



## The E.U.-China Investment Deal and Transatlantic Investment Cooperation

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Rarely has an investment agreement received so much bad press so quickly; or even so much press at all. Since it was announced in late December, the E.U.-China Comprehensive Agreement on Investment (CAI) has not exactly had a smooth run and after the recent sanctions-debacle between Beijing and Brussels the European Commission has now put ratification on hold.

Both critics and proponents should be under no illusion: this is neither a blessing nor disaster. The CAI is limited in nature and even if it should be ratified one day it will only be relevant for a small minority of European firms operating – or seeking to operate in – China. This is not because E.U. negotiators are weak or naive (they are not), but because they could never have hoped for more. At the same time, even if agreement never comes into force, it was not all for naught. It has moved the goalposts for what investment negotiators can achieve with Beijing and could provide a focal point for a new type of investment treaty.

### Binding, not opening

The CAI is more comprehensive than previous Chinese deals, but it does not crack open the Chinese market for European firms. Investment agreements never do. Compare with the more familiar case of goods trade. Free trade agreements change tariffs between the parties resulting in actual preferential access. The U.S.-China Phase I deal went further by, uniquely, committing China to expand purchasing of U.S. goods. By contrast, obligations on investment establishment

very rarely result in new access on the ground. Instead, they almost solely lock in existing access driven by unilateral reform processes as reflected in domestic law.

The CAI is no different. China has agreed to further openness in a couple of sectors (the E.U. didn't have to as it is much more open), and the agreement may have resulted in a few valuable side-deals (as reported [here](#)). But it will not translate into major new investment opportunities for a considerable number of European firms. It does not give access to the Chinese procurement market either. Instead, the core impact of the CAI will be to lock in aspects of China's domestic investment catalogue.

In fact, even some of the commitments presented as providing new market access largely reflect existing domestic rules in China, or rules that were already underway – such as removing joint-venture requirements on private hospitals in major Chinese cities (piloted since 2014), opening up to 50% foreign ownership in cloud services (initiated in 2019), or allowing auto manufactures to invest without joint ventures – including for electric and hybrid vehicles (liberalisation began in 2018).

Negotiations may have sped up, or deepened, some of these domestic initiatives – which would be important. Also, binding is not without value, even without further openness. German auto-makers deeply invested in the Chinese market, for instance, will welcome greater hurdles should the Chinese government be inclined to lower foreign equity caps or reintroduce joint venture requirements in

the future. Equally, while China's investment catalogue now [bans forced technology transfer](#), the CAI enshrines this in an enforceable treaty commitment which gives an added lever for European firms and governments. Binding can also help domestic reformers within China, who are known to use trade and investment agreements when engaging with vested interests within China. Perhaps most importantly, the CAI has shown that China stands ready to bind its unilateral investment opening. Even if this particular attempt may stumble on the finishing line, this opens up opportunities for other states to seek similar deals from China in the future.

### Baby-steps on sustainability and level playing fields

The same is true for other parts of the agreement. Critics have charged that CAI will do little to reign in Beijing's human and labor rights violations or the most distortive effects of Chinese state capitalism. This is true, of course, but when was an investment agreement ever going to change the structure of the Chinese economy or materially influence Beijing's human rights record?

With the CAI, China has agreed to neutral and open examination of obligations related to labour rights, corporate social responsibility, environment and climate change. Agreeing to be 'named and shamed' in these areas is a first for China and could prove meaningful. The Biden Administration should be interested in securing similar commitments from China as well. For instance, the recent panel report in the E.U.-Korea labour dispute shows that CAI's commitments to respect the principles of the eight fundamental

ILO conventions could have real value (and probably more so than promises of future ILO ratifications, which has been the subject of most attention).

More broadly, the structural provisions of the CAI include important [steps up](#) from WTO obligations, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP; which was aimed at China) and the China-U.S. Phase One Agreement. The agreement not only includes comprehensive obligations on technology transfer, as mentioned above, but also feature rules on state-owned enterprises some of which go beyond the CPTPP – for instance by applying to also provincial and local entities. Equally, while the agreement will do little to restrain Chinese subsidies (which are carved out from the state-to-state dispute settlement mechanism), its transparency obligations go beyond the WTO baseline, where members are not required to notify subsidies to services firms, and could benefit non-parties as well.

None of this will change the Chinese economy or revolutionise how European firms do business there, but no bilateral investment deal ever well and the obligations could help some firms at the margin. As importantly, even if the deal is never ratified, these obligations provide a critical marker for other states engaging with China and could possibly even provide a stepping-stone for plurilateral or multilateral WTO agreements at some stage. At a minimum, the agreement's rules on efficient licensing and authorisation procedures responds to a [core ask](#) by multinationals and could be used as a building block in WTO debates on an investment facilitation agreement.

### Protection, but not as we know it

The CAI does not include standard investment treaty obligations on investment protection – such as fair and equitable treatment - or investor-state dispute settlement (ISDS). If the E.U. succeeds to add these on a later date, as was the plan, that would have knock-on effects for the broader investment protection regime and could prove controversial in Europe, where ISDS has become a political poison pill. For the E.U.-China investment relationship, however, the direct effects will be limited.

China already has investment protection treaties with a range of E.U. member states. Some of these have outdated provisions, but others are more recent and can play a role when disputes arise. The day after the CAI was announced, for instance, Huawei initiated an ISDS claim against Sweden for banning the company from its 5G rollout. A similar avenue is available for many European firms operating in China today, but the European Commission's own [survey](#) found that few are familiar with their investment treaties. This is not surprising, as few firms can [afford](#) the ISDS mechanism or have any appetite to bring such claims in the fear of permanently burning relations with the Chinese authorities. Even if the CAI ends up consolidating European bilateral investment treaties at some point – possibly with the E.U.'s revised ISDS model – this will not make the prospect of ISDS claims against China any more attractive for European firms than it is today.

Rather; the more important protection feature of the CAI is that it provides a different type of investment protection

deal. While staying clear of the most controversial features of traditional investment treaties, it includes protection against discrimination backed up by inter-state dispute settlement and the institutional oversight committee (at the level of the Chinese Vice-Premier and Executive Vice-President of the European Commission). Together with the agreement's obligations on establishment, this aligns pretty closely with what the CATO Institute, for instance, has advocated investment treaties should [look like](#) and broader [trends](#) to rethink investment treaties away from their traditional form.

In short; even a ratified CAI will not be a major economic breakthrough, but it would be a meaningful ratchet. As importantly, even its draft form will be a point of reference for future agreements with China and has offered a new form of investment treaty that targets a wide range of barriers while staying clear of contentious investor-state litigation.