

E-PAPER

EU-China Comprehensive Agreement on Investment

A Scoping Study

BY JESSICA LAWRENCE, TARA VAN HO,
AND ANIL YILMAZ VASTARDIS

Published by Heinrich Böll Foundation, December 2020



EU-China Comprehensive Agreement on Investment – A Scoping Study

By Jessica Lawrence, Tara Van Ho, and Anil Yilmaz Vastardis

Contents

Abbreviations	3
Foreword	4
Executive Summary	6
Introduction	9
Investor Claims for Regulatory Changes	12
Weak Labour, Environmental, and Human Rights Protections	17
Weak TSD chapters	17
Missing investor obligations	20
Market Access and Critical Infrastructure	23
Energy Sector	23
Digital infrastructure	26
Human Rights Impacts	28
Specific problems with the 2017 SIA	29
Digital rights	30
Compliance with mandatory human rights due diligence laws	33
Free speech and public engagement in the EU	38
Gendered impacts	39
Conclusion	41
About the authors	44

Abbreviations

BIT	bilateral investment treaty
CAI	EU-China Comprehensive Agreement on Investment
CETA	Comprehensive Economic and Trade Agreement
CSR	corporate social responsibility
DAG	Domestic Advisory Group
EU	European Union
FDI	foreign direct investment
ICS	Investment Court System
ISDS	investor-state dispute settlement
mHRDD	mandatory human rights due diligence
SIA	Sustainability Impact Assessment
TSD	trade and sustainable development
UNGPs-HRIAs	UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements
WTO	World Trade Organization

Foreword

China and the European Union (EU) are currently negotiating a new, far-reaching investment treaty called the EU-China Comprehensive Agreement on Investment (CAI). The CAI is supposed to replace 26 existing bilateral investment treaties (BITs) between China and most EU member states. But it is far more ambitious than offering a mere update of these BITs, as it is going to cover much more comprehensive ground. It will not only take account of the rights of existing foreign investors in each jurisdiction, but also aim at a far-reaching liberalisation of investment.

China has been a significant destination for investment from the EU over the past 30 years as a result of an unprecedented global economic boom. Given the huge amounts that are at stake – and the still significant restrictions on EU companies in China – much of the European debate about the CAI has focused on the ability of the EU to extract Chinese concessions with respect to access to the Chinese market. The «level playing field» in this respect seems to be the foremost concern of EU policy-makers.

While these «offensive» interests of the EU are no doubt relevant, we nevertheless want to focus our attention in this study on the potential downsides and risks for the EU in enshrining rights for Chinese investors in Europe in an international investment treaty. We focus in these «defensive» interests, because investment treaties by their very nature restrict the ability of a state to regulate, or even restrict, foreign investment.

China is home to some of the biggest companies on Earth, some of them state-owned and others private. But China has a very peculiar economic and political system, in which the boundaries between the state and the private sector are blurred. Behind the scenes, the Communist Party is present in both the state, state-owned, and privately owned companies. As China has embarked on a quite assertive course that puts it at odds with many European values, it is now seen by the EU as a negotiating partner, an economic competitor, and a systemic rival.

This study tries to shed light on the potential risks of this wide-ranging agreement with such a peculiar and powerful country. Little is publicly known about the substance of the agreement. Therefore, the ambitions of this study are quite modest, namely to identify potentially problematic areas that merit particular attention from European civil society and policy-makers, and all of this based on the limited available information, a leaked draft dating back to 2019, and similar, comparable agreements. The study is certainly not the final word on the CAI, but rather intends to contribute to an urgently needed European conversation on aspects of the proposed agreement that could pose relevant problems. Its recommendations are those of the authors.

After the debacle on the Transatlantic Trade and Investment Partnership, the European Commission promised comprehensive transparency in trade negotiations. But up to now, very little is publicly known about a treaty with very far-reaching consequences that is supposed to be signed by the end of 2020.^[1] So the first step needs to be to allow for a transparent, fully informed public discussion on this potentially quite consequential treaty.

With an overwhelming majority, the European Parliament passed a resolution on 26 November 2020 that asked for a «sustainable and assertive» trade policy and demanded the «setting up of a China task force to allow the EU to speak with one voice on its China policy».^[2] It is with this backdrop that the CAI merits being watched very closely by policy-makers, civil society, and the broader European public.

Berlin, December 2020

Jörg Haas
Head of International Politics
Heinrich Böll Foundation

- 1** According to China’s ambassador to the EU, as quoted in a recent article: «China-EU investment agreement to be signed by the year end, says ambassador», <https://newseu.cgtn.com/news/2020-11-24/China-EU-investment-treaty-to-be-signed-by-year-end-says-ambassador-VER64j9RkI/index.html>.
- 2** See <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92144/sustainable-and-assertive-parliament-lays-out-is-trade-policy-goals>.

Executive Summary

Currently, the European Union (EU) and China are in talks aiming to conclude a new EU-China Comprehensive Agreement on Investment (CAI). The new agreement is intended to replace 26 existing bilateral investment treaties (BITs) between the EU member states and China and create new treaty obligations for Ireland, harmonise EU investment policy vis-à-vis China, and significantly widen the scope of investment protection. The CAI will differ significantly from existing agreements with China, covering a broader range of areas than current member state BITs and containing more detailed provisions throughout. A leaked draft of the negotiating text of the CAI indicates that the agreement would liberalise market access – an area not covered by existing treaties. Unlike existing member state investment treaties with China, it would also contain detailed chapters aimed at disciplining the state parties on issues of domestic regulation of an investor’s entry into and operation within the host state, financial services, and subsidies. It may also contain provisions on sustainable development and make use of the EU’s new Investment Court System (ICS), though there is still strong disagreement between the parties regarding these chapters.

China’s economic power, systemic importance, and political specificity make it different from other EU trade and investment partners, and require a more cautious approach than the CAI currently offers. It is a country whose unique system does not allow for a neat distinction between private business and the state, and which obliges private companies to cooperate with the state. It is a country with an ambitious industrial policy that aims at occupying a dominant position in the technology sector, and that has been willing to allow the forced transfer of intellectual property as a means of attaining it. And it is a country whose actions – with respect to the Uyghur minority population, the protests in Hong Kong, and mass surveillance practices – have raised serious human rights concerns, both with regard to the actions of the Chinese government as well as the actions of EU companies operating in China.

Thus far, most discussion of the agreement in the EU has focused on the «offensive» opportunities that the CAI represents for European investors, in particular in terms of the potential gains regarding market access and eliminating performance requirements. Much less attention has been paid to «defensive» aspects of the CAI and the potential risks of the agreement for the EU and for EU businesses operating overseas, as well as the potential risks for the populations of both the EU and China.

This scoping study sets out some of the most important concerns regarding the EU’s defensive interests with respect to the CAI, given the information currently available. It aims to draw attention to some of the issues that civil society groups should watch carefully upon the completion and release of the draft agreement, and to highlight the missed opportunities by EU negotiators in terms of strengthening the environmental, labour, and human

rights credentials of EU investment policy. The issue areas that it highlights are divided into four substantive sections.

The first section of the study examines the CAI's failure to address the problem of investor claims regarding regulatory changes, noting the CAI's reproduction of the problems with ambiguous standards such as «fair and equitable treatment» that have led to the loss of regulatory space and the privileging of investor interests over public policy in countries around the world. It goes on to demonstrate that attempts to limit these claims by providing greater specificity in definitions and through exceptions provisions are insufficient, and that more significant reforms are needed.

The second section discusses the watering down of the investment and sustainable development chapter in the CAI, in comparison with similar chapters included in recent EU trade and investment agreements. It also emphasises the lack of investor obligations in the CAI – two significant missed opportunities for ensuring that the EU's external investment policy upholds high standards of protection in the areas of human rights, the environment, and anti-corruption.

The third substantive section explores the potential impacts of the agreement's broad market access protections, questioning whether the EU has ensured sufficient policy space with respect to regulating critical infrastructure, and asking whether the provisions purporting to protect the EU's right to screen investments prior to entry might be challenged if applied stringently to Chinese investments.

Finally, the fourth substantive section focuses on the potential human rights impacts of the agreement, exploring issues such as the potential complicity of EU investors in China, and the deficiencies of the Sustainability Impact Assessment that the EU conducted prior to negotiating the current agreement.

Given China's unique position, the study concludes that the EU must ensure that particularly strong protections for EU regulatory policy space are included in any future investment deal. The CAI should be redrafted to include stronger exceptions provisions, wholesale carve-outs for key areas of EU regulatory policy, and more clearly defined protections for investors. The EU should also consider more far-reaching reforms such as setting out obligations on investors, eliminating ambiguous and overly broad protections such as the «fair and equitable treatment» standard altogether, and curtailing or eliminating the possibility of recourse to investor-state dispute settlement (ISDS),^[3] in line with the practices of several other contemporary investment treaties. The EU should also consider whether it is wise to conclude such an agreement without a commitment on the part of

3 ISDS is used here as a reference to alternative methods of investor-state dispute resolution outside of national court systems.

China to protect human rights – including in Hong Kong and within Uyghur and other ethnic and religious minority communities – and should ensure the CAI includes binding and enforceable commitments with respect to upholding international human rights, labour rights, and environmental protections.

A Chinese consortium led by China Road and Bridge Corporation (CRBC) build the Peljesac Bridge near Komarna in Croatia.



Introduction

Currently, the European Union (EU) and China are in talks aiming to conclude a new EU-China Comprehensive Agreement on Investment (CAI). The new agreement is intended to replace^[4] 26 existing bilateral investment treaties (BITs) between the EU member states and China and create new treaty obligations for Ireland,^[5] harmonise EU investment policy vis-à-vis China,^[6] and significantly widen the scope of investment protection. The CAI will differ significantly from existing agreements with China, covering a broader range of areas than the existing member state BITs and containing more detailed provisions throughout. A leaked draft of the negotiating text of the CAI indicates that the agreement would liberalise market access – an area not covered by existing treaties. Unlike existing treaties, it would also contain detailed chapters aimed at disciplining the state parties on issues of domestic regulation of an investor’s entry into and operation within the host state, financial services, and subsidies. It may also contain provisions on sustainable development and make use of the EU’s new Investment Court System (ICS), though there is still strong disagreement between the parties regarding these chapters.

Negotiations were officially launched in 2013 and are still ongoing, and no official draft of the agreement has yet been released. However, all indications are that the EU-China CAI will be modelled along the lines of recent investment protection agreements included in EU trade deals with countries such as Canada, Singapore, and Viet Nam,^[7] providing «comprehensive» protection that goes significantly beyond the scope of existing member state BITs.

