CHAPTER 11

The EU–China Comprehensive Agreement on Investment: A Model for Investment Coverage in the World Trade Organization?[1]

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Historically, foreign investment policies have been a fiercely contested issue for the international trade regime. The launch of discussions on investment facilitation under World Trade Organization (WTO) auspices suggests greater willingness among some WTO members to discuss investment issues. The China-EU Comprehensive Agreement on Investment (CAI) provides a possible basis for negotiating investment policy disciplines in the WTO on a plurilateral basis. While the prospects for ratification of the CAI by the European Union (EU) are uncertain, the CAI provides a baseline for possible investment rules in the WTO. Investment rules anchored both against the CAI outcomes and structured on a plurilateral basis are a logical part of a WTO resuscitation strategy.

1. INTRODUCTION

Historically, foreign investment has been a fiercely contested issue for the international trade regime. Within the WTO, there is currently only piecemeal coverage of foreign investment, largely in the form of mode III (commercial presence of service supplier) commitments in the General Agreement on Trade in Services (GATS) and express limitations on some (though not all) performance requirements imposed on foreign investors (under the Agreement on Trade-Related Investment Measures). An expansion of that baseline to include foreign investment as a new negotiating item was strongly opposed by developing countries at the 1996 Singapore WTO Ministerial Meeting. Investment issues are regulated instead through a dense (though heterogeneous) network of over 3000 bilateral investment treaties (BITs) and increasingly, investment chapters in Free Trade Agreements (FTAs).[2]

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2 For an overview of the distinct historical trajectories of these two systems, see Kurtz, J (2016), The WTO and International Investment Law: Converging Systems.

Important political economy shifts indicate possible greater willingness among some states parties to consider the inclusion of investment issues within the WTO. The form and nature of investment flows (and their relationship to both trade and development outcomes) has shifted considerably since the late 1980s. Foreign investment in that earlier period was often a simple substitute for trade as a means of accessing external markets. But since the late 1990s, the global economy has been characterised by international fragmentation of production represented by intensive cross-border exchange of intermediate goods and services.[3] For global value chains (GVCs), investment and trade are deeply complementary modalities. Economic actors engaged in GVCs require policy stability across a whole trade, investment, services, and intellectual property nexus.[4] For developing countries, the unbundling of production facilities embedded in GVCs can be a significant opportunity. Participation in a GVC brings the promise of development spillovers at a lower entry cost than past strategies, particularly those focused on industrialisation.[5] Some of those same countries are also increasingly dissatisfied with the BIT network (as are powerful actors like the EU), especially with an assumption of pro-investor structural incentives and outcomes of investor-state arbitration.

Against this backdrop, we seek to explore whether the conclusion of the Comprehensive Agreement on Investment (CAI) between China and the EU can offer a platform for framing negotiations on investment issues in the WTO. The instinctive appeal of the CAI is the significant achievement of reaching a negotiated conclusion on foreign investment issues between such sizeable counterparties as China and the EU. Of course, foreign investment issues have clearly become politically controversial in some developed states, not least during the Trump administration in the United States. Nevertheless, at least some of those concerns (including both treatment of foreign investors in China and the impact on non-trade values such as labour standards and environmental protection) are covered within the CAI, suggesting the possibility of some common foundation for a significant set of states parties (China, the EU, and the US). That said, the recent outbreak of mutual sanctions between China and the EU casts serious doubt on its likely conclusion and ratification. Counterintuitively perhaps, this may well create a greater opportunity to externalise key aspects of its framework to a broader constituency such as the membership of the WTO. Indeed, the risks associated with *not* building on the CAI are considerable. Despite (or because of) the long standstill in multilateralism and the illiberal tendencies unleashed by both the Trump administration and the urgency of the Covid-19 health response, some states parties (especially in South and East Asia) have emphasised regional rulemaking. Some have argued that initiatives like the *Regional Comprehensive Economic Partnership* (RCEP) will fundamentally reorient trade and economic ties away from global linkages to regionally focused relationships in East Asia, particularly in the face of uncertain conditions in other leading states.[6]

3 Baldwin, R (2016).
4 Findlay, C and B Hoekman (2020).
5 Baldwin, R (2016), Chp. 9.
6 Petri, P and M Plummer (2020).

We begin this chapter with an assessment of both the market access provisions, and the post-entry guarantees of competitive conditions in the CAI (in sections 2 and 3). Both conditions are, in our view, fundamentally necessary to the likelihood of any outcome on investment in the WTO. Section 4 then turns to the sustainable development provisions (particularly on labour standards and environmental protection) that reflect, in large part, the desire of the EU to act as a norm entrepreneur. The significance of achieving agreement on these highly sensitive issues with a major counterparty such as China should not be easily discounted, though we would expect some concern among civil society groups within Europe. Section 5 assesses the continued discretion given on securitisation of foreign investment policy in the CAI. Section 6 turns to dispute settlement and the limits of the judicial legalisation strategy publicly pursued by the EU. Section 7 explores existing pathways for cooperation on these issues within the WTO, especially through continuing dialogue on trade and investment facilitation. Section 8 concludes with some thoughts on the modalities of using the CAI to shape new rules within the WTO.

