

ARTICLE

THE INTERNATIONALIZATION OF CHINA'S FOREIGN DIRECT INVESTMENT LAWS

*Sandra Marco Colino**

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* Associate Professor, Faculty of Law, Chinese University of Hong Kong. Course Director, College of Europe, Bruges. Academic Board Member, Dictum Law Firm. Deputy Executive Director, Centre for Financial Regulation and Economic Development. PhD, European University Institute, Florence. Winner of the 2020 Academic Excellence Award, Global Competition Review. The work described in this paper was substantially supported by a grant from the General Research Fund of the Research Grants Council of the Hong Kong Special Administrative Region (SAR), China (Project No CUHK 14600718). A draft was presented at the seminar 'Foreign Direct Investments in the Post-COVID World' (Mar. 11, 2021), European University Institute, Florence. I am grateful to co-panelists Margarida Afonso and Francesco Maria Salerno, moderator Alexandr Svetlicinii, and the audience for their insightful feedback. All errors are mine.

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ABSTRACT

This Article delves into the conventional assumptions regarding the openness (or lack thereof) of China's markets to overseas investors, and critically assesses the merits of the new legal framework for foreign direct investment ("FDI"). It analyzes three strands of the legal system that affect the flow of overseas capital: merger control, international investment agreements, and national FDI regulation. This Article focuses on the interplay between national and international law, and the traditional assumptions about China that often infuse Western scholarship. After pointing to the risks of utilizing merger review rules to address the national security concerns of FDI operations, this Article discusses how China's latest endeavors to expand its shy international commitments have been indefinitely truncated by rising political tensions. In an attempt to foster an investor-friendly atmosphere, a new Foreign Investment Law ("FIL") has streamlined the domestic FDI legal framework and removed vital obstacles. This Article argues that a combination of unfamiliarity with tacit customary rules and skepticism about the candidness of the improvements could jeopardize the effectiveness of the reform. Relying on a combination of doctrinal research methodology and a "law-in-action" approach, it suggests that the success of the new rules is on both investors and policymakers, and points to the limitations of resorting to national

as opposed to international law in the investment liberalization process.

I. INTRODUCTION

China has become a hot spot for foreign direct investment (“FDI”).¹ By the mid 2000s, there was notable foreign presence in sectors such as chemicals, medicine, machinery, and electronics.² In 2020, when FDI flows to the United States and the European Union experienced a colossal, COVID-induced slump, China saw a four percent increase, and became the world’s largest FDI recipient with a total of US\$163 billion.³ Upon joining the World Trade Organization (“WTO”), the government’s policies took a 180-degree turn, shifting from discouraging investment of domestic companies abroad to a more liberal policy that facilitates incoming and outgoing FDI.⁴ In the context of the Belt and Road Initiative (“BRI”),⁵ China has further vowed to make investments easier by removing “barriers, and push[ing] forward negotiations on bilateral investment protection agreements and double taxation avoidance agreements to protect the lawful rights and interests of investors.”⁶ These pledges bore their first fruits in 2019 in a new Foreign Investment Law (“FIL”) which entered into force in 2020

1. See *China Takes New Foreign Investment Top Spot from US*, BBC NEWS (Jan. 25, 2021), <https://www.bbc.com/news/business-55791634> [<https://perma.cc/75LF-VNHE>].

2. See TINGTING WEINREICH-ZHAO, CHINESE MERGER CONTROL LAW: AN ASSESSMENT OF ITS COMPETITION-POLICY ORIENTATION AFTER THE FIRST YEARS OF APPLICATION 11 (2015).

3. See U.N. Conference on Trade and Development (UNCTAD), *Global FDI Flows Down 42% in 2020*, 38, INV. TRENDS MONITOR 1, 2-3 (Jan. 2021) https://unctad.org/system/files/official-document/diaeiainf2021d1_en.pdf [<https://perma.cc/2LYR-XEQY>]; see also Evelyn Cheng, *Foreign Firms Snap Up Chinese Companies Despite Political Tensions as Beijing Opens Its Doors*, CNBC (Jun. 21, 2021) <https://www.cnbc.com/2020/06/22/investing-in-china-foreign-firms-buy-more-china-despite-tensions-with-us.html> [<https://perma.cc/V73J-NKBK>].

4. See Jiyong Chen et al., *Investment Facilitation and China's Outward Foreign Direct Investment Along the Belt and Road*, 61 CHINA ECON. REV. 1, 2 (2020) (“Policies toward the foreign direct investment have become liberal and facilitatory.”).

5. See generally BELT AND ROAD INITIATIVE, <https://www.beltandroad-initiative.com/belt-and-road/> [<https://perma.cc/YM2X-DMWJ>] (last visited Aug. 10, 2021).

6. Nat’l Dev. and Reform Commission, Ministry of Foreign Affairs, and Ministry of Com. of China, with State Council Authorization, *Vision and Actions on Jointly Building Belt and Road*, BELT AND ROAD F. FOR INT’L COOP. (Apr. 10, 2017), <http://2017.beltandroadforum.org/english/n100/2017/0410/c22-45.html> [<https://perma.cc/J3UU-9L84>].

and, at least on paper, removed critical hurdles to FDI and provided greater legal certainty.⁷

The liberalizing trend of Chinese FDI policy is a testament to the importance of the free flow of capital to economic growth. According to the International Monetary Fund (“IMF”), cross-border investment “fosters intertemporal optimization of consumption, helps finance the balance of payments, and promotes efficient allocation of world savings.”⁸ Yet, despite the recent promising events, it is not infrequent to find stories in the press about China’s hostility toward foreign businesses.⁹ These apprehensions are, in part, explained by several outstanding regulatory constraints, such as the considerable number of sectors that remain off-limits for non-Chinese companies (particularly in services markets), and the strict requirements traditionally applied in some of the areas where investment is allowed.¹⁰

Other concerns, however, arise out of investors’ assumptions of Chinese FDI policies, which appear to stem from two more abstract, interconnected phenomena. The first relates to the divergent perceptions of the reality investors are met with upon venturing into China, such as the claim that foreign businesses are forced to transfer their technology to local firms, which has been

7. See (中华人民共和国外商投资法) [FOREIGN INVESTMENT LAW OF CHINA] (adopted at the Second Session of the 13th National People’s Congress, Mar. 15, 2019, effective Jan. 1, 2020), translated at *Foreign Investment Law of the People’s Republic of China*, INV. POL’Y HUB (2019), <https://investmentpolicy.unctad.org/investment-laws/laws/317/china-foreign-investment-law-of-the-people-s-republic-of-china> [https://perma.cc/64PD-WE78] [hereinafter FIL].

8. Matthias Vocke, *Investment Implications of Selected WTO Agreements and the Proposed Multilateral Agreement on Investment* 4 (IMF Working Paper No. 60, 1997).

9. See, e.g., Lucy Hornby & Tom Mitchell, *China Warned About Hostility to Foreign Business*, FINANCIAL TIMES (June 7, 2016), <https://www.ft.com/content/21d99142-2c5e-11e6-a18d-a96ab29e3c95> [https://perma.cc/4JQT-557A]; Wendy Wu, *Is China Making Life Difficult for Foreign Companies?*, SOUTH CHINA MORNING POST (May 2, 2016), <https://www.scmp.com/news/china/diplomacy-defence/article/1940397/china-making-life-difficult-foreign-companies> [https://perma.cc/NW63-YQPS]; Amitrajeet A. Batabyal, *China Makes It Incredibly Hard for Foreign Businesses to Operate—But They Stay Because the Money Is Just Too Good*, THE CONVERSATION (Oct. 19, 2020), <https://theconversation.com/china-makes-it-incredibly-hard-for-foreign-businesses-to-operate-but-they-stay-because-the-money-is-just-too-good-147546> [https://perma.cc/X3AP-BJ9P]; Stanley Chao, *The New Reality of Doing Business With China*, INDUS. WK. (Mar. 31, 2021), <https://www.industryweek.com/the-economy/trade/article/21159780/the-new-reality-of-doing-business-in-china> [https://perma.cc/8H9V-WJR5].

10. See *infra* Section IV.A.

described as one of the “fiercest frictions within US–China trade.”¹¹ Non-Chinese media outlets frequently take it as a given,¹² overseas businesses complain about it,¹³ and the political elites have been vocal in their criticisms of a policy considered to be an outlandish imposition contrary to WTO commitments.¹⁴ Yet, it remains a disputed assertion,¹⁵ and arguably has never been a legal requirement.¹⁶ Accordingly, in the eyes of China, technology transfer is a voluntary commitment that would be undertaken in one’s own interest to access highly lucrative markets.¹⁷

The second issue is the deep-rooted mutual mistrust prevalent among certain Chinese and Western circles, which translates into skepticism of ostensibly positive developments. For example, in the context of a discussion of a prospective investment agreement between China and the European Union, critics pointed

11. See Jyh-An Lee, *Forced Technology Transfer in the Case of China*, 26 B.U.J. OF SCI. & TECH. L. 324, 326 (2020).

12. See, e.g., Keith Bradsher, *A Temporary US–China Trade Truce Starts to Look Durable*, N.Y. TIMES (May 27, 2021) <https://www.nytimes.com/2021/05/27/business/us-china-trade-deal.html> [<https://perma.cc/JB5L-VWB7>] (claiming that one success of the on US-China Phase One Agreement (see *infra* Section II.C.1.) was that ‘China stop[ped] forcing foreign companies to transfer technology to Chinese firms as a condition of doing business there’); Chad P. Brown, *Anatomy of a Flop: Why Trump’s US-China Phase One Trade Deal Fell Short*, PETERSON INST. FOR INT’L ECON.: TRADE AND INV. POL’Y WATCH (Feb. 8, 2021), <https://www.piie.com/blogs/trade-and-investment-policy-watch/anatomy-flop-why-trumps-us-china-phase-one-trade-deal-fell> [<https://perma.cc/A5ZQ-WSK4>] (referring to ‘the forced, insufficiently compensated, transfer of American technology’).

13. See, e.g., 2020 Member Survey, US–CHINA BUSINESS COUNCIL 1, 13 (2020), https://www.uschina.org/sites/default/files/uscbc_member_survey_2020.pdf [<https://perma.cc/7M8N-EAD7>].

14. See *inter alia* Request for Consultations by the European Union, *China – Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/6 (June 1, 2018), https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157591.12.20%20-%20REV%20consultation%20request%20FINAL.pdf [<https://perma.cc/27AJ-C6EP>]; Off. of the U.S. Trade Representative, Exec. Off. Of The President, Findings of the Investigation Into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [<https://perma.cc/Z9SS-D3NP>]; see also Jessica Brum, *Technology Transfer and China’s WTO Commitments*, 50 GEO. J. OF INT’L L. 709, 710–11 (2019).