- 4** The agreement will replace the existing agreements between the member states of the EU and China, the provisions of which will cease to apply from the date of entry into force of the CAI. EU-China Comprehensive Agreement on Investment – revised Joint text (negotiating document) and working texts on financial services and national treatment provisions, 31 July 2019, DS 1022/19, on file with authors [hereinafter CAI Draft], Section VI, Art. 12.
- 5** Austria-China BIT (1985); BLEU (Belgium-Luxembourg Economic Union)-China BIT (2005); Bulgaria-China BIT (1989); China-Croatia BIT (1993); China-Cyprus BIT (2001); China-Czech Republic BIT (2005); China-Denmark BIT (1985); China-Estonia BIT (1993); China-Finland BIT (1984); China-France BIT (2007); China-Germany BIT (2003); China-Greece BIT (1992); China-Hungary BIT (1991); China-Italy BIT (1985); China-Latvia BIT (2004); China-Lithuania BIT (1993); China-Malta BIT (2009); China-Netherlands BIT (2001); China-Poland BIT (1988); China-Portugal BIT (2005); China-Romania BIT (1994); China-Slovakia BIT (1991); China-Slovenia BIT (1993); China-Spain BIT (2005); China-Sweden BIT (1982). Ireland is the only member state that does not currently have a BIT with China.
- 6** The EU gained competence to conclude investment agreements with the adoption of the Lisbon Treaty in 2009 and is currently in the process of transitioning existing bilateral treaties to EU-wide agreements.
- 7** Comprehensive Economic and Trade Agreement between Canada on the one part and the European Union and its member states [hereinafter CETA]; EU-Singapore Investment Protection Agreement (2018); EU-Viet Nam Investment Protection Agreement (2019).

However, China's economic power, systemic importance, and political specificity make it different from other EU trade and investment partners. It is a country whose unique system does not allow for a neat distinction between private business and the state, and which obliges private companies to cooperate with the state. It is a country with an ambitious industrial policy that aims at occupying a dominant position in the technology sector, and that has been willing to allow the forced transfer of intellectual property as a means of attaining it.^[8] And it is a country whose actions – with respect to the Uyghur minority population, the protests in Hong Kong, and mass surveillance practices – have raised serious human rights concerns, both with regard to the actions of the Chinese government as well as the actions of EU companies operating in China.

Thus far, most discussion of the agreement in the EU has focused on the opportunities that the CAI represents for European investors, in particular in terms of the potential gains regarding market access and eliminating performance requirements, technology transfer measures, and other perceived risks of doing business in China. Much less attention has been paid to the potential risks of the agreement for the EU and for EU businesses operating overseas.

This scoping study sets out some of the most important concerns regarding the EU's defensive interests with respect to the CAI, given the information currently available. It aims to draw attention to some of the issues that civil society groups should watch carefully upon the completion and release of the draft agreement, and to highlight the missed opportunities by EU negotiators in terms of strengthening the environmental, labour, and human rights credentials of EU investment policy.

In reaching its conclusions, this study draws on a leaked draft of the CAI, compares it with the provisions contained in EU-Canada, EU-Viet Nam, and EU-Singapore agreements, and notes potential problems with the formulation of its rules in light of the decisions of various investor-state arbitration tribunals interpreting similarly-worded provisions in other agreements. That the official draft text has not yet been released is a significant problem, and the EU should work to publish drafts transparently for the purpose of soliciting adequate feedback, obtaining relevant input on social and human rights impacts, and ensuring good governance decisions that align with EU member states' human rights obligations.

Given China's unique position, the study concludes that the EU must ensure that particularly strong protections for EU regulatory policy space are included in any future investment deal. The CAI should be redrafted to include stronger exceptions provisions, wholesale carve-outs for key areas of EU regulatory policy, and more clearly defined protections for

8 J. Wernau (2019, May 20), «Forced Tech Transfers Are on the Rise in China, European Firms Say», *Wall Street Journal*, <https://www.wsj.com/articles/forced-tech-transfers-are-on-the-rise-in-china-european-firms-say-11558344240> (accessed 28 August 2020).

investors. The EU should also consider more far-reaching reforms such as setting out obligations on investors, eliminating ambiguous and overly broad protections such as the «fair and equitable treatment» standard, and curtailing or eliminating the possibility of recourse to ISDS, in line with the practices of several other contemporary investment treaties. The EU should also consider whether it is wise to conclude such an agreement without a commitment on the part of China to protect human rights – including in Hong Kong and within Uyghur and other ethnic and religious minority communities – and should ensure the CAI includes binding and enforceable commitments with respect to upholding international human rights, labour rights, and environmental protections.

Investor Claims for Regulatory Changes

A major defensive concern with providing broad protections for foreign investors is that they may use these protections to demand compensation from governments that change existing regulations to the detriment of their business interests. When governments adopt new laws that make it less profitable, more difficult, or impossible for a business to operate, or when they shift the regulatory environment in an unanticipated way, investors may be able to claim compensation from the state to make up for the existing or anticipated losses that they may suffer. These claims are generally made on the grounds that the government's action either expropriated the investment (i.e. the measure deprived the investor of the possession or use of their investment) or violated the «fair and equitable treatment» standard (a provision that some investment panels have interpreted very broadly as including everything from «discrimination» and «abusive treatment» by a government to upholding «legal certainty» or the «legitimate expectations» of the investor). This has been a particular problem when countries adopt new rules for the protection of the environment, public health, and human rights.

The risk of investor suits already exists as a result of the current agreements with China. The CAI has done little to reduce it. And the potential for the CAI to encumber the EU and its member states with respect to regulation is likely to be heightened because the CAI expands the scope of protections for investors. Although many of the existing BITs between China and EU member states already offer protection for a more limited range of issues (such as expropriation, fair and equitable treatment, and non-discrimination),^[9] the CAI seeks to provide more «comprehensive» protection, adding new commitments on things such as market access^[10]; the domestic regulation of investment and an investor's operation within the host state, such as licences and authorisations; and more detailed provisions on limiting performance requirements.^[11] This provides more opportunities for investors to leverage overly broad protections in their interest – either through ISDS (if it is extended to any of the new protections) or through pressuring the state to invoke state-state dispute settlement provisions. Though the leaked draft of the CAI contains a clause recognising the parties' right to regulate for public purposes, as we discuss below, the formulation of the clause leaves a large margin of interpretation to arbitral tribunals to determine whether the challenged regulation indeed falls under the right to regulate standard.

The impact of investment treaty protections on the states' rights to regulate has already proven to be a serious issue in the area of environmental law. When environmental laws change in ways that either make it difficult or impossible for an investor to continue

9 See, e.g., China-Germany BIT (2003) Arts. 3, 4.

10 CAI Draft text Art. 2.

11 CAI Draft text Art. 3.

operating their investment, or when they change in ways that the investor thinks are unfair or unpredictable, this may give rise to an investment treaty claim. For example, investors have brought a number of cases regarding the non-issuance or revocation of operating permits on environmental grounds,^[12] the designation of protected areas,^[13] and the adoption of new and more rigorous environmental protection laws.^[14] An area of special concern has been recent attempts by power companies to demand compensation following the introduction of regulations in the energy sector designed to green national electricity supplies – regulations that are essential to fight climate change.^[15]

The Covid-19 crisis has demonstrated how investment treaties and protections can also be used to pursue compensation from states that adopt measures to protect public health. Although states have both the right and the obligation to protect public health and their economies, they are constrained by the interpretation of standard investment clauses, including the poorly defined fair and equitable treatment provisions present in existing EU member state BITs with China. Investors can challenge public health measures that they deem discriminatory, disproportionate, or simply detrimental to their profits. An investor may have a legitimate claim for compensation if, for example, they suffer from a restriction on the export of medical-grade masks or pharmaceuticals, or the suspension of mortgage or rental payments.^[16] Similarly, foreign investors may seek compensation if they are not provided financial support that is equal to what the state provides domestic companies.^[17] There have already been several notifications to states that investors intend to proceed with claims if they are not adequately compensated.^[18]

12 See, e.g., *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v Romania*, ICSID Case No. ARB/15/31; *Infinito Gold v Costa Rica*, ICSID Case No. ARB/14/5; *Tecmed v Mexico*, ICSID Case No. ARB(AF)/00/2.

13 *Lone Pine v Canada*, ICSID Case No. UNCT/15/2; *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1.

14 *Methanex v US* (UNCITRAL).

15 *Westmoreland v Canada*, ICSID Case No. UNCT/20/3; threats by Vermilion against France and Uniper against the Netherlands.

16 At least one law firm has used these examples in encouraging businesses to come forward to pursue ISDS claims against states. See, e.g., J. Day (2020, May), «COVID-19 and Investment Treaties: Balancing the Protection of Public Health and Economic Interests», <https://www.jonesday.com/en/insights/2020/05/covid19-and-investment-treaties> (accessed 20 August 2020). For other examples provided by law firms, see Dechert, «COVID-19 Coronavirus: International Arbitration», <https://www.dechert.com/knowledge/hot-topic/coronavirus-business-impact/covid-19-coronavirus--international-arbitration.html> (accessed 20 August 2020).

17 See, e.g., J. Day, «COVID-19 and Investment Treaties» (see note 16).

18 See A. Bakry (2020, April 21), «The COVID-19 Crisis and Investment Arbitration: A Reflection from the Developing Countries», Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/04/21/the-covid-19-crisis-and-investment-arbitration-a-reflection-from-the-developing-countries/?doing_wp_cron=1598012795.1096360683441162109375 (accessed 20 August 2020).

Whereas some ISDS panels have been receptive to claims that national emergencies may require countries to deviate from their investment obligations in order to protect human rights, other tribunals have rejected this possibility. Case law indicates that crises can give rise to the defence of «necessity», excusing the state from having to pay compensation for regulatory disruptions. Yet, a state cannot rely on that exception if it «contributed» to the crisis and can only make use of it if there are no alternative, less investment-restricting ways to safeguard the public interest.^[19] Tribunals hearing cases against Argentina for government interventions aimed at protecting the right to water during its financial crisis, for example, came to conflicting conclusions as to whether the state could invoke the defence of necessity. Some tribunals found that – because Argentina’s economic policy had played a role in causing the crisis, and because its actions were not the «only» way to safeguard the right to water (it could have chosen something that would have better protected the interests of foreign investors) – it could not invoke necessity as a defence.^[20] As a result, Argentina needed to find a way to simultaneously meet both its human rights and investment obligations and could not prioritise one set of rights over the other without owing compensation.^[21]

One could imagine similar decisions with regard to public health crises in Europe: If a country did not act quickly enough to shut down its economy during the Covid-19 pandemic, it might have contributed to the crisis; if a country acted too quickly to shut down its economy, it might have taken an overly investment-restricting measure when others were available to it. In each of these scenarios, an investment tribunal could refuse to allow the state to invoke the defence of necessity. The same would be true of other crisis situations.

