

EU-China Comprehensive Agreement on Investment (CAI)

Introduction

On 30 December 2020, the European Union and the People's Republic of China (**China**) announced an [agreement in principle](#) on the content of the EU-China Comprehensive Agreement on Investment (**CAI**). On 22 January 2021, [a part of the text of that agreement](#) was published. The full text, including the remaining annexes, is expected to be published in February 2021.

Although the title of the CAI might suggest that it covers all aspects of investment including investment protection, the text of the agreement – as it stands – focuses on investment liberalisation and select modes of the supply of services. In particular, the current text of the CAI focuses on: market access commitments, the need for non-discriminatory treatment in respect of the establishment and operation of enterprises, the conduct of State-owned enterprises (**SOEs**), transparency rules for subsidies and various commitments relating to sustainable development. The Parties have not yet concluded their negotiations on the substantive protection of investors and their investments or an investor-State dispute settlement (**ISDS**) mechanism.

Investment liberalisation (Section II)

Section II of the CAI focuses on investment liberalisation, especially measures or treatment affecting the establishment of an enterprise or the operation of a covered enterprise¹ by an investment of one Party in the territory of another. Section II imposes obligations, subject to reservations, relating to market access, performance requirements, non-discrimination (national treatment and most-favoured nation treatment), SOEs and the temporary stay of natural persons for business purposes.

Similar to other investment agreements, the liberalisation provisions of the CAI do not apply to audio-visual services, certain air transport and auxiliary services and government procurement (under certain conditions). Most provisions also do not apply to subsidies or grants.

¹ Article 2 of Section I of the CAI defines 'covered enterprise' as "an enterprise set up in the territory of a Party through establishment, as defined in this Article, by an investor of the other Party, and which is in existence as of the date of entry into force of this Agreement or made thereafter in accordance with applicable laws".

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For sectors or subsectors where commitments are undertaken, the Parties commit to market access (Article 2). The annexes setting out those sectors or subsectors have not yet been published. However, according to a [press release](#) of the European Commission, China's market access commitments cover: the automotive sector, financial services, health (private hospitals), R&D (biological resources), telecommunication/cloud services, computer services, international maritime transport, air transport-related services, business services, environmental services and construction services. On the EU side, the European Commission deems that "EU sensitivities, such as in the field of energy, agriculture, fisheries, audio-visual, public services, etc. are all preserved in CAI". The market access commitments eliminate, for example, limitations on the number of enterprises that may carry out a specific activity, numerical quotas, an economic needs test or limitations on the total number of natural persons that may be employed in a particular sector or subsector.

The obligations in respect of performance requirements (Article 3), non-discrimination of investors and covered enterprises (national treatment (Article 4) and most favoured nation treatment (Article 5)) and senior management and boards of directors (Article 6) are similar to obligations under other EU agreements in respect of the establishment and operation of enterprises.

In contrast to other investment agreements, but consistent with the understanding that the CAI covers trade in services and thus investment, the CAI addresses SOEs (Article 3*bis*) and guarantees certain treatment in respect of the entry and temporary stay of business visitors and intra-corporate transferees (Article 6*bis*). First, the CAI obliges SOEs to act in accordance with commercial considerations and in a non-discriminatory manner in their purchases and sales of goods or services. Additionally, the Parties undertake specific transparency obligations to provide specific information about the operation of an SOE that may adversely affect the commercial activities of an SOE of the other Party. These obligations are also applicable to other entities or enterprises, which have been authorized or designated by a Party as sole suppliers or purchasers of a good or service. Second, the CAI seeks to facilitate, subject to particular reservations, and make more transparent the entry and temporary stay, in the Parties' territories, of business visitors for establishment purposes and intra-corporate transferees (Articles 6*bis* and 6*ter*).

Regulatory framework (Section III)

Section III relates to both Parties' regulatory framework affecting trade in services and investment. It focuses on domestic regulation affecting the establishment of an enterprise and the operation of a covered enterprise (Sub-section 1), transparency (Sub-section 2) and financial services (Sub-section 3).

For sectors or subsectors where commitments are undertaken, the sub-section on domestic regulation imposes certain standards for licensing and qualification requirements and procedures.

The sub-section on transparency primarily seeks to ensure, subject to legitimate exceptions, that regulation with respect to matters covered by the CAI are promptly published or otherwise made public, that other transparency-related actions are taken (such as the designation of contact points) and that rule of law protections are guaranteed. There are also specific provisions relating to the right of enterprises to participate in standardisation initiatives (outside the context of standards governing sanitary and phytosanitary measures and governmental purchasing specifications). The final provisions of the sub-section on transparency seek to strengthen the WTO obligations in respect of the transparency of subsidies, in particular specific subsidies granted to the services listed and included in the [Annex to Section III\(2\)\(8\)](#), which includes business, communication, construction, distribution, environmental, financial, health, tourism and travel services. Furthermore, a Party may request and, if so requested, must engage in consultations where a Party considers that a subsidy has or could have negative effects on its investment interests with a view to finding a feasible and acceptable solution. The State-to-State dispute settlement provisions of the CAI do not apply to those disagreements.

Taking into account internationally agreed standards, the sub-section on financial services aims to ensure a transparent and non-discriminatory framework with respect to the establishment and supply of financial services, including new financial services. Certain exceptions apply to the supply of services related to social security and the financial resources of both Parties. Furthermore, the Parties are allowed to adopt the measures they deem appropriate for prudential reasons and to ensure the integrity and stability of their financial system.