15. See, e.g., WEIHUAN ZHOU, CHINA’S IMPLEMENTATION OF THE RULINGS OF THE WORLD TRADE ORGANIZATION 136–138 (2019).

16. See *infra* Part III.

17. See Daniel Gros, *The Myth of China’s Forced Technology Transfer*, PROJECT SYNDICATE (Nov. 8, 2018) <https://www.project-syndicate.org/commentary/myth-of-forced-technology-transfer-china-by-daniel-gros-2018-11> [<https://perma.cc/HZ3Q-CEQ2>].

out that any gains for the latter “will likely pale in comparison to the promises that go unfulfilled and the strategic advantage Europe has ceded.”¹⁸ And when asked about China’s supply-side structural reforms,¹⁹ the President of the EU Chamber of Commerce in China, Jörg Wuttke, replied that he saw “some good news” but was afraid it was “only rhetoric.”²⁰ Economist Thomas Piketty has made the point forcefully by highlighting the urgency of “ending Western arrogance and promoting a new emancipatory and egalitarian horizon on a global scale,” and insisting that if Western countries “stick to their usual lecturing posture and dated hyper-capitalist model, [they] may find it extremely difficult to meet the Chinese challenge.”²¹ Regardless of the accuracy of Piketty’s claims, it is not uncommon to encounter strong opinions on developments in China that are tinted with instinctive disapproval, without taking the time to consider possible root causes or contextual differences that may offer an explanation.

Scientifically assessing the accuracy and magnitude of these off-the-record developments is an intricate endeavor. If those findings hold true, on paper China may outwardly be rolling out the red carpet for foreign investors, but in practice tacit policies could continue to complicate operations that should, in theory, be smooth sailing.²² It is evident that any business wanting to enter an overseas market needs to become acquainted with customary practices that will, to a great extent, determine the success of its presence abroad.²³ Ultimately, this is not a China-specific issue, but

18. Dr. James Carafano et al., *The Pitfalls of the China-EU Comprehensive Agreement on Investment*, THE DIPLOMAT (Jan. 22, 2021), <https://thediplomat.com/2021/01/the-pitfalls-of-the-china-eu-comprehensive-agreement-on-investment/> [<https://perma.cc/S6GV-L5BR>].

19. See, e.g., CAI FANG, CHINA’S NEW NORMAL, SUPPLY-SIDE, AND STRUCTURAL REFORM (forthcoming Nov. 2021); LIN XIAO, NEW SUPPLY SIDE ECONOMICS: THE STRUCTURAL REFORM ON SUPPLY SIDE AND SUSTAINABLE GROWTH (2017).

20. Hornby & Mitchell, *supra* note 9.

21. Thomas Piketty, *Responding to Chinese Challenge with Democratic Socialism*, LE MONDE (Jul. 13, 2021), <https://www.lemonde.fr/blog/piketty/2021/07/13/responding-to-chinese-challenge-with-democratic-socialism/> [<https://perma.cc/4QJH-QT7H>].

22. See generally *supra* note 9.

23. See, e.g., Gabrielle Appleby, *Unwritten Rules*, in THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION (Cheryl Saunders & Adrienne Stone eds., 2018) (discussing the power of unwritten rules); Bruce A Markell, *Lawyers, Judges and Unwritten Rules*, 36 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 719 (2020); Lawrence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. OF INT’L L. 563

in light of the colossal disparities that exist between Western and Chinese legal and business traditions, FDI experiences might turn into an uphill struggle without insider knowledge. This could be particularly acute given the volume of unpublished rules in Chinese culture. As Peter Howard Corne, an expert in Chinese corporate and regulatory practice, has explained, historically “[c]ustomary law represented the primary set of norms” applying to everyday activities, and “[f]ormal laws rarely intruded into the daily lives of the people.”²⁴ Despite the legal reforms of the twentieth century which codified the legal system, the supremacy of customary law in business and even family relationships remains unchallenged.²⁵

This article examines the conventional assumptions regarding the accessibility of China’s markets to overseas investors, and critically assesses the merits of the updated “internationalized” FDI legal landscape. To this end, it relies on a combination of doctrinal research methodology and a “law-in-action” pragmatic approach. It explores the full spectrum of legislation that may be used to exert control over foreign investment, namely merger control provisions, international investment agreements (“IIAs”), and national FDI-specific regulation. Part I considers the application of merger control provisions to FDI. Part II delves into China’s international investment commitments, while Part III reflects on China’s new FIL. Part IV assesses the rules. This Article argues that the new policy is, theoretically, consistent with international practice; how China is regulated by Western nations directly impacts how China regulates those nations.²⁶ While generally surmountable, practical hurdles need to be tackled head-on by both would-be investors and policymakers. The findings are sustained by a decade of research into the Chinese legal system, input from international scholars with extensive comparative knowledge of FDI regulation, and data gathered through interviews with European and US companies

(2015); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1997).

24. CORNE, *supra* note 23, at 19. See also *People: Peter Corne*, DORSEY & WHITNEY LLP (2021) <https://www.dorsey.com/people/c/corne-peter> [<https://perma.cc/9KJJ-P22Z>].

25. *Id.* at 20.

26. See generally ANGELA HUYUE ZHANG, CHINESE ANTITRUST EXCEPTIONALISM (2021).

that have invested in China and members of the legal profession in Beijing.²⁷

II. MERGER CONTROL AS FDI GATEKEEPER

The IMF defines FDI as “the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy.”²⁸ Indeed, mergers and acquisitions are “the most important FDI mode in China, and foreign investors preferably enter the Chinese market by acquiring leading domestic companies.”²⁹ As a consequence, merger control provisions may affect the flow of FDI into the country, but only with regard to the initial transaction forming the relationship between the overseas investor and the targeted local company.³⁰ Thereafter, any subsequent dealings between the two entities would still classify as FDI, but would not trigger a merger review process.

A. *The Anti-Monopoly Law and Its Potential to Interfere with FDI*

China’s antitrust legislation, the Anti-Monopoly Law (“AML”), entered into force in 2008,³¹ replacing piecemeal antitrust rules spread over multiple statutes.³² Chapter IV of the AML deals with the “concentration of undertakings,” and allows the State Administration for Market Regulation (“SAMR”) to scrutinize operations that exceed certain pre-established thresholds.³³ The

27. Ethics clearance for the interviews was granted by the Chinese University of Hong Kong’s Survey and Behavioral Research Ethics Committee.

28. INT’L MONETARY FUND, *BALANCE OF PAYMENTS MANUAL* 86 (1993) <https://www.imf.org/external/np/sta/bop/bopman.pdf>.

29. WEINREICH-ZHAO, *supra* note 2, at 27.

30. See INT’L MONETARY FUND, *supra* note 28, at 86.

31. (中华人民共和国反垄断法) [ANTI-MONOPOLY LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml> [<https://perma.cc/487Y-XE4F>] [hereinafter AML].

32. For an overview of the legal framework for competition issues prior to the AML, see Zhenguó Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L. J. 73 (2008).

33. See (国务院关于经营者集中申报标准的规定) [PROVISIONS OF THE STATE COUNCIL ON THE STANDARD FOR DECLARATION OF CONCENTRATION OF BUSINESS OPERATORS] (promulgated by Order No. 529 of the State Council, Aug. 3, 2008, effective May 20, 2020)

analysis conducted under these provisions should be limited to the competition concerns spurred by the acquisition,³⁴ and stay clear of industrial policy or national security considerations.³⁵ Indeed, Article 28 of the AML refers to prohibiting a merger only in the event that the relevant antitrust agency concludes that it “leads, or may lead, to elimination or restriction of competition.”³⁶

Notwithstanding this premise, there is always the possibility—both in China and elsewhere—that merger control is strategically employed to restrain the entry of non-national businesses into local markets. In fact, prior to the adoption of the AML, specific conditions were introduced for mergers giving foreign investors control of Chinese companies in key industries, impacting national security, or affecting notorious national brands.³⁷ Rather ambiguously, the AML lists “the impact of [the] concentration on the development of the national economy” among the factors to be taken into account when deciding whether a merger should be approved.³⁸ This could potentially open the door to protectionist considerations eclipsing the traditional goals of competition law. According to Steve Dickinson, an expert in the field,³⁹ there are certain unwritten norms when it comes to investment by-way-of acquisition of Chinese companies:

http://gkml.samr.gov.cn/nsjg/fldj/202005/t20200526_315561.html
[<https://perma.cc/V9LC-CKED>].

34. This applies to all merger control regimes around the world. In the context of E.U. merger control, Commissioner Margrethe Vestager has said that merger control rules allow “companies to grow by acquiring other businesses while at the same time preserving choice, quality, innovation and competitive prices.” See European Commission, Statement/19/889. Commissioner Vestager on the Proposed Acquisition of Alstom by Siemens and the Proposed Acquisition of Arubis Rolled Products and Schwermetall by Wieland (Feb. 6, 2019) https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_889 [<https://perma.cc/K6ZX-AC4V>].

35. *Id.* (discussing the complementarity of industrial policy and competition enforcement).

36. AML, *supra* note 31, art. 28.

37. (关于外国投资者并购境内企业的规定) [INTERIM PROVISIONS ON MERGERS AND ACQUISITIONS OF DOMESTIC ENTERPRISES BY FOREIGN INVESTORS] (promulgated Sep. 8, 2006), art. 12, translated in *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, MINISTRY OF COM. PEOPLE'S REPUBLIC OF CHINA, <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045825.shtml> [<https://perma.cc/N7SY-43XC>].

38. AML, *supra* note 31, art. 27.

39. Steve Dickinson, HARRIS BRICKEN, <https://harrisbricken.com/our-team/steve-dickinson/> [<https://perma.cc/6G2G-N49B>].

Foreigners are permitted to purchase small established Chinese companies where the government is too busy to be concerned with the management of the small company.

Foreigners are permitted to purchase large established Chinese companies suffering from financial problems, provided that the foreign purchaser will restructure the company and assume the company's obligations to workers and creditors.

Foreigners are permitted to acquire a minority interest in large and successful Chinese companies, provided such investment will provide collateral benefits in the form of technology transfer or access to new markets.

Foreigners are not permitted under any circumstances to purchase a majority interest in a large and successful established Chinese company.⁴⁰

In the European Union, the European Commission has stood firmly against the use of merger control regulations for anything other than the competitive assessment of concentrations.⁴¹ In order to maintain the "purity" of merger control, Regulation 2019/452 came into force in October 2020 with measures aimed at ensuring adequate FDI screening in the European Union (often conducted by national competition authorities).⁴² It is unclear, however, whether other parts of the world, including China, are equally rigorous when separating competition and national security concerns. Since the adoption of the AML, pundits have speculated that the law could turn into "another weapon that China could use against foreign companies."⁴³

40. David Wolf, *The Huiyuan Test*, SILICON HUTONG (Sep. 8, 2008), <http://siliconhutong.com/2008/09/08/the-huiyuan-test/> [https://perma.cc/2P4H-GYJH] (quoting Steve Michael Dickinson's *China Law Blog* originally published in 2008, which is no longer available).

41. See European Commission, Statement by Vestager, *supra* note 34.

42. Commission Regulation 2019/452 of Mar. 19, 2019, Establishing a Framework for the Screening of Foreign Direct Investments into the Union 2019 O.J. (L179/1). Screening is often conducted by national competition authorities. *Id.*

43. Angela Huyue Zhang, *Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan*, 3 PEKING UNIVERSITY JOURNAL OF LEGAL STUDIES 96, 99 (2011).