There have been calls for a moratorium on investment disputes related to public health measures adopted in response to Covid-19,^[22] but this would be a temporary freeze. Longer-term reform is needed because, as investment law scholars have made clear, investment treaties prioritise the profits of foreign investors over public health, not just in the context of Covid-19, but in any future pandemic or public health crisis as well.^[23] Indeed,

19 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para. 263.

20 *Ibid.*, para. 260.

21 *Ibid.*, para. 262.

22 Columbia Center on Sustainable Investment (2020, May 6), «Call for ISDS Moratorium During COVID-19 Crisis and Response», <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/> (accessed 20 August 2020); J. Bacchus and J. Sachs (2020, June 9), «Why We Need a Moratorium on Investment Disputes during COVID-19», *The Hill*, <https://thehill.com/opinion/international/501872-why-we-need-a-moratorium-on-trade-disputes-during-covid-19> (accessed 21 August 2020).

23 See, e.g., D. Davitti, J. Ho, P. Vargiu, and A.Y. Vastardis (2020, May 6), «COVID-19 and the Precarity of International Investment Law», <https://medium.com/iel-collective/covid-19-and-the-precariety-of-international-investment-law-c9fc254b3878> (accessed 21 May 2020).

these and other issues have led several countries to cease using ISDS altogether, and there have been calls from civil society for the EU to do the same.^[24]

The EU is aware of such concerns and has introduced specific clauses to combat this problem in its recent agreements with Canada, Singapore, and Viet Nam, and similar provisions were included in the leaked draft of the CAI.^[25] First, these agreements each include a general provision protecting the parties' «right to regulate» and specifying that the agreements should not be interpreted as committing any party not to change its legal or regulatory framework, even if doing so might negatively affect an investment or interfere with an investor's expectations of profits.^[26] Second, each agreement attempts to limit the scope of protections against uncompensated expropriations by specifying that non-discriminatory measures which are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except where the impact of such measures is «manifestly excessive» in light of their purposes.^[27] And third, they attempt to limit the scope of the «fair and equitable treatment» standard by declining to list «legal stability» as an example of a fair and equitable treatment violation, and either declining to list or specifying that the scope of «legitimate expectations» should be limited to only those expectations arising from specific representations by a party.^[28] Recent investment treaties concluded by China with third countries contain similar clauses that aim to limit the scope of expropriation.^[29]

These modifications are steps in the right direction. However, they do not go far enough in protecting countries against the (ab)use of these provisions. To begin with, the «right to regulate» clauses that the EU has included in its recent agreements, including the draft CAI text, are notoriously vague and abstract. As they currently exist, these provisions express a positive affirmation of national policy space, which may impact interpretation, but do not provide for a legally binding exception or carve-out for public interest measures.^[30] Second, the limitations on expropriation still permit tribunals to find national public policy measures expropriative when they deem the state's conduct «excessive» – meaning that, in the eyes of an investment tribunal, they go beyond what would be deemed necessary to address a particular area of concern. Finally, the limitations on fair

24 See, e.g., Seattle to Brussels Network, «Open Letter to Governments in ISDS and COVID-19», <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/> (accessed 20 November 2020).

25 CAI Draft, Section II, EU Art. 9 bis.

26 EU-Singapore Art. 2.2. See also EU-Viet Nam Art. 2.2. CETA Arts. 23.2, 24.3 also protect the right to regulate, but without the specification.

27 EU-Viet Nam Annex 4.3; CETA Annex 8.A.3; EU-Singapore Annex 1.3; CAI Draft Art. 13.4.

28 CETA 8.10; EU-Singapore 2.4; EU-Viet Nam Art. 2.5; CAI Draft Art. 10.

29 See China-Republic of Tanzania BIT (2013) Arts. 5 and 6; China-Canada BIT (2012) Annex B.12.

30 See, e.g., J. Kim (2018), «Balancing Regulatory Interest Through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements», *George Washington International Law Journal* 50: 289.

and equitable treatment still permit tribunals to take «legitimate expectations» into account where a party has made specific representations on which an investor may have relied,^[31] and they also still permit a broad swath of state behaviour to fall under the notoriously ill-defined scope of «fair and equitable treatment». What's more, although the inclusion of a specific provision on «legitimate expectations» in the treaty may be intended to limit the interpretation of the «fair and equitable treatment» provision, it also serves to legitimise the application of this standard to situations of investor expectations under the circumstances described.

The draft text of the CAI also continues the trend of newer EU investment agreements, in that the EU envisages the adoption of the ICS in place of «traditional» ad hoc investment treaty arbitration. However, the text also indicates that China is resisting the adoption of the ICS. As a result, it is not known at this stage whether the final text of the CAI will contain the Investment Court System. However, although the ICS is an improvement over ad hoc investment arbitration – in that it will likely lead to greater consistency in the interpretation of treaty terms – it does not ensure that investor protections will not be interpreted expansively or alleviate any of the other substantive concerns discussed above. ICS awards, including those against the EU, will continue to be isolated from democratic control and judicial oversight, and are not reviewable by the Court of Justice of the European Union.

Consistency of interpretation may be aided by the establishment of an investment committee with the power to issue binding interpretations of CAI provisions, as envisaged in the draft CAI.^[32] Such a committee may also be able to help limit overly expansive interpretations of treaty terms by arbitral tribunals, though this would not have retrospective effect on cases already decided. However, there is no guarantee that the parties would be able to reach consensus regarding how the terms of the CAI should be interpreted, or that their interpretative determinations would be sufficiently limiting. Other substantive concerns and omissions would remain unaddressed.

31 CETA 8.10.4; EU-Singapore 2.4.3; EU-Viet Nam Art. 2.5.4.

32 CAI Draft, Section VI, Art. 1.S.

Weak Labour, Environmental, and Human Rights Protections

Weak TSD chapters

Another way in which the EU seeks to guard against the potentially damaging effects of investment protections is by including «trade and sustainable development» (TSD) chapters in its agreements. These chapters generally focus on labour and environmental protection issues and apply to both the trade and investment provisions of previously negotiated free trade agreements. For example, CETA's Chapter 22 deals with sustainable development in general, Chapter 23 covers labour, and Chapter 24 addresses environmental protection. There is no chapter that covers human rights more generally.^[33] Although an eventual CAI may modify these provisions somewhat in the context of an investment-only agreement, it is likely that at least some similar rules would be included. This is borne out by the draft CAI, which foresees the inclusion of a chapter on «Investment and sustainable development» that contains provisions on corporate social responsibility (CSR), transparency, the environment, labour, and the right to regulate.^[34] This chapter is, however, reportedly one of the most contentious issues in the CAI negotiations, and civil society will need to carefully examine any resulting compromise text to determine what is and is not included.

Mainstreaming labour and environmental issues within the EU's external economic policy is a good thing.^[35] Making reference to these topics can help to establish dialogue, provide leverage for civil society, and encourage inter-governmental cooperation. However, the substantive provisions incorporated into the EU's TSD chapters to date are unfortunately very weak.

First, the EU's TSD chapters generally include affirmations of the parties' international commitments on labour and environmental protection, such as the ILO Declaration on Fundamental Principles and Rights at Work and the Paris Agreement.^[36] These affirmations are, however, framed in best-efforts language and *encourage*, but do not *require*, the parties to accede to new agreements or increase their current chosen standards of protection.^[37] For example, the EU-Viet Nam Investment Protection Agreement requires each

33 In CETA, human rights are addressed only in preambular language and through a joint declaration that human rights are included in measures «related to the maintenance of international peace and security»; see Annex 8-E.

34 CAI Draft, Section IV.

35 Indeed, the EU is required to take into account environmental protection in all of its activities, including in the common commercial policy.

36 EU-Viet Nam Art. 13.4, 13.6.

37 EU-Singapore Art. 13.3.

party to «make continued and sustained efforts toward ratifying, to the extent it has not yet done so, the fundamental ILO conventions».^[38] If the EU adopts similarly weak language in the CAI – as the leaked draft text seems to indicate that it will – China, which has currently ratified only four of the eight fundamental conventions of the International Labour Organization,^[39] would not be obliged to ratify any additional conventions prior to receiving the benefits of the agreement, would be under no deadline to ratify them in the future, and would incur no penalties for failing to do so. Moreover, the leaked text shows that China continues to resist even this weaker language being included in the chapter.

Second, the EU’s TSD chapters typically include provisions requiring the parties to enforce their current environmental and labour standards.^[40] These «effective enforcement» rules are meant to avoid a «race to the bottom» by preventing countries from competing for investment by lowering their regulatory standards. However, they are too narrowly drafted to be truly useful.^[41] To begin with, they only require countries to uphold their *current* standards, which may be suboptimal, and do not mandate adherence to any particular set of norms. The «effective enforcement» rules are further circumscribed by the requirements that any failures to uphold environmental or labour standards must be done «as an encouragement for trade and investment» and «in a manner affecting trade and investment between the Parties».^[42] These requirements impose significant limitations on the extent to which these provisions could be enforced, even under the weak dispute settlement provisions available for TSD issues. The ineffectiveness of such provisions is illustrated by the arbitration between the United States and Guatemala regarding the effective enforcement provision for labour rules in the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). In that case, despite the fact that the panel determined that Guatemala had failed to enforce its labour laws, and that the failure to do so was intended to encourage trade or investment, this failure did not «affect trade» sufficiently enough to be deemed a violation of the agreement.^[43]

The effective enforcement provisions in the leaked draft of the CAI seem to improve on prior agreements to a certain extent, as they seek to eliminate the «affecting trade»

38 EU-Viet Nam Art. 13.4(3)(a).

39 International Labour Organization, «Ratifications for China», https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404.

40 EU-Singapore 13.12.

41 B.M. Araujo (2018), «Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality», *International and Comparative Law Quarterly* 67(1): 233–53; J.C. Lawrence (2020), «The EU in the Mirror of NPE: Normative Power Europe in the EU’s New Generation Trade and Investment Agreements», in Csongor István Nagy (ed.), *World Trade and Local Public Interest: Trade Liberalization and National Regulatory Sovereignty*, pp. 33–50 (Springer).

42 EU-Viet Nam Art. 13.3(2)-(3).

43 Final Report of the Panel in the Matter of Guatemala – Issues Relating to the Obligations under Art. 16.2.1(a) of the DR-CAFTA, 14 June 2017.

language.^[44] It would be a positive development if this were to remain the case in the final agreement. However, the other limitations remain, as does the lack of strong dispute settlement provisions.

Third, the EU's TSD chapters generally establish advisory bodies on social and environmental issues. Civil society consultations have been a standard part of TSD chapters in recent EU trade and investment agreements. The EU-Viet Nam Free Trade Agreement, for example, requires the parties to establish Domestic Advisory Groups (DAGs) composed of representatives from environmental, labour, and business organisations. These DAGs meet once a year at a Civil Society Forum and are empowered to advise and report to the parties on the implementation of the agreement's TSD chapters. The Civil Society Forums have been criticised due to their lack of authority^[45]: DAGs have no power to initiate investigations or to force the parties to «request consultations» on any issue of concern – any action remains entirely at the discretion of the state parties.