2. THE VITAL PROMISE OF MARKET ACCESS

Market access is a vital condition for both the successful completion and instrumental justification of any contemporary treaty negotiation on foreign investment. Prior to CAI, during the fifth meeting of the US-China Strategic and Economic Dialogue[7] in July 2013, China agreed to begin substantive negotiations with the United States on an investment agreement. Those negotiations were premised on a commitment to secure pre-establishment national treatment (market access) and a negative list approach (to specify reservations to market access), both of which are a critical feature of US investment treaty practice.[8] This expansive liberalisation model encompasses *every* part of a state's economic system and national laws unless specifically (negatively) exempted.[9] To prepare the negative list for the draft China - US BIT, China established an inter-ministerial mechanism in the state council and reviewed tens of thousands of rules governing foreign investment in China. Unfortunately, China and the United States failed to agree on the items of the negative list in 2018, losing the last chance to conclude a BIT during the term of the Obama administration. Nevertheless, China had already carried out domestic reform on foreign investment regulation based on the negative list approach, beginning in October 2013 in the Shanghai Free Trade Pilot Zone.

At the commencement of the CAI negotiations with the EU, China had still hoped to prioritise completion of the China-US BIT negotiations. But with the breakout of the Sino-American trade war during the term of the Trump administration, China pivoted its

7 On April 1, 2009, former Chinese President Hu Jintao and U.S. President Barack Obama agreed to establish the mechanism of China-US Strategic and Economic Dialogue during their first meeting in London on the sidelines of the G20 financial summit. Since then, five rounds of the dialogue have been held, with the first in Washington in July 2009, the second in Beijing in May 2010, the third in Washington in May 2011, the fourth in Beijing in May 2012, and the fifth in Washington in July 2013.

8 Vandevelde, K (1997).

9 Gómez-Palacio, I and P Muchlinski (2008).

negotiation focus to the EU. After 35 rounds of negotiations over seven years, China and the EU reached agreement on the CAI at the end of 2020, with the EU gaining a higher level of market access from China than the standard reached during the BIT negotiations with the United States. The strength of the CAI's market access commitments will bring greater investment opportunities for both Chinese and European enterprises. These instrumental benefits are critical to the justification of extra-domestic constraints on state sovereignty vis-à-vis foreign investment. Empirical studies have sought to identify whether there is a causal relationship between state entry into BITs and an increase in inbound foreign investment.[10] The early literature was characterised by methodological weakness, in that investment treaties were treated as black boxes. More recent empirical research that disaggregates treaties based on form and content finds that the specific content of investment treaties matters a great deal in attracting foreign investment. Of the various provisions in investment treaties, pre-establishment market access (via national treatment) offers the greatest potential for increasing foreign investment flows. One study has estimated that a host country can increase its share in total FDI flows by almost 30% in the hypothetical case of switching from particular investment treaties without pre-establishment national treatment commitments to those with such provisions.[11]

The CAI's market access obligations follow a negative list approach with specific non-confirming measures on obligations of national treatment, most-favoured-nation treatment, movement of senior management and board of directors, and performance requirements listed in specific annexes ('schedules').[12] Critically, both parties commit not to discriminate across sectors unless a specific reservation is included to that end in the schedule of commitments. More generally, both parties take commitments not to impose quantitative restrictions (unless reserved in a relevant schedule) and will not limit the legal form of an investor or require a joint venture arrangement with a domestic company (again, unless reserved in a schedule). The draft China and EU schedules have recently been released and are presented as annexes to the agreement.[13] The binding of the liberalisation commitments is done in a dynamic way (so called 'ratcheting'). Any future relaxation of existing restrictive measures included in the schedules will be automatically bound.

10 For a comprehensive overview of the principal empirical studies, see Yackee J W (2010) and Allee, T and C Peinhardt (2011).
11 Berger, A et al. (2013).
12 EU – China Comprehensive Agreement on Investment (CAI), Agreement on Principle, available https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237, Secn. II (Liberalisation of Investment), Arts. 2 (Market Access) and 7 (Non-Conforming Measures and Exceptions).
13 For China's schedule of commitments and reservations, see https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159483.pdf. For the EU's schedule of commitments and reservations, see https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159482.pdf.

Compared with its other BITs[14] or FTAs,[15] China has not made such far-reaching market access commitments with any other treaty partner. The EU has negotiated further and new market access openings and commitments such as the elimination of quantitative restrictions, equity caps or joint venture requirements in a number of important sectors. In particular, China has made comprehensive commitments on manufacturing with only very limited exclusions (in particular, in sectors with significant overcapacity). Approximately half of EU FDI in China is located in the manufacturing sector (such as in transport and telecommunication equipment, chemicals, and health equipment). For the vital automotive sector, China has agreed to phase out joint venture requirements, a long-standing concern of some EU companies operating in China. For investments by foreign investors in the manufacture of complete automobiles (passenger cars), the current shareholding percentage of the Chinese party shall not be less than 50%. But after 2022, investments by foreign investors in the manufacture of passenger cars will not be subject to restrictions on shareholding percentage. One foreign investor may establish less than two (included) equity joint ventures that manufacture complete automobiles of the same category (passenger cars) within the territory of China, however, such limitation of two enterprises does not apply to the circumstance where the foreign investor acquires other domestic automakers jointly with the Chinese party to the equity joint venture. Once again, after 2022, China will no longer reserve these non-conforming measures. These non-conforming measures do not apply to investments by foreign investors in the manufacture of new (green) energy automobiles and special purpose automobiles.[16]