B. Practical Application of Merger Control to FDI-Related Transactions

Less than a year after the AML came into effect, China's Ministry of Commerce ("MOFCOM") appeared to confirm fears of the strategic use of merger control when it blocked Coca-Cola's acquisition of Huiyuan, a well-known Chinese fruit juice producer.⁴⁴ According to the MOFCOM, there were three main concerns relating to the concentration: first, Coca-Cola would be able to leverage its dominance of the carbonated cola drinks market into the fruit juice market through practices such as tying and bundling; second, Coca-Cola already owned Minute Maid, another juice brand present in China,⁴⁵ and post-merger it would have greater control of the fruit juice market (even though the market share would remain below thirty percent); and, finally, smaller competitors could be squeezed out of the market.⁴⁶

The MOFCOM explained that the remedies offered by Coca-Cola were insufficient to address these reservations, and thus the merger could not proceed. Rather disappointingly, the brief decision perhaps failed to encapsulate the sophisticated theories of harm we have come to expect of established competition agencies when they block a concentration—more so if there are political sensitivities at stake. The case sparked strong international criticism,⁴⁷ with the outcome described as "very unfortunate . . . in an industry that has no economic or national-security significance."⁴⁸

44. (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告#中华人民共和国商务部公告[2009]第22号)[MOFCOM NOTICE ON THE REVIEW DECISION TO PROHIBIT COCA-COLA'S ACQUISITION OF CHINA HUIYUAN Co [2009] No 22] <http://fdj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?946530605=171424798> [https://perma.cc/M43U-F9TD] [hereinafter *COCA-COLA/HUIYUAN DECISION*].

45. Meizhiyuan is the name of Minute Maid's China branch.

46. *COCA-COLA/HUIYUAN DECISION*, *supra* note 44.

47. See *Coca-Cola's Failed Bid for China Huiyuan Juice: The Return of Protectionism?*, Knowledge @ Wharton Blog (Apr. 1, 2009), <https://knowledge.wharton.upenn.edu/article/coca-colas-failed-bid-for-china-huiyuan-juice-the-return-of-protectionism/> [https://perma.cc/P4KJ-DHQU] [archived Aug. 10, 2021]; *Squeezed Out*, THE ECONOMIST (Mar. 18, 2009); Rick Carew et al., *China Denies Protectionism in Coca-Cola Ruling*, WALL ST. J. (Mar. 21, 2009), <https://www.wsj.com/articles/SB123751554403891673#cx> [https://perma.cc/PF3S-AWZE]. For a balanced account, see Shaun Rein, *What Coca-Cola Did Wrong, and Right, in China*, FORBES (Mar. 24, 2009), <https://www.forbes.com/2009/03/24/coca-cola-china-leadership-citizenship-huiyuan.html> [https://perma.cc/3QZ9-6TY9].

48. THE ECONOMIST, *Squeezed Out*, *supra* note 47 (citing Lester Ross).

*C. Outlook: The Significance of FDI Considerations in China's
Merger Control Policy Development*

The media reports on the *Coca-Cola/Huiyuan* fiasco provide a good example of the wariness, or mistrust, that at times permeates analysis of China's legal developments.⁴⁹ *The Economist*, for instance, reported—citing hearsay among lawyers and bankers—that the decision was “a political response to critical comments by America's [Obama] administration,” showing that “foreign companies might be the primary targets of the new law.”⁵⁰ There is no reference to, or analysis of, the competition concerns highlighted by the MOFCOM in its denial of the merger. Another commentator speculated that the deal would be “discussed at high levels of the Chinese government” because a popular local company was the target of a US multinational corporation.⁵¹

The outcome of this merger review process could be interpreted as a validation of Dickinson's assertion about the improbability of foreign companies purchasing a successful or emblematic Chinese business in any sector.⁵² Yet, more than a decade after, with the benefit of hindsight, it appears that the concerns were not entirely justified, as the decision did not signal the beginning of an anti-FDI trend in Chinese merger control.⁵³ In 2011, Angela Zhang questioned the logic of the protectionist narrative, bearing in mind, *inter alia*, the relative irrelevance of the market to national security, and the fact that Huiyuan was already partially owned by foreign companies before Coca-Cola came into the picture.⁵⁴ Given that China's own business community was already heavily investing in other countries,⁵⁵ it would seem wise

49. *See supra* Part I.

50. *THE ECONOMIST*, *Squeezed Out*, *supra* note 47.

51. Wolf, *supra* note 40.

52. *Id.*

53. The only other merger blocked was the so-called ‘P3 Alliance,’ which would have combined container carriers Maersk Line, Mediterranean Shipping Company, and CMA CGM. *See* MOFCOM Announcement No 46 of 2014 Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Centre, MINISTRY OF COM. PEOPLE'S REPUBLIC OF CHINA (June 20, 2014),

<http://english.mofcom.gov.cn/article/policyrelease/buwei/201407/20140700663862.shtml> [<https://perma.cc/NEA9-KB4V>].

54. Zhang, *Problems in Following EU Competition Law*, *supra* note 43, at 98–99.

55. *But see* Thilo Hanemann & Danial H Rosen, *Who's Buying Whom? COVID-19 and China Cross-Border M&A Trends*, RHODIUM GROUP (June 18, 2020), <https://rhg.com/research/whos-buying-whom/> [<https://perma.cc/5TY4-LPDQ>]

for the authorities to pursue reciprocity by refraining from imposing groundless hurdles to incoming FDI. Importantly, recent developments suggest that international buyers have managed to successfully acquire important Chinese enterprises.⁵⁶ In 2020, Pepsi purchased the snack brand Be & Cheery,⁵⁷ while Volkswagen spent over US\$1 billion for a fifty percent stake in the state-owned Anhui Jianghuai Automotive Group, taking control of its existing joint venture with the company.⁵⁸ The trend looks set to continue: in June 2021, JPMorgan Chase announced plans to purchase one hundred percent of its securities joint venture partner in China.⁵⁹

Further, it should be noted that protectionism claims in the application of competition law often emerge when those affected by a decision do not like the outcome. One need only look at the commentary prompted by the European Commission's *General Electric/Honeywell* decision,⁶⁰ which ended the proposed merger of the two US companies, or at the disapproval of the penalties imposed on Google, Qualcomm, Facebook, and Intel in the European Union.⁶¹ Rather than revealing a protectionist agenda, the outcomes of these investigations reflect robust differences in antitrust policies across jurisdictions.⁶² Unlike the United States, the European Union and China are not strongly influenced by the Chicago School's *laissez-faire* approach to merger control, and thus

(explaining that in 2020 China's outbound merger numbers 'collapsed compared to previous years').

56. *Id.*

57. Yingzhi Yang & Brenda Goh, *PepsiCo Buys Chinese Snack Brand Be & Cheery for \$705 Million*, REUTERS (Feb. 24, 2020), <https://www.reuters.com/article/us-pepsico-china-idUSKCN20I07R> [<https://perma.cc/ZK7E-HGAG>].

58. Julie Zhu & Edward Taylor, *Exclusive: Volkswagen in Final Talks to Seal Biggest M&A Deals in China EV Sector—Sources*, REUTERS (May 27, 2020), <https://www.reuters.com/article/us-volkswagen-investment-china-exclusive-idUSKBN2330F1> [<https://perma.cc/KFC4-2XZH>].

59. See Thomas Hale, *JPMorgan Applies to Take Full Control of China Securities Venture*, FINANCIAL TIMES (Jun. 3, 2021), <https://www.ft.com/content/3bd19ceb-50ed-4555-a3e3-e06401b77879> [<https://perma.cc/R5ZZ-UZRD>].

60. *General Electric/Honeywell* (Case COMP/M.2220) Commission Decision 2004/134/EC [2004] OJ L48/1, confirmed by Case T-209/01 *Honeywell International Inc v Commission* [2005] ECR II-5527.

61. See, e.g., Charlene Barshefsky, *EU Digital Protectionism Risks Damaging Ties with the US*, FINANCIAL TIMES (Aug. 2, 2020), <https://www.ft.com/content/9edea4f5-5f34-4e17-89cd-f9b9ba698103> [<https://perma.cc/AGL3-YDXT>].

62. See generally Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, J. BUS. L. 329 (2019). See also Anu Bradford et al., *Is EU Merger Control Used for Protectionism? An Empirical Analysis*, 15 J. EMP. L. STUD. 165 (2018).

competition law enforcement remains more energetic.⁶³ As a consequence, before raising the protectionist flag, any potentially credible alternative explanations should be ruled out.

In light of these considerations, the most plausible scenario is that two factors weighed heavily on the outcome of the brief, and arguably flawed, decision in *Coca-Cola/Huiyuan*.⁶⁴ First, it is at least conceivable that, only months after the AML's entry into force, the MOFCOM's lack of familiarity with the application of competition law meant that it was not prepared to conduct an analysis as sharp as necessary for a transaction of this complexity.⁶⁵ After more than a decade of AML enforcement, however, this impediment should have all but vanished. Second, bearing in mind the relevance of unwritten traditions in the country,⁶⁶ and Western investors' frequent unfamiliarity with Chinese business customs, Coca-Cola may simply not played its cards right. In fact, months before the decision was announced, David Wolf predicted that the deal's approval would be largely dependent on "how well [Coca-Cola] handles the government debates and public discussion on the deal's merit."⁶⁷ With regard to this second issue, the increased presence of overseas investors in China suggests that they are getting the hang of corporate negotiations in the country, and that perhaps enforcers afford them greater latitude.

These observations, while encouraging, do not completely rule out strategic uses of merger control in operations involving foreign firms. In 2018, coinciding with increased tensions in China's trade relationship with the United States, tech giant Qualcomm failed to obtain timely clearance from the SAMR for the purchase of Dutch semiconductor producer NXP.⁶⁸

63. *But see* William E Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459 (2020) (claiming that the influence of the Chicago School in U.S. antitrust policy development has been overstated).

64. *See generally*, *COCA-COLA/HUIYUAN DECISION*, *supra* note 44.

65. Zhang, *Problems in Following EU Competition Law*, *supra* note 43, at 102-18 (highlighting how the rationale employed by the MOFCOM mirrors early European Commission decisions, based on theories that have now been abandoned in the EU and in other parts of the world).

66. *See supra* Part I.

67. Wolf, *supra* note 40.

68. Michael Martina & Stephen Nellis, *Qualcomm Ends \$44 Million NXP Bid After Failing to Win China Approval*, REUTERS (July 25, 2018),

Consequentially, the operation was abandoned despite being greenlit in eight other jurisdictions.⁶⁹ Qualcomm's CEO speculated that it "got caught up in something that was above" them.⁷⁰ The SAMR defended its stance positing that its concerns had not been properly addressed by the deadline.⁷¹ A later statement from the SAMR expressing its willingness to continue talks when it was already too late was interpreted as a gesture "to counter perceptions [that] the deal approval process was politicized, not to revive it."⁷² Accordingly, the risk of contaminating merger control analysis with political considerations has not completely vanished. As long as the trade frictions continue, there is always a risk that some degree of protectionism will result.