Rather than strengthening the DAG mechanism, the draft CAI text removes it altogether. In place of this, the EU's proposal includes a vague reference to involving «relevant non-state stakeholders, in a balanced representation of economic, environmental and social interests» in the context of «regular discussions and exchanges of views» between the parties.^[46] China's proposal would eliminate the participation of «non-state stakeholders» altogether.^[47] If the final text also fails to include any DAG mechanism, this would represent a significant decline in the already meagre protections offered by other EU investment agreements.

Finally, none of the provisions in typical EU TSD chapters are subject to the standard dispute settlement mechanisms available for breaches of the other provisions of trade and investment agreements. Instead, those provisions that are binding (such as effective enforcement provisions) are enforced only by «consultation» procedures and non-binding expert panel processes. No penalties are specified for non-adherence to any TSD rules. This lack of binding dispute settlement has been criticised by the European Parliament itself, which argued that:

[T]he chapter on sustainable development [...] could be strengthened by providing for [...] recourse to a dispute settlement mechanism on an equal footing with the other parts of the agreement, with

44 CAI Draft, Section IV EU Art. 7(2 to 4), CN Arts. 15 bis (3) and 15 ter (3).

45 For an overview of the criticisms, see J. Orbie, L. van den Putte, and D. Martens (2018), «Civil Society Meetings in EU Free Trade Agreements: The Purposes Unraveled», in G. Henner (ed.) *Labour Standards in International Economic Law*, pp. 135–52 (Springer).

46 CAI Draft, Section IV EU Art. 9.

47 CAI Draft, Section IV headnote.

provision for fines to improve the situation in the sectors concerned, or at least a temporary suspension of certain trade benefits provided for under the agreement, in the event of an aggravated breach of these standards.^[48]

Furthermore, the lack of binding dispute settlement falls short of what other countries include in their investment agreements, such as the binding arbitration procedures included in the DR-CAFTA.

The draft CAI, like the EU's previous agreements, excludes its «Investment and sustainable development» chapter from the normal dispute settlement procedures. The EU's proposal would, also in line with previous agreements, resolve any disputes regarding the chapter via state-state consultations and the possibility of referral to an expert panel that could issue non-binding reports.^[49] China's proposal would, however, eliminate even this weak form of dispute settlement as well as third-party dispute resolution from the chapter altogether. Like the elimination of the DAG mechanism, further softening the dispute settlement provisions in the CAI would represent a significant step backward in comparison with other modern EU investment agreements.

Missing investor obligations

In addition to their weak TSD chapters, the EU's agreements suffer from a further major omission: They do not recognise an obligation on foreign investors to respect human rights, environmental standards, or anti-corruption norms in the host state.^[50] Although international human rights law does not yet recognise direct human rights obligations on businesses, the UN Guiding Principles on Business and Human Rights – the most authoritative statement on businesses' responsibilities towards human rights – do require all businesses to respect all human rights in all operations.^[51] This responsibility operates independently of the state's duty to protect so that businesses are expected to respect human rights even where the state is unwilling or unable to do so.^[52] To respect human rights, businesses are expected to adopt policies and processes aimed at ensuring that they proactively identify

48 European Parliament (2010), Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements, 2009/2219(INI), 22(c).

49 CAI Draft, Section IV, EU Art. 11.

50 See, e.g., EU-Singapore Investment Protection Agreement, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; EU-Viet Nam Investment Protection Agreement, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

51 See UN Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011), Principle 12.

52 Ibid.

human rights impacts the business may cause, contribute to, or be directly linked to.^[53] Where a business causes or contributes to an impact, it should provide remedies and reparations.^[54] Where a business is only «directly linked to» a harm, it is expected to use its leverage to affect change in the conduct of its business partners.^[55]

Despite clear expectations that businesses respect human rights, foreign investors can, and do at times, cause or contribute to negatives human rights impacts, environmental harm, and corruption. For example, in *Urbaser v Argentina*, an investor brought a claim against the state for damages it had sustained as a result of governmental policies adopted to protect the right to water during Argentina's financial crisis. Argentina initiated a counter-claim against the business for failing to meet human rights standards.^[56] The panel determined that it had jurisdiction over the counter-claim and also found that the water company's operations were

certainly designed as a substantial contribution to the enforcement of the population's right to water. Nevertheless, the mere relevance of this human right under international law does not imply that [the company] and its shareholders were holding corresponding obligations equally based on international law.^[57]

Yet, the tribunal determined that, even where business operations substantially impact the provision or protection of human rights, businesses only have positive human rights obligations if specifically set out in an international treaty, investor-state contract, or domestic law.^[58] As a result, it concluded that individuals whose human rights are harmed by a business do not automatically have a right to reparations, thus the state could not seek compensation on behalf of its citizens.^[59]

Given the ad hoc nature of investment dispute settlement, it is difficult to anticipate how another panel would handle the same issue. Yet, this case indicates the importance of explicit provisions that require businesses to respect human rights, protect the environment, as well as uphold anti-corruption norms and remediate the harms they cause.

53 Ibid.

54 Ibid.

55 Ibid.

56 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No. ARB/07/26 (2016).

57 Ibid., para. 1212.

58 Ibid.

59 Ibid. para. 1220.

Like the EU's previous agreements, the draft CAI fails to include any investor obligations with respect to human rights, environmental protection, or corruption. Although the proposed «Investment and sustainable development» chapter does make a reference to CSR, it stresses the «voluntary nature» of CSR commitments and does not foresee any binding obligation on either the parties or investors in this respect.^[60]

Without investor obligations, the EU will be less able to protect human rights and the environment on its territory and under its jurisdiction, and it will be less able to properly regulate its own businesses operating abroad. In order to ensure that investors respect human rights in both the EU and China as well as that the EU and its member states are able to meet their international human rights law obligations, it is important for the CAI to include obligations requiring investors to meet these obligations concerning international human rights, environmental protection, and anti-corruption standards.

Aerial view of Energias de Portugal (EDP). One of the companies that China Three Gorges (CTG) took over since Portugal's debt crisis. ▼



Market Access and Critical Infrastructure

In contrast to the 26 existing investment agreements between the EU and China, which cover only investor protections, the EU aims to include market access for investors as a significant feature of the CAI. Market access provisions may seek to remove restrictions on the establishment of an investment (such as limits on the total number of businesses or value of assets that can be invested),^[61] address preconditions that investors must meet to operate their businesses (such as technology transfer and local content requirements), and prevent discrimination against foreign businesses with respect to establishment. Not only are these provisions highly sought-after by EU businesses looking to circumvent the high barriers they face with respect to investment in China, they also raise important questions regarding the extent to which they would hinder the EU in exercising its regulatory sovereignty with respect to its pre-investment screening process for critical infrastructure. Although the discussion in this section is limited to addressing energy and digital infrastructure, similar concerns apply to other areas, including the finance and education industries.

Energy Sector

China is one of the world's largest energy producers and consumers. Most investments into the sector are made by Chinese state-owned enterprises.^[62] State-owned companies such as State Grid have been making strategic investments in the EU's energy sector – including in critical infrastructure – to strengthen its supply chain and market position in the oil and gas industries, as well as to increase its shares in the renewable energy market.^[63] In the last decade, Chinese companies invested in acquiring shares in EU-based energy companies, entered into energy-related construction contracts, and took over energy companies.^[64] The *Financial Times* has reported that «China's goals in the [CAI] talks include guaranteeing rights to invest in the EU electricity industry and wider energy sector, given Europe's increasing sensitivity about foreign ownership.»^[65]

61 CETA Art. 8.5 contains a list of prohibited market access restrictions of this type.

62 S. Liedtke (2017), «Chinese Energy Investments in Europe: An Analysis of Policy Drivers and Approaches», *Energy Policy* 101: 659–69.

63 Ibid.

64 Ibid., 663–64. The list of investments includes things such as a US\$730 million investment in Madrilena Red de Gas, a Spanish gas company; the acquisition of 51% of Romania's KasMunayGaz unit (oil and gas) in 2015; and a US\$160 million investment in nuclear energy with Électricité de France. Ibid.

65 J. Brunsden and S. Fleming (2020, June 28), «EU Warns China That Investment Talks Are Entering <Critical Stage>», *Financial Times*, <https://www.ft.com/content/a5197502-6106-48e9-bb81-e4d87925d619>.

Against this backdrop, the issue of market access may give rise to disagreements between China and the EU regarding Chinese investments in the EU's strategic energy assets. Chinese investments in critical energy assets that influence national security have been among the reasons why the EU developed its current foreign direct investment (FDI) screening framework.^[66]

The leaked CAI Draft indicates that the EU has made offers which include market access commitments in the energy sector. These commitments are paired with a long schedule of reservations that vary from one member state to the next, including limits to market access for all public utilities, including energy utilities; the extraction of coal, lignite, gas, and petroleum as well as other critical raw materials; and electricity and gas production, transmission, and distribution. Civil society organisations will need to carefully scrutinise the final text to determine the precise levels of access that have been granted in each member state.

In addition, there are concerns regarding non-discrimination in the application of the FDI screening framework. The EU already has in place regulations on the gas^[67] and electricity^[68] sectors that require a certification process for investment applications by foreign investors in certain critical energy infrastructures. When the certifications were introduced, concerns were raised that the requirements may breach the non-discrimination provisions of investment and trade agreements that were in force between EU member states and third countries.^[69] Russia challenged the screening process before a World Trade Organization (WTO) panel in 2014, arguing that it breached the non-discrimination standards enshrined in the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services.^[70] The WTO panel rejected all of Russia's claims due to its failure to demonstrate de facto discrimination against Russian service suppliers, but it also found the screening process inconsistent with a prohibition on «arbitrary or unjustifiable discrimination between countries where like conditions prevail» because domestic

66 M. Bungenberg and A. Hazarika (2019), «Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns», *Journal of World Investment and Trade* 20(2–3): 375–400, 376.

67 Directive (EC) 2009/73/EC of the European Parliament and of the Council of 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC [2009] OJ L211/94.

68 Directive (EC) 2009/72/EC of the European Parliament and of the Council of 13 July 2009 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC [2009] OJ L211/55.

69 A. Reinisch (2010), «Protection of or Protection Against Foreign Investment? The Proposed Unbundling Rules of the EC Draft Energy Directives», in C. Hermann and J. Philipp Terhechte (eds.), *European Yearbook of International Economic Law 2010*, pp. 53–76 (Springer).