The scheduled market access commitments that have been released by the parties go beyond investment in goods manufacture to encompass important service sectors. Turning to China's commitments, a number of these service sectors could be of commercial interest to EU investors in China.[17]

- **Financial services:** China had already started the process of gradually liberalising the financial services sector and will grant and commit to keep that opening to EU investors. Joint venture requirements and foreign equity caps have been removed for banking, trading in securities and insurance (including reinsurance), as well as asset management.
- **Health (private hospitals):**[18] Though investments by foreign investors in medical institutions may be made only in the form of joint venture, the EU Investors are permitted to establish wholly foreign owned privately funded hospitals and clinics,

14 Since the first BIT was signed between the Chinese government and the Swedish government in 1982, a large number of BITs have been signed between China and foreign governments in the past 30 years. By the end of 2020, China has signed 126 BIT agreements with other countries and regions (108 of which have come into force), and 23 other agreements including investment clauses (such as free trade agreements), 19 of which have come into force.

15 Currently, China has 24 FTAs under construction, among which 16 Agreements have been signed and implemented already. For the details, see MOFCOM: China FTA Network, available at http://fta.mofcom.gov.cn/english/index.shtml.

16 CAI, above no. 11, Annex I Entry 6 – Manufacture of Transportation Equipment Sector.

17 For further information, see https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2542.

18 CAI, above No. 11, Annex I Entry 18 – Medicine.

excluding traditional Chinese medicine hospitals and clinics in Beijing, Tianjin, Shanghai, Nanjing, Suzhou, Fuzhou, Guangzhou, Shenzhen, and the whole island of Hainan. The majority of doctors and medical personnel of the joint venture and wholly foreign owned hospital and clinics shall be of Chinese nationality. Foreign investors may not invest in the development and application of human stem cells, or the development and application of genetic diagnosis or treatment technology.

- **R&D (biological resources):**[19] China requires approval of the research and development activities conducted by foreign invested enterprises utilising the biological resources (including human, animal, plant, and microbe resources) originated from, and protected by China. China also requires the foreign invested enterprises to conduct the aforesaid activities in the form of cooperation with Chinese institutions, and to share with its Chinese partners the benefits generated from such research and development as well as subsequent applications and commercialisation.

- **Telecommunication/Cloud services**: China has agreed to lift the investment ban for cloud services. They will now be open to EU investors subject to a 50% equity cap.

- **Computer services:** China has agreed to bind market access for computer services – a significant improvement from the current situation. Also, China will include a 'technology neutrality' clause, which would ensure that equity caps imposed for value-added telecom services will not be applied to other services such as financial, logistics, medical, etc. if offered online.

- **Environmental services:** China will remove joint venture requirements in environmental services such as sewage, noise abatement, solid waste disposal, cleaning of exhaust gases, nature and landscape protection, sanitations, and other environmental services.

In contrast to the expansive (negative list) strategy to market access for foreign investment in the CAI, the WTO is both less comprehensive and structurally more conservative. Currently, the WTO only regulates foreign investment in the services sectors through the provisions of the GATS. The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. Commercial presence (FDI) implies that a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service. When it comes to market access, and in contradistinction to the CAI, the GATS adopts a hybrid structure engaging elements of a conservative bottom-up approach. Using a positive-list method, WTO members only opt in to legal coverage by either making horizontal commitments

19 Ibid. Annex I Entry 19 – Protection of Biological Resources.

(across all services sectors) or sector-specific commitments (which cover a particular economic sector) to both the market access[20] and national treatment[21] obligations in the GATS.[22] Each WTO member is required to have a schedule of specific commitments, which identifies the services sectors for which the member guarantees market access and national treatment and any limitations that may be attached.

This structure provides WTO members with significant latitude in determining when, and in what manner, to open up their service sectors to foreign competition. Indeed, analyses of commitments scheduled under the GATS show that developing countries have utilised this structure to significantly control the extent of their liberalisation efforts in the services area,[23] which has included scheduling sectoral commitments by reference either to domestic laws on FDI and/or their BIT obligations.[24] There is however, a justifiable critique that the positive list structure in the GATS provides insufficient incentives for states to extend and deepen their liberalisation efforts. Given the tensions between these liberalisation structures, this further evidences the manner in which the 'CAI Model' for a WTO investment initiative is better positioned as a stand-alone (opt-in) agreement, rather than one embedded in the conventional single undertaking approach to WTO rules.

The CAI as an international agreement will bind China's progress in the liberalisation of foreign investment that has taken place over the last 20 years and, in that way, prevent backsliding of the reform process. For the first time, China has made a market access commitment in the form of negative list in all sectors, including service and non-service sectors, so as to achieve a comprehensive docking with the foreign investment negative list management system established in the Chinese foreign investment law (FIL). This will make the conditions of market access for EU companies clear and independent of China's internal policies. Prior to 2020, foreign investments in China were regulated by a set of fragmented and long-outdated laws. China adopted its unified Foreign Investment Law (FIL) in 2019,[25] which came into effect in January 2020. Article 3 of the new FIL states: 'the State shall implement policies on high-level investment liberalisation and convenience, establish and improve the mechanism to promote foreign investment, and create a stable, transparent, foreseeable and level-playing market environment'. The new FIL takes a pre-establishment negative listing approach similar to the CAI provisions. This means that, unless the foreign investors and their investments fall within the sectors listed in the negative list, the new FIL commits to national treatment and equal