III. CHINA'S FRAGMENTARY INTERNATIONAL COMMITMENTS ON INVESTMENT

The most effective way of facilitating FDI while simultaneously ensuring adequate screening mechanisms involves the adoption of a suitable regulatory framework specifically designed to deal with these issues. This can be done externally by assuming international obligations through IIAs, or internally by way of national legislation. This section examines the transnational sphere, while China's national FDI laws are assessed in the following section. According to the relevant Chinese law, in the event that an international agreement signed by China contains more favorable terms than the national legislation, the conflict will be interpreted *in dubio pro investor*: the international rules will prevail.⁷³

<https://www.reuters.com/article/us-nxp-semicondtrs-m-a-qualcomm-idUSKBN1KF193> [<https://perma.cc/H43H-FAB4>].

69. *Id.*

70. *Id.*

71. See Adam Jourdan, *China Says It is Still Open to Talks on Scrapped Qualcomm-NXP Takeover*, REUTERS (Jul. 27, 2018), <https://www.reuters.com/article/us-nxp-semicondtrs-m-a-qualcomm-idUKKBN1KH01E> [<https://perma.cc/VNB6-3M8H>].

72. *Id.*

73. FIL, *supra* note 7, art. 4.

*A. The Irregular Landscape of International Investment
Responsibilities*

China's accession to the WTO in 2001 signaled a change in the country's approach to FDI,⁷⁴ and membership duties constituted a first crucial step toward liberalization. Despite the complementarity of investment and trade,⁷⁵ the legal framework for the former remains startlingly underdeveloped when compared with the "far more elaborate" multilateral rules that guide the latter.⁷⁶ This progress pattern is not unusual. Even within the European Union, liberalizing trade in goods has been far more straightforward than accomplishing free movement of capital.⁷⁷ Regrettably, the immediate consequence of this underdeveloped legal framework for FDI is a patchy regulatory arena, often embodied by sector-specific rules aimed principally at trade and only indirectly touching upon investment issues.

In the 1990s, an attempt to adopt a Multilateral Agreement on Investment in the context of the Organization for Economic Co-operation and Development ("OECD") did not prosper,⁷⁸ with critics questioning both the need for and the benefits to developing countries of such an accord.⁷⁹ In this context, bilateral and plurilateral⁸⁰ mechanisms often continue to be vital in order to

74. See, e.g., Carlos Aurelio Esplugues, *China's Accession to WTO*, in *CHINESE BUSINESS LAW 1* (Yuanshi Bu ed., 2010).

75. Vocke, *supra* note 8, at 5.

76. *Id.* at 4.

77. See, e.g., Katharina Gnath et al., *Financial Market Integration in the EU: A Practical Inventory of Benefits and Hurdles in the Single Market*, BERTELSMANN STIFTUNG (2019), https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/EZ_Financial_Market_Integration_2019_ENG.pdf [<https://perma.cc/TN7N-VQA7>]; John A. Usher, *The Evolution of the Free Movement of Capital*, 31 *FORDHAM INT'L L. J.* 1533 (2007).

78. Organisation for Economic Co-operation and Development (OECD), *Multilateral Agreement on Investment (MAI) (never adopted)*, <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> [<https://perma.cc/EQ88-SXW6>].

79. Peter Nunnenkamp & Manoj Pant, *Why the Case for a Multilateral Agreement on Investment Is Weak*, (Kieler Diskussionsbeiträge, Working Paper No. 400, 2003), <https://www.econstor.eu/bitstream/10419/2931/1/kd400.pdf> [<https://perma.cc/LP7A-BND2>].

80. Plurilateral incentives kick in when multilateralism fails to meet certain objectives. They involve cooperation between the countries "willing to move forward with the liberalisation process" in the absence of broader multilateral action. See Yonov Frederick Agah, *Plurilateralism Against Multilateralism? A Multi-stakeholder Perspective*, *WTO PUBLIC FORUM* (2012)

secure more extensive reciprocal investment advantages. Below, both the WTO framework and China's additional IIAs are explored. Particular attention is paid to the agreements China has negotiated with the United States and the European Union.

B. The Boundaries of the Basic WTO Framework

Some of China's WTO obligations directly or indirectly impact foreign investment. For instance, the Agreement on Trade Related Investment Measures ("TRIMS") contains certain relevant provisions, but only for investment in goods.⁸¹ Its main aims are "the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase economic growth of all trading partners . . . while ensuring free competition."⁸² The accord precludes WTO members from discriminating (in law or in practice) or implementing quantitative restrictions against imported products. What this means for investment is that, if any national measures regarding FDI could negatively affect imports from or exports to other WTO countries, they would be inapplicable.⁸³ Notwithstanding these commitments, China has opened most of its manufacturing sector by its own initiative through national legislation.⁸⁴ Therefore, the relevance of TRIMS for FDI into China remains fairly trivial. In a similar vein, tangentially connected to FDI are the Agreement on Trade-Related Aspect of Intellectual Property Rights ("TRIPS"), affording protection to overseas investors' intellectual property ("IP"),⁸⁵ and the Energy Charter Treaty ("ECT"), which is relevant for investment in energy products.⁸⁶

https://www.wto.org/english/forums_e/public_forum12_e/session29agah_e.pdf
[<https://perma.cc/Y7Z6-DKHU>].

81. Agreement on Trade-related Investment Measure, Jan. 1, 1995, Art. 1, https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm [<https://perma.cc/MP7E-PM5P>] [hereinafter TRIMS Agreement].

82. *Id.* pmb1.

83. *Id.* art. 2.

84. *See infra* Part IV.

85. Agreement on Trade-Related Aspect of Intellectual Property Rights, effective Jan. 1, 1995, amended Jan. 23, 2017, Art. 68, https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [<https://perma.cc/YRC8-F6A7>] [hereinafter TRIPS Agreement].

86. Energy Charter Treaty (ECT), Apr. 16, 1998, 2080 U.N.T.S. 100 https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT-Positive_Annex_W.pdf [<https://perma.cc/CBA8-8T36>].

Unlike manufacturing, the liberalization of services requires a significant international push. In the context of its WTO membership, China is committed to the General Agreement on Trade in Services (“GATS”),⁸⁷ described as “the only multilateral agreement that covers investment.”⁸⁸ On the basis of GATS, China opened certain services to FDI. However, full market access was only agreed upon for twenty-six out of the 162 sectors listed by the WTO.⁸⁹ In four of these sectors foreign companies face additional requirements inapplicable to national investors.⁹⁰ In another seventy-one sectors, it is possible to invest, but with significant constraints, such as the requirement to form a joint venture with a local business.⁹¹ This amounts to rather modest market accessibility, particularly when compared to that which other members have agreed to.⁹² Moreover, while GATS normally imposes an unconditional obligation to guarantee WTO members’ service providers a most-favored nation (“MFN”) treatment,⁹³ China has not fully embraced this pledge.⁹⁴

Notably, upon joining the WTO, China committed to ensuring that its authorities would not condition the right of investment on

87. GATS: General Agreement on Trade in Services, effective Jan. 1, 1995, https://www.wto.org/english/docs_e/legal_e/26-gats.pdf [<https://perma.cc/4M4X-DA9N>]; WTO, PROTOCOL OF ACCESSION OF THE PEOPLE’S REPUBLIC OF CHINA WT/L/432 (Nov. 23, 2001). For China’s specific commitments, see WTO, THE PEOPLE’S REPUBLIC OF CHINA: SCHEDULE OF SPECIFIC COMMITMENTS GATS/SC/135 (Feb. 14, 2002) https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=71613,11725,21775,25776,34016&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HispanishRecord=True [<https://perma.cc/GM5S-JPME>].

88. Petros C. Mavroidis & André Sapir, *China and the World Trade Organisation: Towards a Better Fit*, BRUEGEL 8 (Jun. 11, 2019), https://www.bruegel.org/wp-content/uploads/2019/06/WP-2019-06-110619_.pdf [<https://perma.cc/NT2T-56ZA>]. The assertion remains true given the failure of the MAI. See OECD, *supra* note 71.

89. GATT Secretariat, *Services Sectoral Classification List*, GATT Doc. MTN.GNS/W/120 (July 10, 1991).

90. Uri Dadush & André Sapir, *Is the European Union’s Investment Agreement with China Underrated?*, BRUEGEL 6 (Mar. 2021) https://www.bruegel.org/wp-content/uploads/2021/04/PC-09-2021_.pdf [<https://perma.cc/Z2MB-H9S7>].

91. PROTOCOL OF ACCESSION, *supra* note 87; GATS, *supra* note 87.

92. Dadush & Sapir, *supra* note 90, at 6.

93. GATS, *supra* note 87, art. 2.

94. Stephen Ezell, *False Promises II: The Continuing Gap Between China’s WTO Commitments and Its Practices Information*, Tech. & Innovation Found. (July 26, 2021), <https://itif.org/publications/2021/07/26/false-promises-ii-continuing-gap-between-chinas-wto-commitments-and-its> [<https://perma.cc/58XB-Q9NT>].

the transfer technology to Chinese firms.⁹⁵ This pledge is particularly relevant in light of the claims frequently made by foreign investors that they are coerced to transfer their IP rights. This issue will be discussed at length in the assessment of the Chinese FDI legislation.⁹⁶

C. The Web of Bilateral and Plurilateral Agreements Establishing Investment Obligations

The most recent data available⁹⁷ suggest that China is party to 109 active Bilateral Investment Treaties (“BITs”)⁹⁸ and nineteen Treaties with Investment Provisions (“TIPs”).⁹⁹ The signatories to these include China’s own special administrative regions,¹⁰⁰ countries such as the United Kingdom, Turkey, Canada, and EU Member States,¹⁰¹ as well as extensive regions such as the Association of Southeast Asian Nations (“ASEAN”)¹⁰² and the Asia-

95. PROTOCOL OF ACCESSION, *supra* note 87, § 7(3).

96. *See infra* Part IV.

97. World Bank Group, *2019 Investment Policy and Regulatory Review: China* (2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/33600/China-2019-Investment-Policy-and-Regulatory-Review.pdf?sequence=1&isAllowed=y> [<https://perma.cc/4Y9B-ATZJ>].

98. A BIT is “an agreement between two countries which establishes a framework to promote and protect the investments made by investors from the respective countries into each other’s territory.” Christopher J Bailey & Flora Jones, *A Guide to International Investment Agreements*, ISDS PLATFORM (Jan. 25, 2017) <http://isds.bilaterals.org/?a-guide-to-international&lang=en> [<https://perma.cc/257Q-FJS9>].

99. TIPs are various kinds of “economic agreements other than BITs that include investment-related provisions.” Susan F Stone, *Investment Provisions in PTAs and How They Contribute to Inclusive Trade*, U.N. ECON. AND SOC. COMM’N FOR ASIA AND THE PAC., 5 (June 2017), <https://www.unescap.org/sites/default/files/5.1Investment%20provisions%20in%20PTAs%20and%20how%20they%20contribute%20to%20inclusive%20trade.pdf> [<https://perma.cc/4HZJ-NUDW>].

100. Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement, China-H.K., June 28, 2017, <https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html> [<https://perma.cc/LUZ8-EBJ5>].

101. The full list of China’s BITs is available on the UNCTAD’s website, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> [<https://perma.cc/ZJR8-LRC8>]. The TIPs can be found at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> [<https://perma.cc/WGC2-6JAT>].

102. ASEAN-China Investment Agreement, Jan. 1, 2010, <https://asean.org/storage/images/archive/22974.pdf> [<https://perma.cc/3JA9-2V2Q>].

