had already been implemented in the New Law. These include the non-discrimination policy addressed under the national treatment rule, the protection against unlawful expropriation under Article 20, smooth funds transfer relating to an investment under Article 21, governments to respect their own written contractual obligations towards investors under Articles 24 and 25 and the guarantee of fair and equitable treatment and physical security under Article 26.[285]

However, the negotiation process was criticised for being difficult and slow in progress for the European industry with China's submission of its negotiation offers in 2018, only two years before the scheduled conclusion.[286] The 20th round negotiations took place in February 2019 and moved into concrete market access negotiations.[287] The negotiation was constructive and reportedly made some progress in several areas, eg, the investor-to-state dispute settlement, sustainable development, national treatment and policy issues in relation to the freedom of transfers and liberalisation of capital

[284] ECORYs & TNO, supra n 21, 27
[285] Foreign Investment Law 2019, Chapter III; ECORYs & TNO, supra n 21, 23
[286] BDI, 'The EU-Chia Investment Treaty' (03/21/2019) online available at: https://english.bdi.eu/article/news/the-eu-china-investment-treaty/#articleToCollection, accessed on 01/07/2019
[287] EC, 'Report of the 20th round of negotiations for the EU-China Investment Agreement', supra n 1

movement for FDIs.[288] At the time of writing, both parties still committed to conclude it by the end of 2020, although the progress was at a 'snail's pace with limited political driving force after the 25th round of negotiation. The new dispute mechanism would replace the ISDS provisions in the current BITs.[289] The ISDS limited the state's ability to regulate, such as when an investor brings a claim against a host state, the host state would adopt regulations to avoid such a claim.[290] From China's perspective, establishing a workable international investment dispute framework through investment agreements or treaties would attract more inward foreign investments and protect outward Chinese investments.[291]

V.2 Policy Recommendations

The EU-China BIT is likely to be shaped by the two regimes' foreign investment policies and economic goals, such as facilitating an effective trade access and investment protection. The EU-China BIT is a favoured strategy for economic development for both parties. Since the 2007-08 Financial Crisis, the EU aimed to attract FDIs and to deepen the single market, while China switched from attracting inward FDIs to promoting outward FDIs.[292] Notably China since made swift improvements in these areas under its recent law reforms, resulting in a sharp soar in the China outward FDIs in the last few years. However, the new foreign law legal system provided a high-level principle basis, the effectiveness of which inevitably depends on the implementation of regulations and policies by the delegated regulatory bodies. With sufficient political will and effort, the challenges facing the EU and China investment relationship should gradually be eliminated, including closing the reciprocity gap and levelling up the playing field.

China's series of economic reforms still support its socialism ideology-influenced economy, which could jeopardise the liberalisation process of the market economy for an optimal open and non-discriminative foreign investment environment. It is unlikely

[288] Ibid
[289] ECORYs & TNO, supra n 21, 29
[290] Ibid; Pathirana, supra n 31
[291] Pathirana, supra n 31
[292] ECORYs & TNO, supra n 21, 23-25

that China would compromise its core principles on sectors which are critical to the power of the CCP.[293] The Chinese State still exercises dominant control over its economy, in particular under President Xi's centralised governmental decision-making structures.[294] This led to market distortion and overcapacities in the international market due to direct and indirect subsidies for Chinese companies from their government to the detriment of other international competitors.[295] The new 'National Treatment' rule should work to eliminate the unequal treatment in foreign investments. Nonetheless, China has since increased the efficiency of economic planning and social control under Xi's leadership.[296] Potentially, the strong influence of the 'planned economy' may stifle for the 'National Treatment' policy for FDIs in terms of subsidies and government finance, if the FDIs are eligible to these benefits automatically in the first place.[297] Hence, the EU-China BIT should be mindful of the divergencies of interests and goals, which the EU's liberal market economy and China's socialist market economy possess. On the contrary, the EU has 28 member states with multifaceted interactions and cooperation among the Member States. The EU would have to ensure a unified front and the coordination of various European institutions when dealing with China which operates under a centre-controlled system.[298] With all divergences considered, both parties should set realistic expectations.

Despite the divergences and challenges, the EU and China should pursue a trade relationship with cooperation to maximise shared interests and to shape the global economy. In the past, China benefited greatly with its technology development and labour market from trading with the EU. It modernised its industry with the benefits of

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[293] Thilo Hanemann et al, supra n 9, 22
[294] BDI, 'Partner and Systemic Competitor-How do we deal with China's State-Controlled Economy?', supra n 54, 3
[295] Ibid
[296]Ibid, 4
[297] Zhou, 'National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective,' supra n 121, 85, Zhao stated the foreign investors would still not be eligible for state subsidies and have restricted access to necessary production resources just like the domestic private investors in a 'Planned Economy' under the 'National Treatment' rule.
[298] ECORYs & TNO, supra n 21, 12

capital and technologies flowing from the western countries.[299] This trade relationship should be reciprocal for the EU with an increasing amount of foreign investments in China and vice versa. Hence, a foreign investment framework which facilitates effective cooperation and mutual benefits and avoids unnecessary disengagement should be the guiding principle for the EU-China BIT negotiations. Clearly the series of Chinese recent foreign investment reforms followed up this principle. Noteworthily, the EU policymakers should also pursue an investment phenomenon with openness and an 'upward convergence' and reject the confrontative approach.[300]

At the same time, the policy principle should also emphasise the right to regulate, a proposal by the EU, which gives all participating states the powers to adopt measures in pursuit of the public policy objective and to safeguard national interests.[301] The right to regulate should also allow the states to implement provisions on foreign investments if they impose threats to the national security, advanced technologies and key infrastructures. China reformed its foreign investment laws in pursuit of an all-round open policy and modernisation strategy. Inevitably the EU should strengthen its foreign trade policy and national security screening framework with effective cooperation and balance.[302] The right to regulate for a national security reason should not become a mechanism for retaliation or impediment of the legitimate protection and operation of foreign investments.[303]

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[299] Ibid, 6
[300] Thilo Hanemann et al, supra n 9, 22
[301] ECORYs & TNO, supra n 21, 12
[302] Ibid, 11
[303] Thilo Hanemann et al, supra n 9, 23

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