Investment and sustainable development (Section IV)

Section IV governs investment and sustainable development. It has become standard policy of the European Union to include sustainable development provisions in its trade agreements. Nonetheless, the inclusion of this section in an agreement with China has generated considerable interest particularly in the scope of the commitments made by the Parties.

Section IV recognises the positive contribution of investment to the economic, social, and environmental dimensions of sustainable development. In order to strengthen that contribution, the CAI seeks to ensure that the Parties cooperate with and encourage businesses in their territories to conduct themselves in accordance with responsible business practices, including recognised international guidelines and principles (Article 2).

Additionally, the CAI ensures the participation of non-State stakeholders, through transparency procedures, in the adoption of measures with an economic, social or environmental dimension (Article 3).

Recognising the right of each Party to determine its own sustainable development policies and priorities, and to set its own level of labour and environmental protection (Article 1 of Sub-sections 2 and 3), the Parties seek to encourage the adoption, improvement and enforcement of laws and policies with a high level of protection (Article 2 of Subsections 2 and 3), and to maintain a dialogue and cooperation in addition to their efforts under existing bilateral and multilateral mechanisms (Article 3 of Sub-sections 2 and 3).

The CAI includes specific provisions related to investment and the environment (Sub-section 2) and investment and labour (Sub-section 3). On investment and the environment, the Parties commit to effectively implement the multilateral environmental agreements to which they are party (Article 4 of Sub-section 2) and to facilitate and encourage investment in environmental goods and services (Article 5 of Sub-section 2). To combat climate change, the CAI seeks to ensure: cooperation between the Parties, bilaterally and in international fora, the effective implementation of the Paris Agreement, and the facilitation and promotion of investment in climate friendly goods and products, such as renewable energy, low-carbon technologies and energy efficient products (Article 6 of Sub-section 2). On investment and labour, the CAI seeks to promote the principles of the International Labour Organization (**ILO**), in particular by committing the Parties to make continued and sustained efforts to pursue ratification of the ILO Conventions on Forced Labour and the Abolition of Forced Labour and to consider the ratification of the other Conventions that are classified as “up to date” by the ILO (Article 4 of Sub-section 3). The CAI also seeks to promote investment which favours decent work policies, including a human-centred approach to the future of work, adequate minimum wages, social protection and safety and health at work (Article 5 of sub-Section 3).

Similar to other EU trade agreements, the resolution of disputes regarding sustainable development commitments is subject to a separate method of State-to-State dispute settlement mechanism. The remedies to induce compliance, applicable under the general State-to-State dispute settlement mechanism (Section V), are not available.

Settling disputes under the CAI (Section V)

Disagreements between the Parties are to be settled or resolved in accordance with Section V of the CAI. Some sections or provisions, such as the investment and sustainable development section and the matters falling under the consultation mechanism for subsidies-related disagreements, are expressly excluded from the scope of Section V.

The general State-to-State dispute settlement mechanism builds on dispute resolution mechanisms found in other EU trade agreements. It envisages a procedure consisting of consultations, potential mediation, the establishment and composition of an arbitration panel and the delivery of interim and final reports. The final report is binding between the Parties and requires immediate compliance, unless the Parties agree on a reasonable period of time for compliance. In the event that there is a disagreement regarding compliance, the Parties may agree on compensation or suspend application of the concessions or other obligations not exceeding the level of the nullification or impairment caused by the violation (Article 16). Detailed rules of procedures are found in [Annex I \(Rules of Procedure for State-to-State Dispute Settlement\)](#). The code of conduct, which is to be included in Annex II (Code of Conduct for Members of Arbitral Tribunals and Mediators in State-to-State Disputes) in due course, is still under negotiation.

Next steps: completing negotiations on investment protection and investment dispute settlement and securing ratification

The CAI expresses the Parties' agreement to continue their negotiations on investment protection and ISDS and to try to complete those negotiations within two years of the date of signature of the CAI. Notably, the CAI states that the Parties will seek to take into account any developments regarding ISDS reform arising out of the discussions in the Working Group of the United Nations Commission for International Trade Law (**UNCITRAL**). Although China has not expressly endorsed the [European Union's proposals for establishing a multilateral investment court](#), it appears to be engaging with the European Union and other interested parties in the [UNCITRAL discussions in relation to the establishment of a permanent investment court](#).

The CAI is currently being finalised and still requires legal revision, translation and signature by both Parties before it can be ratified and enter into force. On the EU side, the European Commission has proposed that the agreement be ratified by the European Parliament as an EU-only agreement.

Conclusion

The market access commitments made by China are undoubtedly an important step in the investment relationship between the European Union and China. The provisions on trade and sustainable development mark a new type of commitment undertaken by China, even if enforcement of those provisions might face considerable challenges. Overall, the CAI must also be seen as a significant step in how China defines its relationship with the European Union, as compared to its ties with other major trading partners. Nonetheless, the current absence of investment protection provisions, including an effective ISDS

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mechanism, diminishes the present value of the agreement. There can be no guarantee that the European Union and China will be able to agree and conclude effective investment protection provisions. Those discussions appear to be closely tied to the ongoing negotiations on ISDS reform. Unless and until the negotiations on this aspect of the Parties' investment relationship advance, the CAI will be far from being a "comprehensive" agreement on investments.

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