Pacific.¹⁰³ IIAs are all individually drafted, and therefore contain tailored provisions responding to the priorities of each of the parties. However, there are meaningful commonalities present in the majority of these treaties. They usually guarantee reciprocal fairness and equity in the treatment of foreign investors; contain a right to compensation for expropriation; propel the free movement of capital linked to investment; lay down dispute settlement mechanisms; make assurances regarding MFN treatment; and specify the areas open to investment and which conditions (if any) apply to investment, as well as outline relevant exclusions.

1. The Failed Attempts to Strike an Investment Deal with the United States

In the list of BITs and TIPs China is party to,¹⁰⁴ the United States is conspicuously absent. Negotiations between China and the United States have taken place in fits and starts since 2008 but have never culminated in a deal. The most recent attempt took off in 2013 but ended abruptly when Donald Trump was elected president.¹⁰⁵ Instead, the United States has relied on the general WTO framework and ad hoc arrangements to protect American investors in China.¹⁰⁶

In January 2020, however, coinciding with the onset of the COVID-19 crisis, the Trump administration signed known as the US-China Phase One Agreement (“Phase One”).¹⁰⁷ Described as “a

103. Regional Comprehensive Economic Partnership (RCEP), signed Nov. 15, 2020, (not yet in force) <https://rcepsec.org/legal-text/> [<https://perma.cc/9B5A-UBFU>].

104. See *supra* notes 100-103.

105. Alicia García-Herrero, *The EU-China Investment Deal May Be Anachronic in a Bifurcating World*, BRUEGEL (Apr. 6, 2021), <https://www.bruegel.org/2021/04/the-eu-china-investment-deal-may-be-anachronic-in-a-bifurcating-world/> [<https://perma.cc/MC3W-FZSF>].

106. Chris Devonshire-Ellis, *Prospects for a 2020 US-China Bilateral Investment Treaty*, CHINA BRIEFING (Dec. 27, 2019), <https://www.china-briefing.com/news/prospects-2020-us-china-bilateral-investment-treaty/> [<https://perma.cc/EQ38-5M7J>].

107. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China (Phase One Agreement), U.S.-China, (adopted Jan. 15, 2020, in force Feb. 14, 2020), https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [<https://perma.cc/R42Q-U6WA>] [hereinafter Phase One Agreement].

temporary truce in [the parties'] 18-month trade war,"¹⁰⁸ Phase One contains a US commitment to lower, albeit modestly, some of the tariffs levied on imported Chinese products. In exchange, China agreed to purchase an additional US\$200 billion worth of US "manufactured goods, agricultural goods, energy products, and services" over the course of two years.¹⁰⁹ Phase One also outlines assurances concerning the protection of IP rights, including measures to combat the misappropriation of trade secrets (likely motivated by the Huawei saga),¹¹⁰ patent protection, and specific measures against counterfeit goods.¹¹¹ Importantly, there is an entire chapter devoted to forced technology transfers ("FTTs"), expressing concerns over these practices and stressing the "importance that the transfer of technology occurs on voluntary, market-based terms."¹¹² It includes a mutual commitment against procedures that require such transfers or pressure companies to grant them.¹¹³ Another significant development is the liberalization of China's financial services, which had previously been inaccessible for US investors.¹¹⁴ Finally, one of the key achievements for both the US and Chinese negotiators¹¹⁵ was the establishment of a detailed dispute resolution mechanism which

108. Bradsher, *supra* note 12.

109. Phase One Agreement, *supra* note 107, art. 6(2).

110. Huawei is currently being investigated for allegedly stealing trade secrets. Moreover, according to documents leaked by Edward Snowden to the *New York Times*, in 2007 the U.S. National Security Service (NSA), fearing links to the People's Liberation Army, would have spied on Huawei and accessed the source code of the company's goods. See U.S. Department of Justice Press Release, Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets (Feb. 13, 2020) <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-subsidiaries-charged-racketeering> [<https://perma.cc/U925-2MD4>]; Norman Pearlstine et al., *The War Against Huawei: Why the US is Trying to Destroy China's Most Successful Brand*, L.A. TIMES (Dec. 19, 2019), <https://www.latimes.com/projects/la-fg-huawei-timeline/> [<https://perma.cc/B8GY-RPDD>] (containing a full timeline of the steps taken against Huawei in the United States); David E. Sanger & Nicole Perlroth, *NSA Breached Chinese Servers Seen as Security Threat*, N.Y. TIMES (Mar. 22, 2014), <https://www.nytimes.com/2014/03/23/world/asia/nsa-breached-chinese-servers-seen-as-spy-peril.html> [<https://perma.cc/FF2M-WN88>]; Colin Hawes, *Why Is Huawei's Ownership so Strange? A Case Study of the Chinese Corporate and Socio-Political Ecosystem*, 21 J. OF CORP. L. STUD. 1 (2021).

111. Phase One Agreement, *supra* note 107, ch. 1.

112. *Id.* ch. 2.

113. *Id.* arts. 2(2) and (3).

114. *Id.* ch. 4.

115. US-CHINA BUSINESS COUNCIL, *supra* note 13, at 4.

created a high-level Trade Framework Group to discuss implementation particulars, and created a Bilateral Evaluation and Dispute Resolution Office in both countries to investigate specific complaints.¹¹⁶

The agreement is another example of a trade deal with some, albeit peripheral, implications for investment. When compared to the default WTO rules, the improvements are modest at best, but hopefully represent a first step toward a more far-reaching, investment-specific deal. In her confirmation hearings in March 2021, US Trade Representative Katherine Tai promised a “comprehensive review” of the Phase One commitments.¹¹⁷ However, no further progress has been announced, and hopes that the Biden administration would meaningfully slash the tariffs on Chinese goods have been frustrated.¹¹⁸

Some press reports also suggest that China has not been living up to its Phase One compromises.¹¹⁹ Indeed, figures from 2020 indicate that the nation purchased less than sixty percent of the promised additional US products,¹²⁰ and US Trade Secretary Tom Vilsack has acknowledged that China could be doing more in certain sectors.¹²¹ However, these data appear to be taken out of context. Vilsack was referring to punctual areas where there is still room for improvement, and has generally expressed satisfaction

116. Phase One Agreement, *supra* note 107, ch. 7.

117. Eric Martin, *Biden Trade Pick Tai Pledges to Ensure China Tariffs Appropriate*, BLOOMBERG (Mar. 1, 2021), <https://www.bloomberg.com/news/articles/2021-03-01/biden-trade-pick-tai-pledges-to-ensure-china-tariffs-appropriate> [<https://perma.cc/G562-E3EZ>].

118. Aime Williams, *Persistence of Donald Trump's China Tariffs Frustrates US Business*, FINANCIAL TIMES (Jun. 3, 2021), <https://www.ft.com/content/fb775a22-eea5-44b4-8643-16c3f40a5d02> [<https://perma.cc/B7YS-PWUC>].

119. See e.g., Yen Nee Lee, *China Failed to Buy Agreed Amounts of US Goods under “Phase One” Trade Deal, Data Shows*, CNBC (Jan. 22, 2021), <https://www.cnbc.com/2021/01/22/china-failed-to-buy-agreed-amounts-of-us-goods-in-phase-one-trade-deal-data.html> [<https://perma.cc/L8D8-NWAM>].

120. Chad P Brown, *US-China Phase One Tracker: China's Purchases of US Goods*, PETERSON INST. FOR INT'L ECON. (Apr. 25, 2020), <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods> [<https://perma.cc/6PHB-JQ4S>].

121. Kellan Heavican, *Vilsack Says China Not Meeting Phase One Trade Requirements*, BROWNFIELD AG NEWS FOR AMERICA (Mar. 26, 2021), <https://brownfieldagnews.com/news/vilsack-says-chinas-not-meeting-phase-one-trade-requirements/> [<https://perma.cc/VP3T-Z8RL>].

with China's compliance with Phase One.¹²² Importantly, the targets were set prior to the COVID-19 pandemic. The Phase One Agreement itself refers to "market conditions, particularly in the case of agricultural goods," as possibly dictating "the timing of purchases within any given year."¹²³ In light of the unprecedented crisis, it is understandable that flexibility might be required regarding the observance of the assurances given when the agreement was concluded.

2. The EU–China Comprehensive Agreement on Investment

In December 2020, after almost a decade of discussions, China and the European Union agreed on the terms of a draft EU–China Comprehensive Agreement on Investment ("CAI").¹²⁴ Its main purpose is to guarantee reciprocal terms for investors from one territory into the other, with enhanced legal certainty and transparency¹²⁵ so as to foster "a better climate to facilitate and develop trade and investment between the Parties."¹²⁶ The agreement constitutes an attempt to ensure that China becomes as open to FDI as the EU, particularly in services.¹²⁷ According to the European Commission, there will be "a greater level of market access for EU investors than ever before" if the agreement is ratified.¹²⁸ It outlines a specified list of activities, all within twelve main areas of investment, in which investors from China and the European Union will have access to: the business sector (including legal, medical, and computer services), communications

122. Thomas Franck & Kayla Tausche, *China Seems to be Living Up to Trade Deal Pledges, Biden's Agriculture Secretary Says*, CNBC (Feb. 25, 2021), <https://www.cnbc.com/2021/02/25/china-living-up-to-trade-deal-promises-bidens-agriculture-secretary-says.html> [<https://perma.cc/ZQ4Q-BHLX>].

123. Phase One Agreement, *supra* note 107, art. 6(2), ¶ 5.

124. Comprehensive Agreement on Investment, China-E.U., *agreement in principle* Dec. 30, 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> [<https://perma.cc/96EQ-VVBC>] [hereinafter CAI].

125. *Id.* Section II art. 3(b)(4) (covering transparency).

126. *Id.* § I. Moreover, the preamble states that the parties are "COMMITTED to building their economic relationship based on openness, reciprocity and mutual benefit, ensuring non-discrimination, a level playing field, transparency, and a predictable and rule-based investment environment." (emphasis in original). *Id.* pmbl.

127. See *supra* Section II.A.

128. *EU and China Reach Agreement in Principle on Investment*, EUR. COMM'N (Dec. 30, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233> [<https://perma.cc/QP8E-8ZPP>].

(encompassing telecoms, audiovisual, or even cinema services) construction and engineering, distribution, education (excluding national compulsory education and special education such as military training), environmental services, financial services, health and social services, tourism, sports, transport, and thirty manufacturing sectors.¹²⁹

From the EU perspective, the agreement would help eliminate enduring barriers to FDI. When compared to WTO commitments¹³⁰ and Chinese law obligations,¹³¹ the list of investment-friendly sectors entails an increase, albeit modest, in the areas accessible to European businesses. Moreover, the requirements that EU investors must comply with would be relaxed, as the agreement would remove barriers to entry including the requirements that investors enter into a joint venture with a Chinese company¹³² or share technology to qualify.¹³³ Of particular relevance is the pressure to ratify various International Labor Organization (“ILO”) conventions relating to forced labor.¹³⁴ China has displayed a willingness to abide by the high labor and environmental standards that the European Union usually requires when drafting trade agreements.¹³⁵ However, to date, no binding commitments have been made in this regard.

