Introduction

The EU and China launched negotiation for a comprehensive agreement on investment (CAI) in November 2013. There have been six rounds of negotiations (as of August 2015) and officials hope there will be an agreement in 2016. The CAI will be the EU’s most important investment agreement since foreign direct investment (FDI) became its exclusive competence under the Lisbon Treaty in 2009.

Once it enters into force, the new agreement will replace the existing bilateral investment treaties between China and EU member states. The CAI negotiations are embedded in the wider framework of EU-China relations which includes the annual summits, high level dialogues on foreign and security policy, economic and trade policy and people to people contacts.

At the 17th EU-China summit in Brussels on 29 June both sides agreed on an impressive list of priorities for the coming year with connectivity, infrastructure financing and innovation at the top of the list. Both sides agreed to discuss links between the Juncker Plan and China’s ‘One Belt One Road’ initiative.

EU and Chinese leaders emphasised at the summit that they wanted to conclude an ambitious and comprehensive CAI that would include investment protection, market access, and other elements further facilitating trade and investment. They agreed that a joint text should be ready by the end of 2015. Cooperation on the protection of intellectual property was also further strengthened by the signing of a MoU on reinforcing the bilateral IP dialogue mechanism.

Why now?

Why did the two sides agree to negotiate a CAI? Despite the one billion euros in daily trade between the EU and China (as much as in the whole year of 1975 when diplomatic relations were established) the respective FDI totals are low. China accounts for less than 5% of global European FDI while Chinese FDI in Europe is less than 3% of the total. Both partners have suffered reduced growth and hope that a comprehensive CAI will give a boost to two-way FDI and help their respective economies.

Apart from the expected economic benefits, the CAI is considered a stepping-stone for a future free trade agreement between the EU and China. The CAI will then fit into the mosaic of FTAs and investment agreements that are being negotiated between the world’s major players eg. TPP, TTIP, and the US-China investment agreement.
A CAI should alleviate and hopefully resolve most trade problems between the EU and China. The EU Chamber of Commerce in Beijing has noted that barriers to European investors in China exist at all levels and in different forms. Problems such as obligations to set up joint ventures with local partners, mandatory transfer of technology and local content requirements negatively accentuate the lack of a predictable and secure economic environment affecting existing and prospective investors. Similarly, China hopes that the CAI will reduce what they view as increasing protectionist sentiment against Chinese investment in Europe.

Contents of the CAI

The CAI is expected to improve the legal certainty for investors by expanding the existing standards of investment protection and reducing barriers for investors. The overall result should be to increase the flow of FDI between them. Some key principles have already been outlined by both sides.

Non-discrimination

The CAI should enforce the principle of non-discrimination principle which means that foreign investors will receive similar treatment to that accorded to national investors in like circumstances. Under the MFN clause, both parties will extend to those investors and investments covered by the CAI, treatment which is no less favourable than that which they could accord to foreign investors of any third country.

From the investors’ perspective, the conditions to entry will be more transparent and predictable, as the regime will be regulated by the agreement itself and not subject to changes by both parties. It is expected that there will be an obligation to accord fair and equitable treatment and provide full protection and security of investments unless there are specific exclusions.

Other provisions

Given that direct expropriation is today very rare, the CAI will mainly focus on the regulation of the notion of indirect expropriation. Other relevant provisions for the protection of investors likely to be in the CAI include the transfer of funds into or out of the country, without delay, at a market rate of exchange; the abolition of performance requirements; the elimination of restrictions on the appointment of senior management of the board of directors.

Dispute settlement

The CAI will contain some type of international dispute-settlement mechanism to enforce its rules and resolve disputes brought by either the affected country or private parties. This is a controversial element and the final agreement may well reflect the outcomes of other similar international negotiations.

Right to regulate

The CAI will have a clause to make sure that the investment protection provisions fully preserve the right of governments to regulate and implement public policy objectives and avoid any abuse of these rules, either with the negotiation of a general exception clause or by the insertion of exceptions in each clause.

Market access

A key part of the CAI will be the provisions on market access. The EU is pushing for a ‘negative list’ approach which means that both sides would be legally bound to open all market sectors unless specifically declared ‘sensitive.’

Conclusion

A successful CAI could give a welcome boost to EU-China economic and trade relations. The potential for increased FDI in both directions is vast. Chinese FDI in Europe, for example, is less than 5% of US FDI in Europe. The CAI will not be a magic bullet but should provide an improved legal framework for economic operators in the EU and China. As such it should be warmly welcomed by business.