20 General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1197 (1994) (GATS), Article XVI.
21 Ibid. Article XVII.
22 Ibid. Article XX; WTO, Revision of Scheduling Guidelines (SC/CSC/W/19, 5 March 1999).
23 Hoekman, B (1996) 'Assessing the General Agreement on Trade in Services' in Martin, W and Winters L A (eds.), The Uruguay Round and the Developing Countries, pp: 88-124.
24 Adlung, R, P Morrison, M Roy, and W Zang (2011).
25 https://npcobserver.com/legislation/foreign-investment-law/.

protections in their establishment and operation in China.[26] The new FIL positions the norm of 'pre-establishment national treatment' as a general principle applicable in all ordinary circumstances, whereas it treats the application of the 'negative list' system as a noteworthy exception.

Before signature of the CAI and during the legal scrubbing, China will update the reference to Special Administrative Measures for Market Access of Foreign Investment (negative list, 2019 edition) in this Schedule, in light of its latest edition. Currently, China has already issued the 2020 edition of the negative list and will soon issue the 2021 edition later this year.

3. POST-ENTRY COMPETITIVE CONDITIONS: TOWARDS 'FIT FOR PURPOSE' GUARANTEES?

In recent years, despite China's extensive commitments in its accession protocol to the WTO, concerns have arisen as to the competitive conditions facing foreign investors when operating in China. Some of these concerns relate to the equality of the competitive position of foreign investors operating against Chinese state-owned-enterprises (SOEs) (and often by extension, the provision of subsidies to those SOEs). Others relate to claims made by foreign investors on perceived 'unfair' practices such as forced technology transfer.

Many of these issues are deeply sensitive from the perspective of one or both parties. From a Chinese standpoint, SOEs are an inherent part of the Chinese economic model that has been so successful in delivering historical development gains to its citizens. Yet capital exporting states to China, including but not limited to the member states of the EU, are increasingly wary of the unevenness of the competitive conditions within China. From their perspective, those variances go beyond the usual frictions of operating in a foreign jurisdiction but are instead seen as being the product of active manipulation by a host state.

Against this baseline of inter-state sensitivity, it is significant that the Chinese and EU negotiators reached agreement on some of these contested points which may well offer a useful platform for future WTO negotiations, particularly on the WTO's limited coverage of SOEs. While China's right to pursue its own economic model based on SOEs is explicitly guaranteed in the CAI,[27] the agreement adopts a definition of 'covered entity' which extends beyond conventional approaches to defining a SOE (which often

26 Article 4 of the FIL provides: The State shall implement the management systems of pre-establishment national treatment and negative list for foreign investment. For the purpose of the preceding paragraph, pre-establishment national treatment refers to the treatment given to foreign investors and their investments during the investment access stage, which is not lower than that given to their domestic counterparts; negative list refers to special administrative measures for the access of foreign investment in specific fields as stipulated by the State. The State shall give national treatment to foreign investment beyond the negative list. The negative list will be issued by or upon approval by the State Council. If more preferential treatment concerning access is offered to a foreign investor under any international treaty or agreement that the People's Republic of China concludes or joins in, relevant provisions in such treaty or agreement may prevail.

27 CAI, above note 11, Section II (Liberalisation of Investment), Article 3bis(2)(a).

revolve around liberal notions of ownership or control interests) to encompass broader mechanisms such as where a state power 'has the power to legally direct the actions' of an enterprise.[28] It is important to recognise here that the CAI is the first international agreement in which China has made detailed commitments on SOEs. Where an entity falls within this expanded definition of an SOE, then a state party is required to ensure that it acts 'in accordance with commercial considerations' and in a non-discriminatory fashion on the purchase and sale of goods and services.[29]

Interestingly, there is a provision that resembles a type of discovery mechanism whereby a party can request information around a covered entity if it believes its interests 'are being adversely affected by the commercial activities' of that entity.[30] Yet this seems to have been something of a redline in the negotiation, as there is no direct obligation on the receiving party to comply with the provisions of the request. On the other hand, there is a sharp and binding prohibition on the use of technology transfer conditions,[31] which is arguably broader than that concluded in the China-US phase one deal.[32] To some degree however, there is a distinct unevenness in the levels of legalisation of commitments in this sensitive area.[33]

Subsidisation is a case in point. The CAI breaks some new ground in requiring transparency of services subsidies.[34] This stands in contrast with the almost Sisyphean task of continuing the WTO-style model of focusing mainly on industrial subsidies and then trying to deductively classify permitted or other forms of subsidisation. At the very least, a starting point of transparency would allow the states parties to focus on the highest points of contemporary friction that affect economic actors. The CAI merely allows consultation between the parties if one state party considers that a subsidy granted by the other 'has or could have a negative effect on its investment interests'. Where the requested party finds merit in that claim it need only 'use its best endeavours to find a solution'. Most strikingly perhaps, this sensitive area of state conduct is expressly exempted from the purview of third-party adjudication.[35]

Reviewed against the corpus of international economic law, two systemic points should be noted. Firstly, some of these provisions seek to address problematic gaps and omissions in the law of the WTO, not least the original failure to overtly limit the use of technology