Competition concerns feature prominently in the CAI. In addition to tackling the controversy around FTTs, there is an attempt to level the playing field by addressing issues related to state-owned enterprises (“SOEs”).¹³⁶ Also referred to as “covered entities,” SOEs include companies in which the state has the power

129. CAI, *supra* note 124, annex III.

130. See *supra* Section II.A.

131. See *infra* Part III.

132. CAI, *supra* note 124, § II, art. 2(b).

133. *Id.* § II, art. 3. See discussion *infra* Part III.

134. CAI, *supra* note 124, § IV.1, art. 1 and 4.

135. CAI, *supra* note 124, § IV deals with investment and sustainable development; see also Lise Johnson et al., *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. OF TRANSNAT’L L. 58 (2019) (highlighting the importance of FDI for sustainable development).

136. See William E. Kovacic, *Competition Policy and State-Owned Enterprises in China*, 16 WORLD TRADE REV. 693 (2017) (discussing competition concerns spurred by SOEs); Justin Yifu Lin et al., *Competition, Policy Burdens, a State-Owned Enterprise Reform*, 88 AMERICAN ECON. REV. 422 (1998); Angela Huyue Zhang, *The Antitrust Paradox of China, Inc.*, 50 INT’L L. AND POL. 159 (2017); Jochem de Kok, *Chinese SOEs Under EU Competition Law*, 40 WORLD COMPETITION: L. AND ECON. REV. 583 (2017).

to appoint directors or control the decision-making process, and those operated by any level of government.¹³⁷ To ensure non-discrimination, SOEs will “act in accordance with commercial considerations in their purchases or sales of goods or services,” and there is a mutual commitment to grant equal treatment to investors from the other party and national enterprises.¹³⁸ In the event that there is doubt as to whether these obligations are being fulfilled, investors can file an information request about the relevant commercial activities, and a dispute resolution procedure may be triggered if the situation escalates further.¹³⁹

Another important step toward the effective protection of competition is the possibility to exert control over the subsidies granted to national firms, including SOEs, that can provide an unfair advantage in the marketplace. The parties to the CAI commit to announcing “on a publicly accessible website the objective, legal basis, form, amount or amount budgeted for, and recipient” of any relevant funding.¹⁴⁰ Beyond the CAI, the European Union is positioned to take separate regulatory steps in this regard. In May 2021, the European Commission published a draft regulation to address the distortions caused by foreign subsidies in the single market.¹⁴¹ If adopted, this regulation will give the European Commission the power to “investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic activity in the European Union and redress their distortive effects.”¹⁴²

The CAI has been attacked on multiple fronts.¹⁴³ The main criticisms relate to the high cost the European Union may shoulder

137. CAI, *supra* note 124, § II art. 3.

138. *Id.*

139. *Id.*

140. CAI, *supra* note 124, § III, art. 8.

141. *Commission Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market*, COM(2021) 223 final (May 5, 2021)

https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf [<https://perma.cc/B3TN-DE53>].

142. European Commission Press Release, *Commission Proposes New Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market*, IP/21/1982 (May 5, 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982 [<https://perma.cc/KAE7-PGJJ>].

143. García-Herrero, *supra* note 105 (claiming that in current times “European countries will find it much harder to profit from this deal”, and that the EU “has concluded

for relatively modest concessions.¹⁴⁴ While most of the agreement's gains have already been secured through WTO commitments and/or bilateral investment agreements between China and individual EU Member States, the move could be interpreted as an affront by the United States, who is keen to work together with the European Union on a common China strategy. In December 2020, then-President-elect Joe Biden's National Security Advisor, Jake Sullivan, retweeted a post about the CAI, saying that the incoming Biden administration "would welcome early consultations with our European partners on our common concerns about China's economic practices."¹⁴⁵ There are also reservations about the message the European Union is sending out by entering into a deal with China in the same year that the latter is said to have "crushed the freedom of Hong Kong, intensified oppression in Xinjiang, killed Indian troops, threatened Taiwan and sanctioned Australia."¹⁴⁶ Skeptics further point out that the commitments made by China with regard to subsidies, sustainable development, or labor standards may be illusory if the country does not in fact live up to its international treaty obligations.¹⁴⁷

These criticisms might not be entirely justified. China is currently the European Union's largest trading partner.¹⁴⁸ It is therefore unsurprising that the European Union would be eager to

a deal which could soon become anachronistic in the era of economic bifurcation"); Carafano, et al., *supra* note 18; Jack Ewing & Steve Lee Myers, *China and EU Leaders Strike Investment Deal, But Political Hurdles Await*, N.Y. TIMES (Dec. 30, 2020) <https://www.nytimes.com/2020/12/30/business/china-eu-investment-deal.html> [<https://perma.cc/Q3UT-PQBK>]; Mark Konstantinidis, *The EU-China Comprehensive Agreement on Investment: A Tale of Sound and Fury*, EJIL: TALK! (Feb. 9, 2021) <https://www.ejiltalk.org/the-eu-china-comprehensive-agreement-on-investment-a-tale-of-sound-and-fury/> [<https://perma.cc/N497-GAE6>] (arguing that "the CAI's substantive provisions do not, on their own, seem sufficient to foster a radically closer economic relationship between the EU and China"); Gideon Rachman, *Europe Has Handed China a Strategic Victory*, FIN. TIMES (Jan. 4, 2021), <https://www.ft.com/content/2d759671-0b1d-4587-ba63-7480990f0438> [<https://perma.cc/N46C-XQAB>].

144. Rachman, *supra* note 143.

145. Jake Sullivan (@jakejsullivan), TWITTER (Dec. 22, 2020), <https://twitter.com/jakejsullivan/status/1341180109118726144?lang=en> [<https://perma.cc/ALV8-Y7H3>].

146. Rachman, *supra* note 143.

147. *Id.* See also Markus Krajewski, *Dancing with the Dragon: The New EU-China Investment Agreement*, VERFASSUNGSBLOG (Jan. 5, 2021) <https://verfassungsblog.de/dancing-with-the-dragon/> [<https://perma.cc/TA3W-6BWQ>].

148. *China Overtakes US as EU's Biggest Trading Partner*, BBC NEWS (Feb. 17, 2021) <https://www.bbc.com/news/business-56093378> [<https://perma.cc/58Y9-G4NT>].

adopt a clear set of rules to secure legal certainty for its investors in the nation. It is worth noting that the United States was discussing a similar investment agreement with China when the European Union began considering the CAI.¹⁴⁹ Bilateral cooperation is standard practice, and need not substitute common EU-US initiatives. Rather, the former could complement the latter, and address the minutiae that would not be pertinent in a more broadly construed joint action plan. While the gains may be small, even baby steps toward widening the scope of investment, removing the most onerous investment conditions, and making preliminary assurances in regard to leveling the playing field for investors, protecting the environment, or improving labor standards, are significant. The fact that China has been open to making commitments in these areas is an encouraging sign that, moving forward, the government intends to address these lingering concerns.

Regrettably, the ongoing political frictions may well be the Achilles' heel of the CAI. Amid a deteriorating relationship between the parties,¹⁵⁰ the European Parliament adopted a resolution to put the deal on hold.¹⁵¹ For the time being, therefore, it is politically untenable for the European Union to ratify the agreement, leaving the CAI unenforceable.

IV. THE NEW CHINESE FOREIGN INVESTMENT LAW

In light of the potentially insurmountable obstacles that international initiatives face in nurturing cross-border investment, appropriate national rules for FDI are necessary. Foreign investors in China can now benefit from a fresh, more welcoming regulatory

149. See *supra* Section III.C.1.

150. Scilla Alecci, *EU, US, Canada and UK Sanction Chinese Officials for Human Rights Violations in Xinjiang*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 22, 2021), <https://www.icij.org/investigations/china-cables/eu-us-canada-and-uk-sanction-chinese-officials-for-human-rights-violations-in-xinjiang/> [https://perma.cc/38MM-QNUK]; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel* (Mar. 22, 2021), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1863106.shtml [https://perma.cc/QYX4-7JTJ].

151. Joint Motion for a Resolution on Chinese Countersanctions on EU Entities and MEPs and MPs, EUR. PARL. DOC. (RSP 2644) (2021), https://www.europarl.europa.eu/doceo/document/RC-9-2021-0269_EN.html [https://perma.cc/HP8L-MQ6T].

framework thanks to China's new Foreign Investment Law. The FIL entered into force in a pre-COVID-19 world, on January 1, 2020.¹⁵² It is accompanied by Implementing Regulations,¹⁵³ and replaces various pieces of legislation.¹⁵⁴ As a result, the FIL unifies the legal framework for foreign investment—defined as “investment activities in Mainland China conducted directly or indirectly by natural persons, enterprises, or other organizations of foreign countries”—as well as foreign-invested companies, or “enterprises that, in accordance with Chinese law, are established in Mainland China after being registered and that are wholly or partially invested by foreign investors.”¹⁵⁵

A. Legal Landscape Pre-FIL

Prior to the introduction of the FIL, the relevant legislation was remarkably formalistic and challenging to navigate.¹⁵⁶ Non-Chinese businesses faced strict structural, corporate governance, and management requirements, and foreign ownership ratios of

152. FIL, *supra* note 7.

153. [REGULATION ON THE IMPLEMENTATION OF THE FOREIGN INVESTMENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (promulgated by the 74th Executive Meeting of the State Council, Dec. 12, 2019, effective Jan. 1, 2020), *translated in Regulation on the Implementation of the Foreign Investment Law of the People's Republic of China*, SHANGHAI MUNICIPAL PEOPLE'S GOVERNMENT, https://www.shanghai.gov.cn/nw48709/20200826/0001-48709_127901.html [<https://perma.cc/7P85-X3QQ>] [hereinafter IMPLEMENTING REGULATIONS].

154. Three main pieces of legislation were replaced by the FIL: (中华人民共和国中外合资经营企业法) [LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON CHINESE-FOREIGN EQUITY JOINT VENTURES] (promulgated July 1, 1979, effective July 8, 1979, last amended Oct. 1, 2016)

<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045777.shtml> [<https://perma.cc/ZDN8-QUGB>]; (中华人民共和国中外合作经营企业法) [LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON SINO-FOREIGN COOPERATIVE JOINT VENTURES] (promulgated Apr. 13, 1988, last amended Oct. 1, 2016) <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100065891.shtml> [<https://perma.cc/ET7S-2AKH>]; *see also* (中华人民共和国外资企业法) [LAW ON WHOLLY FOREIGN-OWNED ENTERPRISES] (promulgated Apr. 12, 1986, last amended Oct. 1, 2016)

<http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100062858.html> [<https://perma.cc/TC2S-FKHW>].

155. FIL, *supra* note 7, art. 2.

156. For a full account of the prior legislative framework, see JIANGYU WANG, *COMPANY LAW IN CHINA: REGULATION OF BUSINESS ORGANIZATIONS IN A SOCIALIST MARKET ECONOMY* (2014).

national companies were capped.¹⁵⁷ The deficiencies in the legal framework were perceived as an obstacle to the Chinese government's vision of a new era of socialism with Chinese characteristics.¹⁵⁸ One of the pillars of the plan, known as the Four Comprehensives,¹⁵⁹ is to build "a moderately prosperous society in all respects,"¹⁶⁰ an objective that could be jeopardized if foreign capital nosedives.¹⁶¹ While the substantial profits that can be reaped in Chinese markets suffice to incite foreign interest, the old rules could certainly deter some companies and/or prevent successful entry of others.

