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Challenges for the EU-China BIT negotiations*

by

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The EU and China have been negotiating an investment agreement since 2013.¹ The [EU-China Summit Joint Statement](#) released on April 9, 2019 set an ambitious target for the conclusion of a EU-China Comprehensive Investment Agreement in 2020. However, some critical concerns remain to be addressed.

- **Market access.** Although both parties have agreed on a “negative list” approach, they face difficult challenges with defining a short and narrow list of reservations. Contrary to the EU, China has never adopted negative lists in bilateral agreements (except in the 2017 supplementary agreements relating to the comprehensive economic partnership agreements with Hong Kong and Macao). China’s experiments conducted in pilot free trade zones since September 2013 have not been successful enough to warrant further experimentation. Furthermore, EU members, for their part, have reservations at the state level under the EU’s two-tier legal system, while China is a unitary state that has to adopt a single negative list. Balancing the EU and member states’ expectations for market access and China’s possible concessions is a difficult exercise. To move negotiations forward efficiently, both parties may want to take the third version for market access considered in the U.S-China bilateral investment treaty (BIT) negotiations as a basis. China may make reservations in sensitive industries (e.g., national defense, infrastructure, finance, media) and attempt to minimize EU member states’ reservations.
- **National treatment (NT).** Among China’s 26 BITs with EU members, only 15 provide for NT, and none of them includes pre-establishment NT. Pre-establishment NT is not just a contentious matter in the negotiations, but controversy persists about the definition of “Chinese investors”. Even though none of China’s statutes grant more advantages to Chinese state-owned enterprises (SOEs) than to private entities, SOEs enjoy more favorable preferences regarding subsidies, tax deferral and credit support. While China’s just-adopted Foreign Investment Law grants pre-establishment NT, it does not clarify the status of SOEs, which may be specified in future State Council regulations. In the EU-China BIT negotiations, China may adopt neutral competition principles in allocating subsidies, tax referral, finance, or other support, as well as providing for equal access to

information and government procurement, to ensure non-discriminatory treatment of EU investors.

- **Investment court system (ICS).** To address the flaws of investor-state dispute settlement (ISDS), the EU advocates an ICS in negotiating investment agreements with other partners, while historically China has been skeptical about—even averse to—international dispute-settlement mechanisms. As a host and home country vis-a-vis the EU, China aims to balance benefits in both capacities. China has adopted ISDS in most of its agreements since entering into the 1998 China-Barbados BIT, and it has been involved in some ISDS cases. Due to significant differences between the ISDS and ICS approaches, China has not taken a clear stand on, nor expressly opposed, the ICS. In the above-mentioned Joint Statement, both the EU (and member states) and China envisage cooperating in support of ISDS reform. In particular, China may request further negotiations on specific issues, including the selection of third-party ICS members, the appeal tribunal authority and the enforcement of decisions (since the EU is not a signatory to the [ICSID Convention](#) and the [New York Convention](#)), as well as clarifications on some substantive matters (especially fair and equitable treatment, indirect expropriation). China may adopt the ICS if the parties agree on these pending issues.
- **Other issues.** Besides seeking high standards for investment protection and liberalization, the EU also seeks to include such “investment-plus” (or “investment-extra”) issues as democracy, taxation, intellectual property, labor and environmental protection, and sustainable development in the negotiations. Although China has incorporated sustainable development, public health and environmental protection in the preambles of recent agreements, it is reluctant to adopt them as binding obligations, enforced through ISDS. Instead, China prefers negotiations, mediation, conciliation, *ad hoc* state-to-state committees, or other approaches. The EU must know that these issues cannot be settled under an “all-or-nothing” strategy. The more pragmatic and effective way is to set these issues as non-binding obligations (e.g., stated purposes, objectives, guiding principles) or as obligations actionable through joint consultations, negotiations, mediation, or periodic policy reviews—and upgrade them step-by-step through further negotiations.

Concluding the EU-China BIT is a considerable challenge. However, as economies are becoming increasingly interconnected and interdependent, and with both parties considering cooperation as a counterpoint to the “America-First” policy, an agreement should be possible in the near future. The parties’ ambition to reach an agreement in 2020 and China’s just-adopted Foreign Investment Law (which promotes investment and provides high standards of investment protection) are strong signals to that effect.

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¹ [European Parliament, “Resolution of 9 October 2013 on the EU-China negotiations for a bilateral investment agreement,” 2013/2674\(RSP\).](#)

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