28 Ibid. Article 3bis(1)(a)(b).
29 Ibid., Article 3bis(3).
30 Ibid. Article 3bis(4).
31 Ibid. Article 3(1)(f). On the issue of technology transfer conditions generally, see Zhou, W, H Jiang and Q Kong (2020).
32 As one example, consider Article 3(3) of the CAI: 'Neither Party shall directly or indirectly require, force, pressure, or otherwise interfere with the transfer or licensing of technology between natural persons and enterprises of a Party and those of the other Party. Such transfer or licencing of technology shall be based on market terms that are voluntary and reflect mutual agreement' (emphasis added). Ibid., Article 3(3). CAI, above note 11. While there is somewhat similar language in the U.S-China Phase One Deal, there is no exact equivalence of these highlighted terms which taken together suggest a more expansive operation for the CAI. By contrast, see Economic and Trade Agreement between Government of the United States of America and the Government of the People's Republic of China, 15 January 2020, Article 2.1(2), 2.2 and 2.3.
33 For a conceptual account on the dimensions and value of legalization, see Abbott, K W, et al. (2001).
34 CAI, above note 11, Section III (Regulatory Framework), Arts. 8(1)-5).
35 Ibid., Arts. 8(7), 8(6) and 8(10).

transfer conditions in the Agreement on Trade-Related Investment Measures (TRIMs) and the general failure to discipline SOEs in the WTO. To that extent, they represent a natural foundation for the possibility of developing a collective commitment to remedying those limitations in any future set of WTO investment negotiations. Secondly, the negotiators here have elected to move beyond the generic forms of investment protection that are typically covered in a BIT (such as the broad guarantee of 'fair and equitable treatment' obligation) to focus instead on tailored provisions directed at the specific causes of trade and investment disputes between China and the EU. This reveals a welcome break from the path dependency that typically characterises BIT negotiations (though it will naturally prompt opposition from those vested interests (including professional advisers) who have abundant incentives to defend the current expansive model of investment protection found in most BITs). That said, there are still problematic gaps and omissions such as protections against expropriation, which would need to be considered in the WTO (given the vitality of that protection for the property rights of investors) and are flagged as future negotiating items in the CAI.[36]

4. FOREIGN INVESTMENT AND SUSTAINABLE DEVELOPMENT NORMS

The CAI is notable in its express inclusion of provisions dealing with the relationship between foreign investment and 'sustainable development', particularly in relation to potential impacts on labour and environmental standards.[37] There may well be a tendency to dismiss this aspect of the CAI as limited in strategic ambition, but any critique should be assessed against both the depth of internal commitment within the EU to sustainable development norms, as well as the achievement of reaching an agreement with such a significant counterparty as China. Sustainable development concerns are an essential (offensive) interest for the EU in its commercial treaty negotiations. The EU's quasi-constitutional conditions prioritise those values under the 'common commercial policy' changes imposed by the Treaty of Lisbon.[38] External trade and investment agreements concluded by the EU must, along with all other embodiments of its external relations, promote a set of EU values and interests including the express promotion of 'sustainable development'.[39]

In recent years, the European Commission has escalated its enforcement of a broad array of FTA and EU Association Agreements often in connection with so-called 'non-trade values' (though this framing itself is deeply flawed). Most notably, this has included the decision to launch a claim against the Republic of Korea for breach of a range of labour commitments (many of which are echoed in the CAI) under the EU-Korea Free Trade Agreement. While the Panel of Experts in that dispute did not entirely rule in favour of the

36 CAI, Section VI (Institutional and Final Provisions), Sub-section 2, Article. 3 (Negotiations on Investment Protection).
37 Ibid. Section IV (Investment and Sustainable Development).
38 Articles. 206-207, Consolidated Version of the Treaty on the Functioning of the EU [2012] OJ C 326/47.
39 Articles. 3(5) and 21, Consolidated Version of the Treaty on the EU (2012) OJ C 326/13. See also Directorate-General for Trade, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (European Commission, 2015).

EU (including on the question of whether Korea had complied with its obligation to make 'continued and sustained efforts' for the ratification of key 'fundamental' conventions of the International Labour Organization'),[40] they did find fault with Korea's failure to respect principles surrounding freedom of association under the FTA.[41] Consider for one moment the significance of achieving even some agreement with China on these points, given the sensitivity surrounding issues of labour practices in China.

Importantly, the EU's commitment on these non-economic values mirrors, at least facially, the revealed preferences of other large, developed countries. The United States is especially important here, given that any substantive WTO reform agenda on investment issues modelled on the CAI would be unlikely without American support. Like the EU, the US has also begun to enforce labour provisions under its FTAs. One of the key labour provisions in the CAI is a set of obligations (in Article 2) designed to ensure the parties both set high levels of labour protections and enforce them. These exact issues were litigated in a claim brought by the US against Guatemala under the Dominican Republic–Central America–US Free Trade Agreement.[42] And most recently, a group of Mexican migrant women have filed the first labour dispute under the US–Mexico–Canada Agreement, arguing that sex-based discrimination in recruitment and hiring processes for US jobs bar them from obtaining necessary work visas.[43]

Historically, developing countries have been fiercely resistant to these types of non-economic provisions given the fear that they (especially labour protections) would be used as cover for protectionism in developed counterparties. This is by no means an unreasonable concern given the political economy temptation for politicians to use foreign trade and investment to avoid responsibility for their own domestic failings to deal with pressing issues on dislocation of workers (including through higher levels of automation) and growing levels of income and wealth inequality. Not surprisingly, we see express acknowledgment of the dividing lines in this debate within the CAI.[44]

It is important to note that the sustainable development provisions in the CAI also tackle the vitally important issue of environmental protection. Formally at least, both China and the EU have evinced shared rhetoric and goals in this area, illustrated by China's recent pledge to become carbon-neutral by 2060, and the fact that the EU has long been recognised as a green policy pioneer and is home to the world's first major carbon market. Given its rapid and ongoing industrialisation, coupled with the ability to deploy state power to pursue strategic objectives, there is a powerful argument that China is the *only* state capable of anchoring a rapid transformation that would limit global

40 Panel of Experts Proceeding Constituted under Article 13.5 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts (20 January 2021), p. 79.