B. Main Changes in the New Legislation

1. General Aspects

There is no question that the new Chinese FIL aims to facilitate inward FDI. Article 1 explicitly refers to "opening-up" to and "actively promot[ing]" overseas investment, by protecting investors' rights and standardizing the relevant rules, among other reforms.¹⁶² There is also a promise that the state will implement a "policy of liberalizing and facilitating investment at a high level," guaranteeing "mechanisms for promoting investment," and fostering "a market environment of stability, transparency, predictability, and fair competition."¹⁶³ The scope of application is also wider than that of the previous laws, covering both direct and

157. For a comprehensive explanation of the previous legislative framework, see Yawen Zheng, *China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals*, 22 J. OF WORLD INV. & TRADE 388 (2021).

158. (习近平新时代中国特色社会主义思想) [Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era] (incorporated into the Constitution of the Chinese Communist Party (CCP) in Oct. 2017).

159. *China's Xi Jinping Unveils New "Four Comprehensives" Slogan*, BBC NEWS (Feb. 25, 2015) <https://www.bbc.com/news/world-asia-china-31622571> [https://perma.cc/7Q2F-C8JH].

160. See generally XI JINPING: THE GOVERNANCE OF CHINA, <http://www.npc.gov.cn/englishnpc/xjptgoc/xjptgoc.shtml> [https://perma.cc/2FD2-BVH3].

161. April A. Herlevi, *China's New Foreign Investment Law: Quick Passage After a Long Wait*, 19 CHINA BRIEF 9 (2019), <https://jamestown.org/wp-content/uploads/2019/03/Read-the-03-22-2019-CB-Issue-in-PDF-1.pdf?x31108> [https://perma.cc/8TLS-L657].

162. FIL, *supra* note 7, art 1.

163. *Id.* art. 3.

indirect investment, including the development and establishment of foreign subsidiaries in China.¹⁶⁴

The general principle established for the treatment of foreign investors is that it will be “no less favorable than that afforded to Chinese domestic investors and their investments,”¹⁶⁵ with the exception of the sectors included on a “negative list” in which FDI is either explicitly prohibited or is restricted by an access application.¹⁶⁶ This list is updated annually, and has been progressively shrinking.¹⁶⁷ The FIL specifies that equal treatment extends to state support,¹⁶⁸ procurement processes “through fair competition,”¹⁶⁹ and market access.¹⁷⁰ The Implementing Regulations go further, calling for equity in “government funding arrangements, land supply, tax and fee reduction and exemption, qualification licensing, development of standards, project applications, and human resource policies.”¹⁷¹ Moreover, there is also a list of areas where investment is encouraged by granting foreign businesses preferential treatment¹⁷² “[a]s needed for national economic and social development.”¹⁷³ Feedback from foreign investors will be sought when developing rules affecting their rights and obligations.¹⁷⁴ They will be freely allowed to move capital and profits in and out of China in any currency.¹⁷⁵

2. Intellectual Property Protection and the Issue of Forced Technology Transfers

Like most of China’s recently negotiated international treaties,¹⁷⁶ the FIL pays special attention to the protection of the IP

164. *Id.* art. 2.

165. *Id.* art. 4.

166. *Id.*; MARKET ACCESS NEGATIVE LIST 2020 https://www.ndrc.gov.cn/xxgk/zcfb/ghxwj/202012/t20201216_1252897_ext.html [<https://perma.cc/NE65-TATQ>].

167. MARKET ACCESS NEGATIVE LIST 2020, *supra* note 155.

168. FIL, *supra* note 7, art. 9.

169. *Id.*, art. 16.

170. *Id.*, art. 24.

171. IMPLEMENTING REGULATIONS, *supra* note 153, art. 6.

172. FIL, *supra* note 7, art. 14.

173. IMPLEMENTING REGULATIONS, *supra* note 153, art. 11.

174. FIL, *supra* note 7, art. 10; IMPLEMENTING REGULATIONS, *supra* note 153, art. 7.

175. FIL, *supra* note 7, art. 21; IMPLEMENTING REGULATIONS, *supra* note 153, arts. 22 and 37.

176. *See supra* Section II.C.

rights of foreign investors and tackles FTTs.¹⁷⁷ In general terms, there is a compromise from the State to:

strengthen the punishment for intellectual property right infringements, continuously enhance the enforcement of intellectual property rights, promote the establishment of a rapid collaborative protection mechanism for intellectual property rights, improve the diversified settlement mechanism for intellectual property disputes, and equally protect intellectual property rights of foreign investors and foreign-invested enterprises.¹⁷⁸

Under the FIL administrative bodies and their employees are precluded from coercing FTTs,¹⁷⁹ and pledge to punish those who pressure foreign investors for FTTs.¹⁸⁰ Prior to the FIL, there was some dispute as to whether Chinese law compelled overseas businesses to share their technology in order to invest in China.¹⁸¹ These reports stemmed from the 2001 Regulation on the Administration of Import and Export Technology, which encouraged imports of technology¹⁸² consistent with “the protection of the economic and technological rights and interests of China.”¹⁸³ The 2001 Regulation made registration certificates from the MOFCOM necessary for the processing of relevant contracts “through the formalities at the authorities of foreign exchange, banking, taxation and customs.”¹⁸⁴

According to Weihuan Zhou, an Associate Professor at University of New South Wales Sydney,¹⁸⁵ these rules do not

177. FIL, *supra* note 7, arts 21–22; IMPLEMENTING REGULATIONS, *supra* note 153, arts. 22–23.

178. IMPLEMENTING REGULATIONS, *supra* note 153, art. 23.

179. FIL, *supra* note 7, art. 22; IMPLEMENTING REGULATIONS, *supra* note 153, art. 24.

180. IMPLEMENTING REGULATIONS, *supra* note 153, art. 43.

181. *See supra* Part I.

182. REGULATION ON THE ADMINISTRATION OF IMPORT AND EXPORT TECHNOLOGIES (中华人民共和国技术进出口管理条例) (promulgated Dec. 10, 2001, effective Jan. 1, 2002) art. 7. An English translation can be found at <http://mg.mofcom.gov.cn/article/policy/201910/20191002904839.shtml> [<https://perma.cc/UBT8-SMVW>].

183. *Id.* art. 4.

184. *Id.* art. 20. *See also id.* art. 22 (stating that when technology is imported from abroad “the contract of import of technologies shall be reviewed or registered in accordance with the procedure for approval of the establishment of foreign-invested enterprises”).

185. Associate Professor Weihuan Zhou, UNSW SYDNEY, <https://www.unsw.edu.au/staff/weihuan-zhou> [<https://perma.cc/DYN5-8ZBU>].

actually amount to a legal mandate to transfer technology.¹⁸⁶ Similarly, the laws replaced by the FIL referred to the possibility of foreign businesses using technology as a form of capital contribution, but did formalize an obligation to transfer such technology.¹⁸⁷ In this light, the word “forced” does not make economic sense, as “American and European companies do not have to invest in China; if they choose to do so, knowing that it will require them to share their technology, it is because they still expect to make a profit.”¹⁸⁸

The crux of the matter, therefore, does not appear to be a genuine legal obligation to transfer technology. Further, it is questionable whether *de facto* FTT pressure comes from the Chinese administration. Rather, the need to form a joint venture with a local company, or the caps on foreign ownership, would place Chinese businesses in a privileged position to pressure overseas investors to compete for their partnership, thus giving them the power to require know-how access.¹⁸⁹ This perspective raises doubt about the effectiveness of a law that punishes administrative bodies, rather than private firms, for forcing investors to transfer their know-how. As a consequence, the FIL pledge might not address the real problem. A more effective approach would extend the prohibition of FTTs (and the relevant punishment) to the wider Chinese business community.

3. Obligations for Foreign Investors

The facilitation of overseas investment inevitably accompanied the implementation of a thorough scrutiny process to alleviate potential national security concerns. Controlling FDI through regulation is not unique to China. Around the world, the rising tide of overseas capital has caused certain angst over national security concerns, and many countries have introduced legislation to scrutinize the relevant transactions.¹⁹⁰ In China,

186. ZHOU, *supra* note 15, at 136.

187. *Id.* at 137.

188. Gros, *supra* note 17.

189. See Alan O. Skyes, *The Law and Economics of “Forced” Technology Transfer and Its Implications for Trade and Investment Policy*, 13 J. OF LEGAL ANALYSIS 127 (2021). See also ZHOU, *supra* note 15, at 137 (noting that technology transfers could be “an outcome of private negotiations between [joint venture] parties”).

190. European Commission Regulation 2019/452, *supra* note 42.

Article 32 of the FIL mentions possible inspections “by the relevant competent departments.”¹⁹¹ Article 35 refers to establishing a review system for an investment that might pose such a threat,¹⁹² while Article 34 imposes an obligation to provide investment information to the authorities.¹⁹³

In January 2021, new Foreign Investment Security Review Measures came into effect,¹⁹⁴ fleshing out the review system mentioned in Article 35 of the FIL.¹⁹⁵ The measures contain an obligation to proactively report investment in certain sectors, including arms, agriculture, and energy.¹⁹⁶ If the parties fail to comply, they may be compelled to do so by a given deadline, after which the State may order the disposal of the equity interest or assets acquired, or reverse the transaction altogether.¹⁹⁷ Filings for national security review are to be scrutinized by a Working Office with members of the National Development and Reform Commission (“NDRC”) and the MOFCOM.¹⁹⁸ Three stages of review are contemplated: first, a fifteen business day deadline to decide whether a review will be conducted;¹⁹⁹ second, if required, a general review of an additional thirty days;²⁰⁰ third, if the investment has not been approved by the end of this period, then an in-depth review lasting up to sixty business days (with the possibility of extension) may take place.²⁰¹

If FDI occurs in a prohibited industry, or the parties fail to comply with the relevant legal requirements, the authorities may

191. FIL, *supra* note 7, art 32.

192. FIL, *supra* note 7, art 35.

193. FIL, *supra* note 7, art 34.

194. (外商投资安全审查办法) [MEASURES FOR THE SECURITY REVIEW OF FOREIGN INVESTMENTS] (promulgated by the National Development and Reform Commission and the Ministry of Commerce, Dec. 27, 2020, effective Jan. 18, 2021) <https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202012/P020201219582032130362.pdf> [<https://perma.cc/87H2-PMTJ>], translated in Measures for Security Review of Foreign Investments, BAKER & MCKENZIE (2020) https://www.bakermckenzie.com/-/media/files/insight/publications/2021/01/foreign_investment_security_review_measures.pdf?la=en [<https://perma.cc/E959-EATK>] [hereinafter MEASURES FOR SECURITY REVIEW].

195. FIL, *supra* note 7, art 35.

196. MEASURES FOR SECURITY REVIEW, *supra* note 194, art. 4.

197. *Id.* art. 16.

198. *Id.* art. 3.

199. *Id.* art. 7.

200. *Id.* art. 8.