70 *European Union and Its Member States: Certain Measures Relating to the Energy Sector*, Request for the Establishment of a Panel by the Russian Federation (28 May 2015) WT/DS476/2.

operators were not subjected to the same screening process as foreign operators.^[71] It found that while «the risk or threat to the [EU's] security to energy supply posed by domestically controlled [operators] may be different or less than that posed by foreign controlled» operators, the EU still needed to provide an equitable process for foreign and domestic operators.^[72] The EU is appealing this decision, but a future investor-state (if ISDS is extended to any pre-establishment provisions) or state-state investment panel may very well come to a similar, or a more expansive, conclusion, finding that there is no legitimate means for discriminating between foreign and domestic operators, despite the importance of the industry for national security.

If the final text of the CAI includes broad market access commitments, then the FDI screening framework, which covers a broader range of investments in the energy sector than the gas and electricity directives,^[73] could give rise to claims of discrimination. Similar to Russia's challenge to the earlier process before the WTO, China or its companies could claim that any screening that targets foreign investors generally, or Chinese investors specifically, and/or that treats Chinese investors differently from other third-state actors, would violate the CAI. An investment panel is likely to assess whether discrimination happened *prima facie* due to the nature of the regulation or in practice if Chinese investors are subjected to standards that EU operators, or other third-state operators, are not.

Recent EU investment agreements contain exceptions for measures «necessary to protect public security or public morals or to maintain public order»,^[74] and the leaked CAI Draft includes a similar provision, though with the «public security» language removed.^[75] Such an exception could help to protect the EU's investment screening process from a challenge on the grounds that it is discriminatory, even if market access commitments are eventually made in key sectors. However, this exception does not go far enough. To begin with, the exception is modelled and drafted in very similar language to the general exception contained in GATT. In the GATT context, Panels and the Appellate Body have interpreted the exceptions quite restrictively, to the extent that only two cases before the WTO's dispute

71 Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector (EU-Energy Package)*, WR/DS476/R (circulated 10 August 2018) («EU – Energy Sector»), paras. 7.1250-7.1254; *General Agreement on Trade in Services*, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S 183, 33 I.L.M. 1167, Art. XIV.

72 *Ibid.*, paras. 7.1252–7.1253.

73 M. Bungenberg and A. Hazarika, «Chinese Foreign Investments in the European Union Energy Sector», <https://doi.org/10.1163/22119000-12340136>.

74 EU-Viet Nam Art. 4.6(a); EU-Singapore Art. 2.3(3); CETA Art. 28.3(2).

75 CAI Draft, Chapter VI.

settlement body have ever been able to successfully make use of the general exceptions.^[76] Particularly problematic is the word «necessary», which has been interpreted as a requirement that there must be no alternative measure available that would have been less restrictive of trade; and the qualification that, in order to make use of the exception, the measure must not be «a means of arbitrary or unjustifiable discrimination» or a «disguised restriction», which has been broadly read as a requirement that the measure be fair and even-handedly applied, and not be a means of protecting local businesses. Identical limitations appear in CETA and the EU-Singapore and EU-Viet Nam investment protection agreements, as well as in the leaked CAI Draft. Although there is no guarantee that an investment tribunal would interpret the exception in a similar way, the practice of the WTO provides ample warning that GATT-style general exceptions are insufficient for protecting the public interest.

Even worse, CETA contains a further caveat: «The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.»^[77] The EU-Singapore agreement contains similar language, but limits it to only the public order exception. This further tightening of the language makes it even more difficult for a state to successfully invoke the exception in its defence. Although the leaked CAI Draft does not contain a similar limitation, the elimination of the «public security» exception altogether is perhaps even more troubling.

As noted above, the leaked CAI Draft contains limitations to market access for certain aspects of the energy sector. The maintenance of these reservations in the final text is essential to safeguarding the sovereignty of the EU and its member states over critical energy assets. However, in order to avoid a potential clash between the EU's FDI screening rules and any eventual market access concessions in the energy sector, the EU should insist on a wholesale carve-out from market access and non-discrimination provisions for those energy assets that it deems critical.

Digital infrastructure

Similar problems arise in the area of digital infrastructure. A major area of concern is the updating of the EU's telecommunications infrastructure to provide 5G network service and the dominant role of Chinese investors in this sector. It has been acknowledged by EU authorities in a recent press release that «[p]rogress is urgently needed to mitigate the risk

76 *US—Shrimp (Article 21.5—Malaysia)* (2001); *US—Tuna II (Article 21.5—Mexico, Second Recourse)* (AB) (2018). The Appellate Body also found that in principle the rule in question in *EC—Asbestos* would also have been permissible, though the case was ultimately decided on other grounds. *EC—Asbestos* (AB) (2001).

77 CETA Art. 28.3(2), footnote 33.

of dependency on high-risk suppliers, also with a view to reducing dependencies at Union level». ^[78] The same press release also highlighted the importance of the FDI screening process to act as a barrier to risky investments threatening security and public order.

CAI negotiators should bear these issues in mind when negotiating market access standards and – given the weakness of the public order exception – should secure a carve-out from the market access standard for investments in critical infrastructure and industries to ensure that the CAI remains compatible with the EU’s FDI screening regulation. ^[79] Without an explicit carve-out for market access for Chinese investments in critical digital and communications infrastructure, the implementation of FDI screening processes by EU member states may constitute discrimination against Chinese investors under the CAI. Even if the final agreement does not extend ISDS to pre-investment procedures, state-state dispute settlement would still be available. The leaked draft does not contain a limitation to market access in the area of telecommunications, but there is a reservation entered to the application of national treatment, performance requirements, and management requirements for certain aspects of telecommunications services. These reservations do not appear robust enough to protect critical EU interests in the area of digital infrastructure without clear reservations for market access.

78 European Commission and the German Presidency of the Council of the EU (2020, July 24), «5G Security: Member states report on progress on implementing the EU toolbox and strengthening safety measures», Press Release, Brussels.

79 In CETA, the only carve-out from Art. 8.4 on market access is found in Annex 8-C and it concerns the exclusion from the ISDS provisions of CETA FDI screening decisions for EU investors in Canada under the Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)

Human Rights Impacts

The inadequacies of protection in the CAI discussed above are particularly concerning in light of the potential risks to human rights that come along with the agreement. These risks are both general and specific and have not been adequately taken into account in the current draft text.

In 2017, the EU undertook a Sustainability Impact Assessment (SIA) evaluating the CAI. The CAI SIA aimed at identifying potential risks to human rights, the environment, and labour standards caused by the agreement. However, the current SIA provides an incomplete picture of the potential impact of the agreement on human rights. It also makes aspirational assessments of the CAI without support. For example, the SIA suggests that providing «[a]ccess to international remedies for violation of» the rights to an effective remedy and to a fair trial could inspire China to reform domestic standards and enhance the realisation of the right within China.^[80] There is no support for this proposition, other than the expressed hopes of the SIA authors, while at least one significant study on the impact of investment protections on states' domestic laws suggests this is highly unlikely.^[81]

The SIA focuses on only a few human rights, fully dismissing any potential impact on some rights, including those to «life, liberty and security, etc.»^[82] Strangely, the SIA also focuses on the same rights for both the EU and China, despite the significant differences in their respective political, social, economic, and legal contexts. As the UN Guiding Principles on Business and Human Rights rightly recognise, business (and foreign investment) activities can impact the full range of human rights and economic instruments, and policies that facilitate the entry of businesses into another state also carry with them a risk to the full range of human rights.^[83] Although states should pay particular attention to the most salient risks posed by an agreement, that the SIA considers the most salient risks to be the same in the EU and China should raise some general doubts about its comprehensiveness and focus. Moreover, the SIA inadequately considers the CAI's general impact on human rights, including the potential for the CAI to impact states' ability to regulate in the interest of human rights.

There are additional problems with the 2017 SIA, which raises concerns about the EU's preparedness with respect to protecting human rights, labour rights, and environmental

80 SIA, p. 102.

81 See, e.g., M. Sattorova (2018), *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* <http://www.ejil.org/pdfs/29/3/2902.pdf>.

82 SIA, p. 94.

83 UN Guiding Principles (see note 51), Principles 9, 12, and Commentary.

protections within the agreement. There are also specific human rights considerations that either received inadequate attention within the CAI or that have arisen or gained attention since the SIA was completed. This section addresses some of these issues, notably: digital rights and the right to privacy; issues of forced labour; compliance with EU member states' mandatory human rights due diligence laws; the impact of Hong Kong's National Security Law; free expression, association, and assembly in China, protection of human rights defenders in China, and free speech and public engagement in the EU; and the gendered nature of any impacts.

Specific problems with the 2017 SIA

While serving as the UN Special Rapporteur on the Right to Food, Olivier De Schutter established the UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (UNGPs-HRIAs).^[84] These standards are the most comprehensive guidance to date on how to assess the human rights impacts of international economic law agreements. The UNGPs-HRIAs are clear that although states can establish their own methodologies, they need to base their assessments on human rights indicators, including qualitative and quantitative indicators that measure the realisation of a right within a society and that can be disaggregated to provide a better understanding of how an investment agreement will impact individuals differently on the basis of their gender, disability status, age, region of residence, ethnicity, and other grounds. The human rights impact assessment should be drafted on the basis of transparent and appropriate consultations with affected stakeholders.^[85] The SIA fails in two regards:

- Although the current SIA recognises that there may be impacts on indigenous and non-Han groups, it does not provide the data necessary to understand the potential for the CAI to create or exacerbate discriminatory impacts. This is particularly disturbing given the allegations that EU companies have been engaged in the use of forced labour by Uyghurs;
- There was a limited consultation of affected stakeholders, with only 150 stakeholders in all of China and only 285 in all of Europe participating.^[86] Of those, there were only 10 human rights NGOs and 14 academics or think tanks consulted in Europe, and only 6 human rights organisations and 17 academics or think tanks in China. In comparison there were 182 businesses or business organisations consulted in

84 UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements. UN Doc. A/HRC/19/59/Add.5.

85 Ibid., Principle 5, Commentary.

86 SIA, p. 207.

European and 82 in China.^[87] The SIA includes an ambiguous «other» category for stakeholders, but it appears there were no consultations of local communities.

Without clearer data or more comprehensive inputs from stakeholders, the SIA itself is incomplete and cannot provide the necessary foundation on which to assess the treaty's impact. These limitations mean that the SIA does not provide the EU with the grounding and information it needs to understand the impact of the proposed agreement on human rights. This is particularly worrying because the CAI raises several important questions regarding its impact on human rights.