41 Ibid. pp. 78-79.

42 In the Matter of Guatemala – Issues Relating to the Obligations under Article. 16.2.1(1) of the CAFTA – DR, Report of the Panel (26 June 2017).

43 'Mexican Migrant Women file First USMSA Labor Complaint against U.S', Inside U.S Trade (24 March 2021), https://insidetrade.com/daily-news/mexican-migrant-women-file-first-usmca-labor-complaint-against-us (accessed, 25 April 2021).

44 CAI, above note 11, Sub-Section 3 (Investment and Labor), Article. 2(6).

temperature increases to the critical baseline position of 2 degrees Celsius.[45] Yet many of the provisions on environment in the CAI are pitched at a fairly general level, including the requirement that both parties strive for 'high levels of environmental protection', and ensure that investment is not incentivised by either weakening domestic standards or failing to enforce those standards.[46] There is however, a notable and specific endorsement of the United Nations Framework Convention on Climate Change (UNFCC) and the Paris Agreement, which requires both parties to implement those commitments.[47] For China, this endorsement is a significant concession given the constant development challenge of balancing environmental protection with growth and energy security. However, the real challenge may lie elsewhere. Momentum is building in both the US and the EU towards both higher climate change mitigation targets coupled with some form of carbon border taxes targeted at imports from countries that are seen as lagging behind on climate action.

5. SECURITISATION OF FOREIGN INVESTMENT POLICY: ENTRENCHMENT OF THE STATUS QUO?

In recent years, there has been a trend among Western states to 'securitise' economic policy directed at foreign trade and investment.[48] This has been particularly the case in the technology sector. We have seen a range of countries ban China's Huawei from running their telecommunications networks. India has also banned the Chinese-owned social media app TikTok following border clashes between the two countries. The US has blocked semi-conductor exports, while China has explored the possibility of limiting US access to rare earth minerals, which are essential to the manufacture of many tech products.[49]

More generally, there has been a greater focus on investment screening with significant delegation of power to vet incoming investments. Of course, national security flexibility has long been a feature of domestic regulatory frameworks for reviewing foreign investments. Nonetheless, there is a perception that the 2019 establishment of a framework for the screening of FDI into the EU[50] was undertaken principally to target Chinese investors. The screening regulation encourages EU members to adopt measures based on 'security or public order' to tighten entry choices around foreign investment. That said, there are similar provisions operating in China, such as Article 6 of the Chinese FIL, which provides: 'Foreign investors and foreign-funded enterprises carrying out investment activities within the territory of China shall observe the Chinese laws and regulations and shall not impair China's security or damage any public interest'.

45 See Drahos, P (2021).
46 CAI, above note 11, Sub-Section 2 (Investment and Environment), Article 2.
47 Ibid. Article 6.
48 For analysis on this dimension in the context of contemporary U.S trade policy *vis-à-vis* China, see Aaken, A v and J Kurtz (2019).
49 On the above, see John Thornhill, 'Technology Wars are Becoming the New Trade Wars', *Financial Times* (22 April 2021).
50 Regulation (EU) 2019/452 of the European Parliament and of the Council of 10 March 2019.

There has long been flexibility in both the law of the WTO and international investment law. to respond to security-related matters. In fact, security exceptions in many treaties afford *greater* discretion to governments than general exceptions (for policy objectives such as health or environmental protection), by permitting a government to adopt a measure that 'it considers necessary' in the circumstances, or by appearing to make the invocation of the provision entirely self-judging. This is especially the case in the law of the WTO. For example, Article XXI(b) of the General Agreement on Tariffs and Trade (GATT) lends itself to an affirmative defence in WTO disputes, which means that the defendant responds to a challenge by claiming that the provision authorised it to derogate from other GATT 1994 obligations. In other words, rather than maintain that its measures comply with WTO rules, a member can argue that any alleged deviation was backed by the exception provision.[51]

The proliferating use of the national security argument combined with the end of members' self-restraint related to Article XXI litigation puts the WTO in a position of great vulnerability.[52] Although the GATT's Contracting Parties had invoked GATT's security exception in various disputes prior to the inception of the WTO, the exception was not raised in a WTO dispute until 2016.[53] Faced with a difficult and politically charged task, the WTO Panel in *Russia – Traffic in Transit* sought to achieve a delicate balance between two important objectives: (1) to ensure that members can derogate from their obligations if necessary to protect essential security interests and (2) to contain the risks for abuse in the argument, which would otherwise undermine the effectiveness and credibility of the WTO itself. In international investment law, disputes involving national security exceptions have for the most part arisen under the Argentina-US BIT, concerning measures adopted by Argentina in response to its economic crisis of 2001-2002.[54] Much has been written about these disputes.[55] The continued expansion of national security as a basis for rejecting investment applications not only threatens levels of economic integration, allowing international tribunals to review these decisions by ruling on this exception may well be suboptimal.[56]