201. *Id.* art. 9.

additionally sanction the foreign companies under the FIL and other laws.²⁰² Under the new legislation, overseas investors are subject to the same legislation as domestic firms, meaning they have all the rights and obligations recognized in the Chinese legal system.²⁰³

*V. CRITICAL ASSESSMENT: ASPIRATIONS, LIMITATIONS, AND
WIDER IMPLICATIONS*

Having explored the most relevant angles of the current legal framework for FDI in China, the task here is to critically discuss the new developments and their repercussions. It should be noted that, based on the findings put forward in Part I, there does not seem to be sufficient evidence to support the claim that the merger review process established in the AML is employed as a tool to exert control over incoming FDI.²⁰⁴ Therefore, the commentary focuses on international law developments and the FIL.

Following the 2019 reforms, China now possesses a better structured, more comprehensive set of rules for incoming FDI, resembling those of other WTO members.²⁰⁵ As outlined above, the new regime is grounded upon three pillars: greater investment possibilities, increased legal protection for investors, and rigorous scrutiny of national security concerns.²⁰⁶ Still, questions remain as to how supervisory powers will be exercised in practice, how the inspections mentioned in Article 32 of the FIL might be implemented, and how and when to apply for permission to invest in sectors still requiring prior approval.²⁰⁷ Moreover, the rules do little to clarify the division of competences and cooperation requirements between the various bodies involved in FDI screening.²⁰⁸

The concern that these improvements might be undermined if inadequately implemented looms large. Commentators have expressed concerns that, given the unilateral nature of the FIL, it

202. FIL, *supra* note 7, arts. 36-39.

203. FIL, *supra* note 7, arts. 31-33.

204. *See supra* Part I.

205. *See supra* Section III.A-B.

206. *See supra* Part III.

207. *See Zheng, supra* note 157, at 410-13.

208. *Id.* at 416-17.

could potentially “be revoked at the stroke of a pen.”²⁰⁹ Additionally, the law refers to the “healthy development of the socialist market economy” among its objectives,²¹⁰ raising doubts as to how this provision might be interpreted when enforcers chisel out the specifics of the revamped approach. However, this wariness may be misguided. There is little reason to doubt the government’s genuine intention to facilitate FDI. The amendments are not altruistic. As a developing country,²¹¹ China’s leadership is acutely aware that amassing capital is fundamental to ensure economic growth, and studies suggest that incoming FDI has had a favorable effect on the Chinese economy.²¹² In this context, complicating the path to investment runs counter to China’s own interests. The new rules only further attempt to boost the positive effects of FDI for the country. For example, the list of industries in which investment is not only allowed but even encouraged can be seen as an attempt to channel foreign capital into “state-defined priorities.”²¹³

The condemnation of FTTs in the new legislation is a particularly welcome development, through which China can convey to investors that it is aware of their concerns and intends

209. Dadush & Sapir, *supra* note 90.

210. FIL, *supra* note 7, art. 1.

211. Despite being one of the largest economies in the world, China is listed as a developing country in the context of the WTO (a classification accepted by Beijing), based on its Human Development Index (HDI) and gross domestic product (GDP) per capita. The WTO’s definition of developing countries can be found at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [<https://perma.cc/JD2G-KJDP>].

212. See *Foreign Direct Investment—The China Story*, THE WORLD BANK (Jul. 16, 2020) <https://www.worldbank.org/en/news/feature/2010/07/16/foreign-direct-investment-china-story> [<https://perma.cc/3VTZ-HPUC>]; Zheng, *supra* note 157 (pointing out that “at least 40% of China’s total import and export value and an average of about 18% of national tax revenue are contributed by foreign-invested enterprises each year”); Justin Yifu Lin & Jun Zhang, *China: Learning to Catch Up in a Globalized World*, in HOW NATIONS LEARN: TECHNOLOGICAL LEARNING, INDUSTRIAL POLICY, AND CATCH-UP (Arkebe Oqubay & Kenich Ohno eds., 2019); Sajid Anwar & Sizhong Sun, *FDI and Market Entry/Exit: Evidence from China*, 23 J. OF ASIAN ECON. 487 (2012); Shujie Yao, *On Economic Growth, FDI and Exports in China*, 38 APPLIED ECONOMICS, 339 (2006); see also Albert G.Z. Hu & Gary H. Jefferson, *FDI Impact and Spillover: Evidence from China’s Electronic and Textile Industries*, 25 WORLD ECONOMY 1063 (2002). This is an older empirical study suggesting that while short-term benefits would be absent, in the long term they would indeed materialize. *But see* Min Ye, *Policy Learning or Diffusion: How China Opened to Foreign Direct Investment*, 9 J. OF EAST ASIAN STUDIES 399 (2009).

213. ATUL KOHLI, *STATE-DIRECTED DEVELOPMENT: POLITICAL POWER AND INDUSTRIALIZATION IN THE GLOBAL PERIPHERY* (2004), at 382.

to act. It is also a clear nod to the WTO that it is complying with its membership commitments.²¹⁴ Nonetheless, the pressure local companies might exert on potential investors to be granted access to their technology remains unaddressed. Since technology transfer “remains fundamental for China’s transformation to an innovative economy,”²¹⁵ the legislature appears to have been reluctant to completely outlaw a practice that is ultimately beneficial for the country. Crucially, the practice may be waning. China’s expenditure in research and development has grown exponentially over the course of this century: it has already overtaken the European Union and is currently on the heels of the United States.²¹⁶ According to a 2020 survey of US companies operating in China, only thirteen percent of those surveyed had been asked to transfer their technology when negotiating with local firms.²¹⁷

Recently, doubts have been cast regarding China’s FDI openness moving forward. In May 2020, President Xi Jinping announced plans to adopt a “dual circulation” strategy.²¹⁸ The move, conceived amid a deteriorating relationship with the United States, aims to bolster the national economy, without closing the country off from the rest of the world. In this context, it is expected that in the coming years China “will focus more on building a stronger domestic market and pay[] more attention to quality and efficiency instead of extensive expansion in attracting foreign capital, or making investments in other countries.”²¹⁹ At this point in time, the potential impact of dual circulation on FDI is unclear. So far, most of the efforts appear to be devoted to targeting inequality in an effort to increase consumption, focusing

214. See *supra* Section II.B.

215. ZHOU, *supra* note 15, at 138.

216. Beethika Khan et al., *The State of US Science and Engineering 2020*, NATIONAL SCIENCE BOARD (Jan. 2020), <https://ncses.nsf.gov/pubs/nsb20201> [<https://perma.cc/7XVG-QHQB>].

217. See US-CHINA BUSINESS COUNCIL, *supra* note 13.

218. *China’s “Dual-Circulation” Strategy Means Relying Less on Foreigners*, ECONOMIST (Nov. 5, 2020), <https://www.economist.com/china/2020/11/05/chinas-dual-circulation-strategy-means-relying-less-on-foreigners> [<https://perma.cc/T4U7-P577>]; Kevin Yao, *What We Know About China’s “Dual Circulation” Strategy*, REUTERS (Sep. 15, 2020), <https://www.reuters.com/article/china-economy-transformation-explainer-idUSKBN2600B5> [<https://perma.cc/673C-UYN7>].

219. Jing Fang et al., *On the Global COVID-19 Pandemic and China’s FDI*, 74 J. OF ASIAN ECON. 1, 2 (2021).

production on internal demand rather than exports, and achieving technological independence by investing in innovation.²²⁰ In light of these efforts, it appears that the trend to remove rather than erect barriers to foreign investment is not immediately threatened.

One clear way to address the doubts regarding adequate implementation due to the unilateral nature of the FIL would be to get China to commit via international agreements, through the assumption of reciprocal obligations. Yet, in the current climate, this is an unlikely prospect. Despite the efforts of the past years, the European Union and the United States have prioritized taking a stance against China's controversial handling of internal and external affairs over the protection of their investors. From this perspective, the FIL can be interpreted as an attempt by China to fill gaps left by the breakdown in international negotiations to ensure FDI continues to flow into the country, and to demonstrate that it will not be intimidated by the failure of negotiations. IIAs are no longer as urgent as they were relevant prior to the amendments introduced by the FIL, even though the former may offer superior compliance guarantees, and the latter squanders the opportunity to exert pressure on China to accept international environmental and labor commitments.

VI. CONCLUSION

In a post COVID-19 world, China's leading position in the FDI ranking looks set to remain unchallenged. China's economy has been less battered than others, and it has managed to maintain a "large-scale domestic market, medium to high level per capita wealth as well as long and complete industrial and supply chains."²²¹ The commitment to curb inequality, if adequately implemented, would mean a larger middle class with increased purchasing power, and even more profitable markets. Furthermore, the country has gone to great lengths to remove regulatory constraints to investment by reforming its national

220. Frank Tang, *What Is China's Dual Circulation Economic Strategy and Why Is It Important?*, SOUTH CHINA MORNING POST (Nov. 19, 2020), <https://www.scmp.com/economy/china-economy/article/3110184/what-chinas-dual-circulation-economic-strategy-and-why-it> [https://perma.cc/ZL8N-JWLS].

221. Fang et al., *supra* note 219, at 15.

legislation, striking bilateral deals, and developing a merger control policy largely consistent with international practice.

The prospect of new bilateral investment commitments prospering is slim in light of the existing political climate. News questioning China's respect of human rights and individual freedoms weighs heavily on negotiations. Meanwhile, China decries slander and requests non-interference with its affairs, indicating the divergence of perceptions between the nation and the West.²²² As tensions continue to escalate, there is little hope of improvement in sight. Silvia Fernández de Marucci, Executive Manager and Official Spokesperson of the Panama Canal Authority, once said that China is not going to stop being China, and it is unlikely that the government will alter its tactics to appease critics.²²³ Instead, China has taken steps unilaterally to induce FDI. The FIL attains roughly the same level of liberalization as recently negotiated international agreements, and merger review developments indicate that the contentious *Coca-Cola/Huiyuan* decision did not mark the onset of a crusade against foreign investment in popular national brands.

Beyond the blackletter law, mutually antagonistic perceptions have the potential to hinder FDI prospects. Often unsubstantiated and speculative, they may frighten investors rather than encourage them to carefully monitor the markets they seek to enter or study the local customs they must become familiar with. Critical scholarship is undoubtedly fundamental, but it is most valuable when it is as rigorous as can be in at least two respects. First, before jumping to conclusions, scholarship should explore alternative explanations for the developments in discussion (including those that might not fit into conventional narratives). Second, it must consider context-specific nuances and needs, and assess those developments from that perspective as well as one's own viewpoint.

Overcoming this "noise," thereby boosting the effectiveness of the new legal landscape, is crucial, and requires determination from both foreign investors and Chinese authorities. Instead of

222. *China Denounces G7 After Statement on Xinjiang and Hong Kong*, BBC NEWS (June 14, 2021), <https://www.bbc.com/news/world-asia-china-57466576> [<https://perma.cc/9282-LY5W>].

223. *QuickHit: China is Not Going to Stop Being China*, YOUTUBE (Aug. 10, 2020) <https://www.youtube.com/watch?v=1sF-ji1NNQU> [<https://perma.cc/JZ9X-743X>].

fretting over the genuine extent of reforms, investors should focus on adequately preparing for first time investment in China's markets. Simultaneously, greater transparency and consistency from the Chinese establishment, as well as a willingness and consideration to join international environmental and labor agreements, would go a long way in reinforcing trust and overturning fixed misperceptions.