Digital rights

Digital rights are increasingly relevant for the operations of all investors and the impact of investor operations on host communities due to the reliance of businesses and consumers/users on digital services and technologies. In the context of the CAI, the key provisions on digital trade and rights are likely to concern the cross-border investment in digital/computer services and investor access to telecommunications networks in host states.^[88] Investments in digital technologies can improve human rights for users by, for example, providing platforms for expression of thought and access to information as well as facilitating freedom of assembly for activists and communities. But they can also have serious adverse impacts. Fundamental rights that may be affected by the operations of investments in digital technologies include freedom of thought and expression, freedom of association, privacy, access to information, and intellectual property rights; and each of these issues can have further adverse impacts on other fundamental rights, such as liberty, non-discrimination, and the right to health.^[89] The SIA claims that the CAI would potentially improve freedom of expression and association, stating that the presence of foreign investors in the host state may impact these rights positively, especially in the case of EU investors in China. Although this may be the case in some instances, it is unclear that this would happen in any widespread or structural way, given the extensive digital surveillance practiced in China. The SIA also fails to recognise the potential detrimental impacts of CAI-facilitated investments on human rights affected by digital technologies, both in the EU and in China. It is important that investment treaties put in place safeguards to ensure that investors do

87 Ibid.

88 See EU-Viet Nam Arts. 8.22, 8.26, 8.26, 8.45, and 8.53.

89 Each of these rights are guaranteed under the EU Charter of Fundamental Rights; on the impact of technology and data on human rights, see L. McGregor, V. Ng, and A. Shaheed with E. Abrusci, C. Kent, D. Murray, and C. Williams (2018, December 20), «The Universal Declaration of Human Rights at 70: Putting Human Rights at the Heart of the Design, Development, and Deployment of Artificial Intelligence», *HRBDT*: 11–28, <https://www.hrbdt.ac.uk/the-universal-declaration-of-human-rights-at-70-putting-human-rights-at-the-heart-of-the-design-development-and-deployment-of-artificial-intelligence/>.

not adversely impact users' fundamental rights when using, storing, and transferring user data.

Existing investment treaties between EU member states and China do not specifically refer to investment in digital services or digital rights. New EU agreements, however, do contain specific provisions on trade and investment liberalisation in computer services, telecoms and networks, as well as further clauses placing requirements on regulatory authorities in these areas and cross border data flows, data processing, storage and privacy issues.^[90] For instance, the EU-Australia Draft Proposal on Digital Trade recognises in Article 6 that «the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade». It further stipulates that

[e]ach Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.

This provision recognises that protection of personal data and privacy is a fundamental right, and it also recognises that each party may regulate in this area as they deem appropriate.

No specific provision on digital rights appears in the leaked draft CAI text, however «privacy and data protection» are mentioned as legitimate public policy goals under the EU's proposed text of the right to regulate provision.^[91] Leaving data protection and privacy standards up to each party, however, means that both the EU and China could continue to follow their respective pathways with respect to regulating the digital environment.

In order to protect digital rights in the EU and China, it is crucial that the CAI contain explicit safeguards on the use and transfer of data for both Chinese investors operating in the EU and vice versa. Although the increasing recognition of the host state's right to regulate in investment treaty practice is a welcome development – and indeed the state has a duty to protect human rights – in the area of digital trade, there is a real risk that a host state's reluctance to adequately safeguard digital rights will have serious human rights implications. During negotiations on the Transatlantic Trade and Investment Partnership, for example, leaked documents revealed that the United States had proposed provisions

90 See CETA Chaps. 15 and 16; EU-Japan Economic Partnership Agreement Art. 8.51 and Chap. 8 Section F.

91 CAI Draft, Section II, EU Art. 9 bis.

that would undermine EU protections in the area of privacy and personal data protection,^[92] which are recognised as fundamental rights in Articles 7 and 8 of the EU Charter of Fundamental Rights. A similar concern may arise in the context of the CAI if it fails to contain safeguards to guarantee that Chinese investors' conduct shall not undermine the EU standards in relation to digital rights. Safeguards alone, however, may not be sufficient. Given China's growing market share, EU regulators would find it challenging, if not practically impossible, to monitor and enforce these safeguards against Chinese businesses.

Chinese law recognises freedom and privacy of communication and freedom of expression with express limitations to these rights for the purposes of state security and criminal investigations.^[93] Surveillance, monitoring, and censorship of communications and the internet are commonplace. Freedom House reported that in 2019 «Internet censorship and surveillance reached new extremes» in China.^[94] Recent developments on the Hong Kong National Security Law (discussed in more detail below) have seen international companies such as Facebook, Twitter, Google, Apple, Microsoft, and Zoom compelled by the government to hand over data to Chinese authorities. Some companies have reportedly suspended cooperation with authorities while they evaluate the new law, and others continue to comply with requests.^[95]

China's notorious record on digital freedoms should be a cause for concern for the EU. Although its digital investors may benefit from the new market access obtained under the CAI, they may then be required by Chinese authorities to share personal data and censor users in ways that would breach EU standards, and this could put EU citizens at risk when visiting China. It is unclear how many EU citizens are currently detained in China and how many of those were targeted for their online speech. The EU has expressed concern in the past over the detention of EU citizens, some of whom were targeted for their online speech.^[96] China has reportedly already threatened the family members of activists based

92 M. Fernández Pérez, E. Massé, E. Paton-Williams, A. Sghirinzetti, T. Siedsma, W. van Holst, and A. Wessels (2015), «TTIP and Digital Rights», *EDRI Papers*, 11th Edition, 8.

93 Privacy International and The Law and Technology Centre of the University of Hong Kong (2013, March), *The Right to Privacy in China: Stakeholder Report Universal Periodic Review 17th Session – China*, https://privacyinternational.org/sites/default/files/2017-12/ChinaUPR_2013.pdf.

94 Freedom House (2020), *Freedom in the World – China Country Report 2020*, <https://freedomhouse.org/country/china/freedom-world/2020>; see also Freedom House, *Freedom on the Net 2019 – China*, <https://freedomhouse.org/country/china/freedom-net/2019>.

95 S. Feldstein (2020, July 9), *China's Latest Crackdown in Hong Kong Will Have Global Consequences*, Carnegie Endowment for International Peace, <https://carnegieendowment.org/2020/07/09/china-s-latest-crackdown-in-hong-kong-will-have-global-consequences-pub-82264>.

96 See, e.g., T. Phillips (2017, January 3), «A Human Rights Activist, a Secret Prison, and a Tale from Xi Jinping's New China», *The Guardian*.

in the EU for their online posts criticising China.^[97] Policing and enforcing any data privacy provisions will likely be very difficult, in particular if China's massive digital corporations such as Tencent and Alibaba acquire significant market share.

The European Commission has recognised that China needs stronger privacy and data protection rights.^[98] However, it is unclear how the EU is planning to promote the protection of these rights in China. Without strong safeguards in the CAI to ensure that EU investors will not be compelled by requests from Chinese authorities that breach EU fundamental rights norms and data protection standards, EU digital investors risk contributing to human rights abuses by the Chinese government.

Compliance with mandatory human rights due diligence laws

Perhaps the biggest concern faced by EU businesses entering China is that China currently requires private companies to engage in activities that are incompatible with internationally recognised human rights. Although problematic at all times, the liberalisations of market access and controls on domestic regulation included in the investment treaty are likely to encourage EU businesses to undertake more direct and sustained engagements within China. In doing so, they may be required to take actions that negatively impact human rights. They may also fall afoul of mandatory human rights due diligence (mHRDD) laws that already exist in the EU or that are being developed by the EU.

Currently, France is the only country with a universal mHRDD law: the Duty of Vigilance law.^[99] The Netherlands has adopted an mHRDD law targeting child labour that is expected to enter into force in 2022,^[100] and the European Commissioner for Justice has

97 See, e.g., B. Haas (2019, October 17), «'Think of your Family': China Threatens European Citizens over Xinjiang Protests», <https://www.theguardian.com/world/2019/oct/17/think-of-your-family-china-threatens-european-citizens-over-xinjiang-protests>.

98 European Commission (2016, June 22), Joint Communication to the European Parliament and the Council Elements for a New EU Strategy on China, Brussels JOIN (2016) 30 final, 9.

99 Loi No. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [French Duty of Vigilance Law], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (accessed 28 April 2020).

100 A. Hoff (2019, June 10), «Dutch Child Labour Due Diligence Law: A Step towards Mandatory Human Rights Due Diligence», *Oxford Human Rights Hub*, <http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#> (accessed 28 April 2020).

indicated he will propose an EU mHRDD law in 2021.^[101] The French law applies to businesses with 5,000 or more employees in France (including via direct and indirect subsidiaries) for two consecutive years and those with 10,000 employees in France or abroad.^[102] It requires companies to develop, publish, and implement a plan to ensure respect for human rights. If the company fails to adopt an appropriate plan, or if it fails to implement its plan, the company can be liable for the damage caused to others. Although the Dutch Child Labour Law is not universal in the human rights it protects, it does apply to a broader number of companies: any company selling consumer goods or services in the Netherlands.^[103] Such companies must carry out due diligence on child labour and report their efforts to regulatory agencies.^[104]

Where Chinese law and practice requires companies to engage in activity that breaches their human rights responsibilities, such companies may run afoul of mHRDD laws.

One prominent example is in the area of forced labour. The current SIA indicates that China has abolished «one form of arbitrary detention, known as re-education through labour».^[105] In fact, labour transfer programmes targeting the ethnic and religious minority Uyghur community function in a similar manner to the previous re-education through a labour scheme.^[106] The Australian Strategic Policy Institute estimates that more than 80,000 Uyghurs were transferred from their homes in Xinjiang province to work in factories elsewhere in nine other provinces in China.^[107] China claims that participation in the labour transfer programmes is voluntary, but independent evidence indicates that Uyghur workers are subject to arbitrary detention if they do not participate.^[108] They are isolated,

- 101** Comments by European Commissioner for Justice, Didier Reynders, Webinar: Responsible Business Conduct Working Group of the European Union, 29 April 2020, <https://vimeo.com/413525229> (accessed 21 August 2020); see also, R. McCorquodale and M. Scheltema (n.d.), «Core Elements of an EU Regulation on Mandatory Human Rights and Environmental Due Diligence», https://www.business-humanrights.org/sites/default/files/documents/Contribution%20McCorquodale%20and%20Scheltema%20mandatory%20due%20diligence_05082020_1.pdf (accessed 20 August 2020).
- 102** French Duty of Vigilance Law (see note 99).
- 103** Hoff (see note 100).
- 104** Ibid.
- 105** SIA, p. 100.
- 106** V.X. Xu et al. (2020, February), «Uyghurs for Sale: «Re-education», Forced Labour and Surveillance beyond Xinjiang», Australian Strategic Policy Institute, Policy Brief Report No. 26/2020, pp. 3–4; A.K. Lehr and M. Bechrakis (2019, October 16), *Connecting the Dots in Xinjiang: Forced Labor, Forced Assimilation, and Western Supply Chains*, CSIS Human Rights Initiative, p. 6, <https://www.csis.org/analysis/connecting-dots-xinjiang-forced-labor-forced-assimilation-and-western-supply-chains> (accessed 30 April 2020).
- 107** Xu et al. (see note 106).
- 108** Ibid., p. 4; Lehr and Bechrakis (see note 106), p. 6.

monitored, prevented from practicing their religion, and subjected to «patriotic education» classes.^[109] Their families are placed under surveillance.^[110]

Due to the nature of the programme, German companies have allegedly already participated in the use of forced labour by Uyghur workers. The Australian Strategic Policy Institute found BMW, adidas, Puma, and Inditex each benefitted from the forced labour of Uyghur workers.^[111] Esprit, a Spanish company, was also implicated in the report.

