Towards an EU-China Bilateral Investment Treaty

Professor Wenhua Shan
Oxford Brookes University, UK
Xi’an Jiaotong University, China

European Parliament Hearing on EU-China Investment
Questions:

I. What is the current legal framework for EU-China investment relations?

II. Why should we consider an EU-China BIT?

III. What would be the main legal issues involved in the potential EU-China BIT talks?
I. What is the current legal framework for EU-China investment relations?

The Current Legal Framework

International Law
- ICSID Convention, MIGA Convention, WTO Agreements
- China-EU MS BITs, China-EU Cooperation Agreement

Domestic Law
- EU Law + EU MS Law
- Chinese Law
1. China-EU MS BITs
   - Incomplete (26 BITs, 23 effective)
   - Inconsistency (e.g., ISDS provisions below)
   - MFN effect limited (*Tza Yap Shum v. Peru*)

<table>
<thead>
<tr>
<th>BITs with full access to international arbitration</th>
<th>Belgium (new), Bulgaria (new protocol), Cyprus, Czech (new), Finland (new), France (new), Germany (new), Latvia, Luxembourg (new), Malta, Netherlands (new), Portugal (new), Romania (new), Slovakia (new), Spain (new), Sweden (new protocol)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BITs requiring only AOC may be settled by international arbitration</td>
<td>Austria, Denmark, Estonia, Hungary, Italy, Poland, Slovenia, UK</td>
</tr>
<tr>
<td>AOC and other disputes with mutual consent may be submitted to international arbitration</td>
<td>Greece, Lithuania</td>
</tr>
</tbody>
</table>
   - Wide coverage
   - Encouraging mutual investment
   - Extension of BIT network

2-1. Partnership and Cooperation Agreement (PCA) talks since 2007
   - Political and economic dimensions
   - Technical barriers to trade, investment, competition, intellectual property right (IPR), and public procurement, among other economic issues.
   - Investment chapter built-in?
An Assessment of the Current Legal Framework

• “However it has also been concluded that the current legal framework is neither complete nor consistent. Despite the recent amendments the Chinese FDI law remains unsystematic, scattered as it is throughout Chinese laws and regulations. The EU has acquired shared international investment competence which prevents it from fully engaging in international co-operation on investment matters. The applicable international treaties are neither complete nor coherent, or they are either too general or too specialized.”

II. Why we should consider an EU-China BIT?

1. Strengthening Bilateral Legal Protection and Promotion
   - Single rather than multiple agreements
   - Complete coverage (no state left unprotected)
   - Equal treatment throughout EU and among all EU investors in China
   - Market access liberalisation possibility
China’s Total FDI Inflows and Outflows and EU’s share

Chart 1: China’s Non-Financial FDI Inflows and EU’s Share (2005-2011) ($Billion)

Chart 2: China’s Total OFDI and Direct Investment in EU (2005-2011) ($100Million)

Source: MOFCOM

European Parliament Hearing on EU-China Investment

2012/11/6
2. Improving “Domestic” Legal Systems

• China
  – Improving investment laws and regulations.
  – “Spill-over effect”: Facilitating legal reforms and other reforms.

• EU:
  – EU: A best “test run” for the implementation of the new investment competence by entering into an important BIT.
  – EU and MSs: improving domestic laws and regulations.
3. Facilitating MIA Negotiation

- A Multilateral Investment Agreement (MIA) is desirable to facilitate world investment flows

- Both the EU and China are positive in negotiating such an MIA

- EU-China BIT likely to have significant influence on future MIA talks
III. What Would Be the Main Issues Involved in the Potential EU-China BIT Talks?

1. Investment liberalisation

2. Investment protection

3. Dispute resolution

4. Sustainable development
1. Investment Liberalization

a. Chinese BITs: No pre-establishment obligations
b. Traditional EU MS BITs: No pre-establishment obligations
c. EU: would want investment liberalisation included
d. Difficulties:
   a) No experience on both sides
   b) Positive or negative approaches?
   c) Significant preparation required for both
   d) EU: the Union of MSs to commit liberalisation?
      a) EU: consolidation
      b) MSs: coordination and response from China?
China’s Direct Investment Stock in EU by sectors as of 2011
(Source: 2011 Statistical Bulletin of China’s OFDI, MOFCOM)
EU’s FDI to China by sectors

Source: German Institute of Global and Area Studies
Germany’s Direct Investment in China by sectors in 2010
Mainly focusing on High-tech industries
Manufacturing Industries 59.8%, Lease and Commercial Industries 17.0%
2. Investment Protection

– Fair and equitable treatment (FET)
  • “minimum standard of treatment” under customary international law?
  • Autonomous?

– Monetary transfer
  • Balance of payment exceptions?
  • Capital account liberalisation and “subject to the Chinese formalities”?

– Expropriation and compensation
  • “indirect expropriation”
  • Hull formula?
3. Dispute resolution

- EU’s ICSID membership?
- International liability?
- MFN covering DS?
- Brief or detailed?
- Scope of access to international arbitration
  - Breach of BIT
  - Breach of investment agreements and authorisations
- Applicable law: ibid; and wording on international law and its relationship with applicable domestic laws
- Cooling period: how long?
- “Fork in the road clause”?
4. Sustainable Development

- “balancing” and “socialization” of BITs
- safeguarding health, safety, the environment and the core labor standards for the purposes of ensuring sustainable development
- EU commitment
- Chinese practice
Sino-Canada BIT

• “it is inappropriate to encourage investment by waiving, relaxing, or otherwise derogating from domestic health, safety or environmental measures,”

• “[E]xcept in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.”
Conclusion

1. EU and China are key investment partners to each other with huge potential.

2. An EU-China BIT will certainly help to strengthen the partnership and to realize the potential.

3. Many legal issues will be involved in the BIT negotiations including market access, investment protection, dispute resolution, sustainable development, etc.

4. The most challenging issue would be on market access, or investment liberalization.
Many Thanks!