Various states parties have exhibited some concern with the tendency towards securitisation of economic policy. For example, in its May 2019 WTO reform proposal,[57] China asked for greater disciplines to curb abuse of the national security exception. China first complained that certain WTO members had imposed unwarranted tariffs on steel and aluminium products, and threatened to raise tariffs on auto and auto parts to protect its domestic industries, using national security as a pretext. China also argued that WTO members should act in good faith and exercise restraint in invoking provisions

51 Prazeres, T L (2020).
52 Weiβ, W (2020).
53 Panel Report, Russia - Measures Concerning Traffic in Transit (Russia-Traffic in Transit), WT/DS512/R.
54 See generally, Kurtz, J (2010).
55 For a recent example, see Henckels, C (2020)..
56 Knight, L and T Voon (2020)..
57 China's Proposal on WTO Reform: Communication from China, 13 May 2019, WT/GC/W/773.

related to national security. China argued that it is necessary to enhance the notification requirements on measures such as imposing import tariffs on the ground of national security exceptions, and carry out multilateral reviews on such measures.

Despite these concerns, the CAI does not substantively constrain state ability to control incoming investment on the basis of security concerns. In general terms, the CAI has been complemented by a set of horizontally applicable exceptions based on the WTO approach, consisting of general exceptions, security exceptions, taxation flexibilities, balance of payments safeguards, as well as carve out for prudential measures to protect integrity and stability of the financial systems. For the specific issue of security exceptions, the CAI essentially replicates the WTO legal position in GATT Article XXI.[58] It is difficult not to see this entrenchment of the status quo as a significant lost opportunity to write new and better rules to shape this increasingly contentious aspect of contemporary economic policy. On the flipside however, this may be an issue simply too politically sensitive to subject to greater legal oversight. In the end, it seems that the status quo may well have been a pragmatic choice (and cost) to secure the overall agreement in the CAI.

6. LIMITS OF LEGALISATION AND REFORM CHOICES ON DISPUTE SETTLEMENT

Historically, international investment law has adopted a different model of third-party dispute resolution than in the WTO. The system of investor-state arbitration in most BITs confers standing rights on foreign investors (as non-state actors) to commence a claim for treaty breach against a respondent (host) state. Those procedural rights are, in most cases, remarkably extensive, with little requirement to consider or engage domestic institutions or remedies in a host state. The WTO, by contrast, reserves standing rights only to states parties. A political calculus (at least for smaller states) will often *de facto* limit the likelihood of invocation especially given the possibility of reciprocal invocation of WTO proceedings.

Both of these legal systems are under considerable stress in the contemporary setting. In particular, there are growing levels of state dissatisfaction with the outputs of investor-state arbitration. These concerns traverse not only outcome factors (including issues of preference and the integrity of the underlying reasoning deployed by tribunals) but also questionable inputs into that process (such as the notorious practice of 'double hatting' where individuals act as both arbitrators and counsel). The EU sits at the apex point of opposition to this regime with its bold and ambitious proposal to replace investor-state arbitration altogether with a WTO-influenced judicial model.[59] To be clear, even under the EU's trustee court model, foreign investors would still have standing rights to pursue

58 CAI, above note 11, Section. VI (Institutional and Final Provisions), Article 10 (Security Exceptions).
59 Dietz, T, M Dotzauer and E Cohen (2019).

a claim for breach of the treaty (thereby departing from a fundamental precept of the WTO dispute settlement system). That new system is now being rolled out with select counterparties, including Canada and Vietnam.

In understanding the EU's positioning, it is important to be mindful of the pivotal role of judicialised dispute settlement in driving integration within the EU legal order.[60] This has led to a (some might say naïve) belief of the EU in the central role of third-party dispute resolution when it comes to public international law. Certainly, as we survey the contemporary landscape of international economic law, there are relatively few states that entirely share the EU's normative preferences on third-party adjudication (absent the formidable condition of accessing the sizeable EU market). Of course, it is tempting to dismiss, say, US objections to the WTO dispute settlement system – which have left that vital system in standstill – as a regrettable last gasp of Trumpian trade policy. Yet US objections to the WTO legal system have deeper and longer roots than the 2016 election of President Trump.[61] In other settings too – such as the Regional Comprehensive Economic Partnership – there is a general reluctance of states parties to delegate sovereign authority to third-party decision-makers.[62]

The CAI starkly reveals the limits of the EU's capacity to act as a norm entrepreneur in this contested area. China has only agreed to state-to-state dispute settlement, thus departing from the EU's preferred baseline of extending standing rights to foreign investors.[63] Moreover, the CAI adopts a remedy structure modelled on the WTO, which requires ensuring the measure in breach is brought into conformity with the CAI, and absent compliance or some other agreement, the successful party can then resort to prospective suspension of concessions.[64] By contrast, a damages system (such as exists in China's BITs as well as in the EU's new investment court model) would directly compensate foreign investors for the harm caused by state conduct in breach of operative conditions. At best, the CAI's dispute settlement provisions represent a confusing distillation of some (but not all) of the WTO dispute settlement model. Pointedly, the absence of any appellate review (which exists both in the WTO and in the EU's investment court system) reveals the limits of the EU's preference of a trustee court model to a counterparty such as China.

