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The case for an EU-China investment treaty

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The case for an EU-China investment treaty

Bonn, 10 June 2014. While the European public debate focuses mainly on the Transatlantic Trade and Investment Partnership (TTIP) the European Union is also negotiating a host of other treaties. The envisaged EU-wide international investment treaty (IIA) with China is one of the most significant in this respect. This treaty should replace the current legal patchwork consisting of 26 different bilateral investment treaties that individual EU member states have negotiated with China during the past three decades. Both parties place a lot of hopes in the treaty's effects on foreign investment flows, in particular as it should not only provide legal protection for existing investments but should also open up new markets for foreign investors.

However, the hopes for higher investment flows as a result of an EU-China IIA may not be realised. This is mainly because the challenges Chinese investors face in Europe, have little to do with a lack of investment protection or unfair (legal) treatment. Surely, European investors may benefit from an increased market access in China. The eventual opening of Chinese markets for foreign companies, however, would primarily be the result of domestic reforms already under way in China. Nevertheless, the overall economic effects to be expected from an EU-China IIA will remain limited.

As TTIP, the EU-China investment treaty has been criticised due to the inclusion of controversial investor-to-state dispute settlement (ISDS) clauses. ISDS clauses allow foreign investors to sue host states before international tribunals without having to go through their national court system. In addition to sweeping substantive provisions such as the fair and equitable treatment standard ISDS clauses have been criticised in recent years on grounds of their detrimental influence on host governments' ability to regulate in the public interest. While it may indeed be unnecessary or even harmful to include investment dispute provisions in the TTIP – a treaty negotiated between two industrialised countries with highly developed and impartial legal systems – the EU-China investment treaty represents a different case. Why?

First, because the status quo is unsatisfactory. In contrast to TTIP, the EU-China IIA would not create a new set of investment rules. In fact, China has negotiated IIAs with all but one EU member state. Most of these agreements contain unrestrained ISDS provisions and far-reaching substantive provisions. As a result, Chinese investors already have recourse to international arbitration to enforce their rights against European governments. The claim filed in 2012 by the Chinese insurer Ping An against the Belgian government in the wake of the global financial crisis is a prominent example in this respect.

The EU-China IIA would thus represent a perfect opportunity to recalibrate the existing set of investment rules in order to seek a better balance between the rights granted to foreign investors and the ability of host states to regulate foreign direct investments (FDI) in the public interest. China, in its most recent IIAs negotiated with countries from the Americas and Asia, has already made a step into this direction and so has the EU in the context of its trade agreement to be finalised with Canada.

Second, because the EU-China investment agreement will contribute to a more coherent global investment regime. An EU-wide IIA with China improves the status quo replacing the existing investment treaties. Otherwise, an EU-China IIA would only add another layer of investment rules increasing the system's overall complexity while changing little (foreign investors could still choose to sue on the basis of the old and more favourable treaties). The EU and China thus offer an alternative to the "termination approach" followed by countries like South Africa or Indonesia who terminate their IIAs instead of renegotiating their terms. If more countries followed the EU's "replacement approach" the trend towards a regionalisation of investment rule-making (often in the context of broader free trade agreements) could indeed lead to more coherent global investment governance.

Third, because the significance of the negotiations between the EU and China extends beyond the bilateral relationship itself. For some years now, China has also been negotiating with the US about an investment treaty that is to take a similar form as the European-Chinese agreement. In addition, the TTIP between the US and Europe may also comprise a comprehensive investment chapter. The rules being developed in this triangle will most likely be more balanced compared to the treaty practice of the past 50 years and may thus provide a template for IIAs being negotiated by other countries. However, in order to make this process as inclusive as possible, the investment negotiations between the EU, the US and China should be accompanied by a process of global investment dialogue.

An EU-China IIA can thus be a milestone in achieving a global consensus regarding investment policy that is more development-friendly compared to the status quo.