Another area in which EU companies would be at risk of complicity with human rights-violating behaviour is with respect to the current situation in Hong Kong. In July 2020, a new National Security Law for Hong Kong came into force. The new law criminalises secession, subversion, terrorism, and «collusion with foreign forces», although the definition of these terms remains unclear. As Amnesty International has stated, the terms «are so broadly defined they can easily become catch-all offences used in politically motivated prosecutions with potentially heavy penalties».^[112] The law also creates specialised secret security, denies fair trials, and weakens judicial oversight.^[113] The United Nations Office of the High Commissioner for Human Rights and several UN human rights special procedures have expressed concerns over the law's human rights impacts.^[114]

It appears that the new law places on businesses a burden to report and terminate employees who engage in prohibited conduct.^[115] It also requires banks and financial providers to report clients who might be in violation of the law.^[116] UK-based HSBC and Swiss-based UBS, Credit Suisse, and Julius Baer have reportedly «examined» whether their clients in Hong Kong have ties to the city's pro-democracy movement» in an attempt to avoid getting

109 Xu et al. (see note 106), p. 4; Lehr and Bechrakis (see note 106), p. 6.

110 Xu et al. (see note 106), p. 4.

111 Ibid.

112 Amnesty International (2020, July 17), «Hong Kong's National Security Law: 10 Things You Need to Know», <https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know/> (accessed 20 August 2020).

113 Human Rights Watch (2020, July 29), «China: New Hong Kong Law a Roadmap for Repression: Security Legislation Already Having Chilling Effect on Fundamental Freedoms», <https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression> (accessed 20 August 2020).

114 See, e.g., United Nations (2020, July 3), «UN Rights Office Expresses Alarm at Hong Kong Arrests under New Security Law», <https://news.un.org/en/story/2020/07/1067682> (accessed 20 August 2020); Letter to the Government of China from Seven Special Procedures (2020, June 19), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25354> (accessed 20 August 2020).

115 Comments at a webinar on the new National Security Law, organised by City University of Hong Kong.

116 Human Rights Watch (see note 113).

caught in the crosshairs of China's new National Security Law.^[117] This means that EU businesses are being asked to contribute to the human rights violations perpetrated by the Chinese government. Under the UN Guiding Principles on Business and Human Rights, such contributions give rise to an international responsibility on the businesses to provide remedies and reparations to the individuals harmed.^[118]

Additionally, the Hong Kong National Security Law would also prevent EU businesses from using their «leverage» to affect change and increase respect for human rights. The application of the law to business has already begun,^[119] and EU business leaders have already indicated that the National Security Law means they will not raise difficult issues, such as human rights, with the Chinese government.^[120] These businesses are not meeting, and cannot meet, their international human rights responsibilities as outlined in the UN Guiding Principles on Business and Human Rights.^[121] The UN Guiding Principles state an international expectation on businesses to use their «leverage» to positively influence situations where they are «directly linked to» a human rights violation. If a business is unable to use its leverage, or if its leverage is ineffective and the business remains involved in the situation, it may be seen as «contributing to» the violation and owe a responsibility to remediate.^[122]

117 S. Chatterjee, et al. (2020, July 20), «Exclusive: Global Banks Scrutinize Their Hong Kong Clients for Pro-democracy Ties», *Reuters*, [https://www.reuters.com/article/us-hongkong-security-wealth-exclusive/exclusive-global-banks-scrutinize-their-hong-kong-clients-for-pro-democracy-ties-sources-idUSKCN24L096#:~:text=HONG%20KONG%20\(Reuters\)%20%2D%20Global,with%20knowledge%20of%20the%20matter](https://www.reuters.com/article/us-hongkong-security-wealth-exclusive/exclusive-global-banks-scrutinize-their-hong-kong-clients-for-pro-democracy-ties-sources-idUSKCN24L096#:~:text=HONG%20KONG%20(Reuters)%20%2D%20Global,with%20knowledge%20of%20the%20matter) (accessed 20 August 2020).

118 OHCHR (2017, June), *OHCHR Response to Request from BankTrack for advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector*, p. 7, <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> (accessed 20 January 2019); J. Ruggie (2017, March 6), Letter to Prof. Dr. Roel Nieuwenkamp, <https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf> (accessed 26 February 2020); see also UN Guiding Principles (see note 51), Principle 19(b), Commentary.

119 Human Rights Watch (see note 113).

120 «What Hong Kong's New Security Law Means for Business», *Bloomberg News* (1 July 2020), <https://theprint.in/economy/what-hong-kongs-new-security-law-means-for-business/452145/> (accessed 20 August 2020).

121 UN Guiding Principles (see note 51).

122 UN Guiding Principles (see note 51), Principle 19(b), Commentary; see also C. Macchi, T.V. Ho, and L.F. Yanes (2019, April), «Investor Obligations in Occupied Territories: A Report on the Norwegian Government Pension Fund – Global», *Essex Business and Human Rights Project*, <https://www1.essex.ac.uk/ebhr/documents/Investor%20Obligations%20in%20Occupied%20Territories%20-%20Report%20on%20the%20Norwegian%20Government%20Pension%20Fund%20-%20Global%20-%20EBHR%20report.pdf>.

The law is still new, and its complete impact unclear. It does raise concerns, however, about whether EU businesses can operate within China while abiding by EU laws, principles, and standards. Greater research is needed to offer fuller conclusions about the law's impact.

The new Hong Kong National Security Law is not the only area of concern for the rights to free speech, association, and assembly in Hong Kong. In 2018, Swedish book publisher Gui Minhai was arrested «while he was being accompanied by Swedish diplomats» on grounds that breach the right to free expression.^[123] Germany's ambassador to China has warned that China set a dangerous precedent for other EU citizens, including by refusing to allow consular assistance.^[124] There are several other laws that

use vague and overly broad concepts of national security, [and] grant effectively unchecked powers to the authorities, lack safeguards to protect against arbitrary detention and infringements to the right to privacy and freedom of expression, and can also be misused by the authorities to silence dissent, censor information and harass and prosecute human rights defenders.^[125]

EU member states recognise the significant threat to human rights. Germany, Sweden, Czechia, Estonia, France, Italy, and Luxembourg have all explicitly called on China to do a better job of respecting the rights to freedom of expression, assembly, and belief.^[126]

These violations of the rights to free expression, association, and assembly are not only disturbing in their own right, but they harm the ability of EU companies to secure the type of information they need to comply with mHRDD legislation.

Finally, EU businesses could also risk becoming complicit in China's actions against human rights defenders. Reports indicate that the Chinese government routinely jails human rights defenders, writers, journalists, and bloggers for their use of the rights to free speech,

123 «China Has Arrested an EU Citizen, German Ambassador Alarmed», *The Globe Post* (6 February 2018), <https://theglobepost.com/2018/02/06/china-eu-citizen-arrest/>.

124 «EU Ambassador Says He Expects Release of Swedish Citizen Detained by China», *Reuters* (24 January 2018), <https://fr.reuters.com/article/china-sweden-bookseller-eu/eu-ambassador-says-he-expects-release-of-swedish-citizen-detained-by-china-idINS6N10500U>; P. Wintour (2020, September 15), «US and UK Warn Travellers of Risk of Arbitrary Arrest in China and Hong Kong», *The Guardian*, <https://www.theguardian.com/uk-news/2020/sep/15/us-and-uk-update-travel-advice-to-china-and-hong-kong>.

125 Universal Periodic Review, China: Compilation of Stakeholder Materials, UN Doc. A/HRC/WG.6/31/CHN/3* (2018), para. 4.

126 Report of the Working Group on the Universal Periodic Review: China, UN Doc. A/HRC/40/6 (2018), paras. 28.194, 28.199–28.201, 28.203–28.205, 28.207–28.208.

assembly, and association.^[127] Human rights defenders face arbitrary detention, torture, and suppression of the rights to free association and assembly.^[128] Like the violations of free expression, association, and assembly, these human rights violations harm the ability of EU companies to secure the type of information they need to comply with mHRDD legislation. Also, without clear obligations on EU businesses to respect human rights, businesses could use these laws to silence human rights defenders who are critical of the company's operations. Consequently, although the SIA suggests there is unlikely to be an impact on «life, liberty, and security, etc.»,^[129] the CAI – coupled with existing Chinese laws – poses a significant risk to human rights defenders as well as risks that incentivise EU businesses to participate in these violations.

Free speech and public engagement in the EU

EU citizens have a right to information and participation in decisions affecting their human rights, including but not exclusively their right to health. They may protest businesses they feel are not sufficiently protecting their interests or their human rights. Yet, investment tribunals have at times found that states can be held liable if they allow their citizens to protest business operations they disagree with.^[130] According to these decisions, states have an obligation to prevent protests that are disruptive to the business's obligations.^[131] Additionally, Tanzania was found to be responsible for violating investment protections when a minister complained about a company's conduct and damaged its public reputation.^[132] These cases set a foundation that could significantly curtail free speech within the EU or could lead to large compensation orders against EU states if their residents effectively protest a company in a way that disrupts their operations, or if government officials criticise a company's conduct in a way that damages their public reputation and standing in the community. Unfortunately, if the CAI retains a provision providing «fair and equitable treatment», it creates an avenue for these types of claims. Rather than a general provision, the CAI should identify specific types of investment rights that are fundamental to investors but that do not open up challenges that are likely to undermine human rights, including free speech. The EU could protect the «rights to due process, a fair trial, and remediation», or a «right to non-discrimination», without using «fair and equitable treatment».

127 Universal Periodic Review (see note 125), para. 34.

128 Ibid., para. 65.

129 SIA, 94.

130 See, e.g., *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1 Award (30 August 2020); *Tecmed v Mexico*, ICSID Case No. ARB(AF)/00/2 (29 May 2003).

131 *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2020); *Tecmed v Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003); *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008).

132 *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008).

Gendered impacts

Finally, the SIA did not assess the gendered impacts of the harms. The SIA indicates that «literature on the link between gender and investment is scarce, and the interviews with stakeholders did not provide substantial inputs to address gender dimension of the investment agreement in a comprehensive manner».^[133] This obviously highlights the limited engagement with stakeholders and the need for further research. Additionally, while it is true that in 2017 there was limited literature on investment and gender specifically, since that time there has been a development in the literature and, more importantly, in the practical understanding of how business operations can have gendered impacts.