7. PATHWAYS FOR COOPERATION: TRADE AND INVESTMENT FACILITATION

The parallels between trade and investment facilitation – besides the obvious similarities in name, and the shared background in terms of the Singapore issues – are limited in theory and practice.[65]

60 See, e.g. Maduro, M (1998).
61 McDougall R (2018).
62 For an account of a principled commitment to a non-Western, delegalised model of investment treaty commitments among the ASEAN states (being the architects of the RCEP negotiations), see Cho S and J Kurtz (2018).
63 CAI, above note 11, Section V (Dispute Settlement).
64 Ibid. Article 16.
65 Calamita, N J (2020).

WTO members concluded negotiations at the 2013 Bali Ministerial Conference on the landmark Trade Facilitation Agreement (TFA), which entered into force on 22 February 2017 following its ratification by two-thirds of the WTO membership. The TFA contains provisions for expediting the movement, release, and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area.[66]

Trade facilitation involves what happens to goods as they cross national borders. The TFA measures focus on issues such as the release and clearance of goods. Investment facilitation goes well beyond border issues and relates to the establishment and subsequent operation of an enterprise, potentially involving a wide range of regulatory issues as diverse as environment, labour, consumer protection, competition, transportation, anti-corruption, taxation, health, and safety, among others.

Since 2017, WTO members have been engaged in structured discussions aimed at agreeing on a multilateral framework on investment facilitation for development. Two groups convened informal meetings and workshops throughout 2017 on whether and how the WTO could be a place for considering 'measures that members could take to facilitate investment'. That effort led to the adoption of a Joint Ministerial Statement on Investment Facilitation for Development at the 11th Ministerial Conference in Buenos Aires at the end of 2017, with 70 members announcing the launch of 'structured discussions with the aim of developing a multilateral framework on investment facilitation'. To address some members' concerns about an attempt to develop multilateral rules on investment liberalisation and protection, the group clarified that this work would exclude market access, investment protection, and investor-state dispute settlement (ISDS).[67]

The participants in the negotiations for an agreement on investment facilitation for development held a negotiating meeting on 8-9 March 2021.[68] Members continued the negotiations on the future agreement based on the latest version of the informal consolidated text. Participants discussed the establishment of a 'business obstacle alert mechanism' to resolve problems faced by investors and addressed the issue of 'responsible business conduct' based on text proposals from different members. The discussions addressed measures against corruption based on text proposals on this subject submitted by several members. Provisions to combat corruption would contribute to creating a transparent, efficient, and predictable environment for facilitating foreign direct investment, and thus contribute to sustainable investment and development. Participants engaged in a discussion on a revised proposal on domestic supplier databases, with proposals on general exceptions, security exceptions and financial exceptions also discussed.[69]

66 For an overview of these developments, see https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm
67 Gabor, E, and K P Sauvat (2021).
68 For the latest negotiation news, see https://www.wto.org/english/news_e/events_e/events_e.htm
69 https://www.wto.org/english/news_e/news21_e/infac_09mar21_e.htm

One of the objectives of the CAI is to 'create a better climate to facilitate and develop trade and investment between the Parties'. Section III of the CAI on 'regulatory framework' includes a comprehensive set of transparency rules for regulatory and administrative measures enhancing legal certainty and predictability, as well as on procedural fairness and the right to judicial review. Many of these provisions mirror key articles on investment facilitation in the new Chinese FIL.[70] Moreover, the CAI's provisions are basically similar to most of the draft investment facilitation agreement. Section III of the CAI will ensure that licensing and qualification requirements and procedures are publicly available, easily understandable, and reasonable, so that they do not act as a barrier to investment. The relevant provisions are inspired by similar provisions in the GATS and the ongoing multilateral process such as the Joint Initiative on Services Domestic Regulation.

8. CONCLUSION

Many of the CAI provisions are fundamentally WTO-plus in nature and orientation. This is a characterisation that follows almost by definition, given the paucity of investment rules in the WTO. Substantively, the CAI represents a significant negotiating outcome on a range of deeply contested issues that span market opening issues to a complex values dimension. No doubt however, there will be interest groups within the EU that will decry the level of ambition in the CAI. In our view, this type of critique ignores both the sizeable outcomes in the CAI and the historic achievement of reaching agreement with a counterparty such as China. Yet, it may well be that the CAI is destined for a holding pattern, at least in the short term, given the outbreak of mutual sanctions imposed by China and the EU. To our mind, that limitation should not impact the value of using the CAI baseline as an exploration of possible investment rules in the WTO.

The WTO is in a significant moment of legislative crisis. WTO members are voting with their feet and diverting their negotiating capital into bilateral and regional trade agreements. Investment issues are front and centre in these new embodiments of international economic law. There is then an urgent need to divert state appetite from FTAs to resuscitate the WTO. As argued in other contributions to this volume, the key here could be a philosophical shift to variable geometry and away from the rigidity of the single undertaking approach within the WTO.[71] Investment rules anchored both against the CAI outcomes and structured on a plurilateral basis are a logical part of this resuscitation strategy.

70 China FIL, Articles. 10, 15-16, 19, and 26.
71 See also Hoekman, B and C Sabel (2021).

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