As the UN Working Group on Business and Human Rights has recognised, «gender-neutral» trade and investment agreements «tend to exacerbate existing discrimination against women».^[134] The Working Group recognised that the «[t]he impacts of environmental pollution, climate change and land acquisition are not gender-neutral».^[135] Instead, when land is acquired for infrastructure projects, women are «rarely consulted» appropriately and consequently «might not receive a fair share in the development project nor receive compensation for loss of livelihood».^[136] The Working Group calls on states to include «explicitly [...] a binding obligation on investors to respect women’s human rights under national and international law».^[137]

Research indicates that land acquisition and use will often have gendered impacts, particularly in the agricultural sector.^[138] As a group of experts recognised, there are four ways in which women are vulnerable to exploitation through land investments:

- Systemic discrimination in access, ownership, and control of land as well as protection in land rights;
- Discrimination in socio-cultural and political relations;
- Changes that reduce incomes;
- Physical force and violence by men.^[139]

133 Ibid., p. 94.

134 UN Working Group on Business and Human Rights, Report on the Gender Dimension of the Guiding Principles on Business and Human Rights (2019), UN Doc. A/HRC/41/43, para. 17.

135 Ibid., para. 18.

136 Ibid.

137 Ibid., para. 17.

138 Committee on World Food Security, High Level Panel of Experts on Food Security and Nutrition (2011), «Land Tenure and International Investments in Agriculture», p. 35, <http://www.fao.org/3/a-mb766e.pdf> (accessed 17 August 2020).

139 Ibid.

Women in China face systematic discrimination that leaves them more vulnerable to land exploitation by foreign investors. Studies suggest that as of 2011, more than 80 per cent of land contracts were held in men's names only, leaving wives dependent on their husbands.^[140] A more recent study indicates that gender disparity in land ownership remains significant, particularly in rural communities.^[141] Significant changes in law and society are required to ensure women receive adequate protection for their land ownership and use.^[142] In practice, this means that if land expropriation is required for an infrastructure or development project in support of European businesses operating in China, women are unlikely to be consulted or compensated for their loss. The compensation they would and should receive will instead be given to their male counterparts. This same issue can be replicated in smaller-scale sales and transfer as European businesses contract with and compensate male contract owners.

There are likely other gendered impacts in both the EU and China that were missed by the SIA. Without additional research, it is difficult to know if the investment agreement would increase or decrease this impact. A more comprehensive report on the gendered impacts of the agreement is warranted. Specific clauses may be needed to protect women, including direct recognition that foreign investors respect human rights, in line with the UN Guiding Principles on Business and Human Rights.

140 See L.H. Fincher (2016), *Leftover Women: The Resurgence of Gender Inequality in China* (London: Zed Books).

141 See K. Li (2020), «Land Dispossession and Women's Rights Contention in Rural China», *China Law and Society Review* 5: 33.

142 Ibid.

Conclusion

If the CAI were concluded in its current form, it would represent a significant expansion of the rights provided to investors in both China and the EU. As explained in this study, the agreement would liberalise market access – an area not covered by existing investment treaties between China and the member states. Unlike existing member state investment treaties with China, it would also contain detailed chapters aimed at disciplining the state parties on issues of the domestic regulation of an investor’s entry into, and operation within, the host state, financial services, and subsidies. It may also contain provisions on sustainable development and make use of the EU’s new Investment Court System, though there is still strong disagreement between the parties regarding these chapters.

These expanded protections, however, have not come with adequate safeguards to ensure that they do not infringe on the ability of the EU, its member states, or China to protect important public interests. The lack of such safeguards is particularly troubling when considering the economic power of the two parties to the CAI, and the additional challenges posed by China’s unique economic and political system, with its blurring of the line between state and private enterprise, its aggressive industrial policy, and its recent actions with respect to the Uyghur minority population, the protests in Hong Kong, and mass surveillance.

This study has highlighted in particular four areas of «defensive» concern for the EU and EU investors with respect to the CAI, and that civil society and other concerned parties should closely examine upon the release of the final CAI text.

First, it emphasised the failure of the CAI to limit claims regarding regulatory changes. This is a known issue caused by such factors as the ambiguity of the «fair and equitable treatment» standard, the inconsistency of interpretation across investment dispute settlement panels, and the lack of sufficient exceptions, carve-outs, and protections for governmental action taken in pursuit of legitimate public policy objectives. The CAI does not provide any remedies for these issues, but rather reproduces the same problems that have led to the loss of regulatory space and the privileging of investor interests over public policy in other countries around the world.

Second, it examined the proposed «Investment and sustainable development» chapter of the CAI. The EU has proposed that such a chapter should be included in the CAI, as it has been in other recent trade and investment agreements. However, the chapter is currently the subject of disagreement between the parties, and it remains to be seen what will be included in the final text. Even if it is included, the chapter currently proposed is extremely weak and contains even fewer protections than those in other «new generation» EU agreements, in particular because it eliminates the limited oversight provided by the system of Domestic Advisory Groups. The watering down of the «Investment and sustainable

development» chapter – if one is included at all – represents a significant backward step and raises concerns regarding the EU’s commitment to improving the environmental, labour, and sustainable development credentials of its investment agreements. In addition, the CAI – like other EU investment agreements – fails to include investor obligations on human rights, environmental protection, or anti-corruption: another missed opportunity for improving the EU’s international investment policy.

Third, the study examined the potential impact of the CAI’s broad market access and pre-investment protections, questioning whether the EU has ensured sufficient policy space to allow it and the member states the freedom to make decisions regarding critical infrastructure. It examined in particular the potential for challenges to the EU’s investment screening processes and called out the EU’s failure to carve out critical infrastructure systems, for example in the energy and digital sectors, from the coverage of the agreement.

Finally, the study set out some of the many potential human rights impacts of the agreement, exploring the potential for EU investors to become complicit in violations of human rights in China, and the lack of attention to the obligations of investors to respect human rights in all of their activities. It emphasised as well the deficiencies of the SIA that the EU conducted prior to negotiating the current agreement. The EU’s failure to consider the human rights impacts of the agreement more seriously should be a matter of concern, not only for the current agreement, but also for future investment negotiations.

The CAI therefore poses significant concerns, and civil society and other parties should carefully examine the final text to determine whether – and to what extent – the deficiencies noted in this study are addressed. The EU could go much further than it does in protecting its public policy space; ensuring that its investors respect human rights, environmental standards, and anti-corruption norms when operating abroad; and ensuring that investors’ rights do not trump the public interest. At a minimum, the CAI should be revised to include strong protections for EU regulatory policy space, including stronger exceptions provisions, wholesale carve-outs for key areas of EU regulatory policy, and much more clearly defined and limited protections for investors. The EU should also consider farther-reaching reforms, such as including obligations for investors to respect international environmental, human rights, and anti-corruption standards; eliminating the «fair and equitable treatment» provision altogether; and either eliminating the ISDS system altogether, or making it contingent on the exhaustion of domestic remedies. The EU should also consider whether it is wise to conclude such an agreement without a commitment on the part of China to protect human rights – including in Hong Kong and within Uyghur and other ethnic and religious minority communities – and should ensure the CAI includes binding and enforceable commitments with respect to upholding international human rights, labour rights, and environmental protections.

Thus far, most of the discussion surrounding the CAI has focused on the potential opportunities that the CAI represents for European businesses that may see increased market

access and the elimination of some performance requirements and other provisions which have hindered EU investment in China. However, it is important also to consider the risks of the agreement for the EU, EU businesses, and important public policy goals. Due to the size and strength of its economy, the EU has significant negotiating power in the realm of international economic policy. It should use this power to create fairer, greener investment agreements that do a better job of protecting human rights and the environment, in the CAI as well as in future agreements.

About the authors

Tara Van Ho is a Lecturer in the School of Law and Human Rights Centre at the University of Essex, a co-director of the Essex Business and Human Rights Project, co-President of the Global Business & Human Rights Scholars Association, and a member of the Editorial Board of the *Business and Human Rights Journal*. Her research bridges the gap between corporate law, international investment law, human rights law, tort law, armed conflict, and post-conflict reconstruction, examining how these areas challenge and reinforce one another. She is concerned with how the confluence of laws affect rights-holders in practice, and how rights-holders can access adequate remediation when their human rights have been harmed. She has published works on the impact of investment law on human rights, the adequacy of clauses aimed at modifying investment law for the protection of human rights, the responsibility of supply chain auditors, and business and human rights in conflict and post-conflict societies. She has contributed to works on the human rights, labour, and environmental impacts of European corporations in Nigeria, Bangladesh, Afghanistan, Colombia, and Palestine. She has worked in collaboration with NGOs and law firms based in the United Kingdom, Norway, Germany, Colombia, Myanmar, and Palestine, and has advised or provided trainings for a UN Group of Experts responsible for a particular conflict situation, the UN Working Group on Business and Human Rights, and the Organization for Security and Co-operation in Europe.

Anil Yilmaz is a Lecturer in the School of Law at the University of Essex and a co-director of the Essex Business and Human Rights Project. Her research bridges the gap between corporate law, international investment law, human rights law, labour law and tort law, examining how these areas can and should interact so as to operationalise human rights standards in the modern business context. She is interested in reimagining business regulation to alleviate the adverse impacts of the privileges of capital embedded in the law on human rights and welfare of communities. She has published works on parent-subsidiary relationships in the business and human rights context, non-financial reporting, duty of care in supply chain relationships, human rights in investment contracts, and the embedded inequalities in the investment treaty regime. She has contributed to works on the human rights, labour, and environmental impacts of European corporations in Pakistan, Nigeria, Bangladesh, and Afghanistan. To date, she has worked in collaboration with NGOs and law firms based in the United Kingdom, Colombia, and Germany on business and human rights litigation and policy-making.

Jessica Lawrence is a Senior Lecturer in the School of Law at the University of Essex. Her research focuses on issues relating to international economic integration at the WTO; in regional and bilateral trade and investment agreements; and within the EU internal market. She has a particular interest in the interaction between economic and non-economic public policy goals, and in the ways in which trade and investment agreements take into account their impacts on human rights, labour, sustainable development, environmental

protection, and gender. In addition to her academic work, Dr Lawrence has held various positions at NGOs, think tanks, and universities in the United States, the EU, India, New Zealand, and Costa Rica, and she continues to provide research and training for governmental and non-governmental organisations on issues related to trade and investment agreements and their impact on social policy goals.

Imprint

Editor: Heinrich-Böll-Stiftung e.V., Schumannstraße 8, 10117 Berlin
Contact: Jörg Haas, International Politics **E** haas@boell.de

Place of publication: www.boell.de

Release date: December 2020

Proof reading: Robert Furlong

Cover: Port of Piraeus in Greece. (Xinhua /imago images – All rights reserved)

Licence: Creative Commons (CC BY-NC-ND 4.0)

<https://creativecommons.org/licenses/by-nc-nd/4.0>

The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Heinrich-Böll-Stiftung.

You can find other E-Books here:

www.boell.de/en/publications