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When the Dragon comes Home to Roost: Chinese Investments in the EU, National Security, and Investor–State Arbitration

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ABSTRACT

The gradual rise of China as an economic, normative, and lending power has resulted in more protectionist measures in areas of the world that traditionally championed economic liberalization. Currently, 21 out of 27 European Union (EU) Member States have national laws or measures in place for the screening or review of foreign investments. However, such restrictive national measures can result in investment treaty-based arbitration under the existing bilateral investment treaties concluded by 26 EU Member States with China, as evidenced by the recent arbitration initiated by Huawei against Sweden. Therefore, this article assesses whether EU Member States are likely to see a spike in investor–State arbitral claims initiated by Chinese investors as a result of the former's investment screening measures. To achieve this aim, the article first looks at the bilateral investment treaties (BIT)-level variables that can influence the initiation of arbitration against EU Member States, such as the presence and type of investor–State arbitration (ISA) clauses, the types of investments being made, the coverage of the pre- and/or post-establishment phases, or the inclusion of 'non-precluded measures' clauses. This is then followed by a look at other variables, such as the decreasing number of Chinese foreign direct investment into EU countries, the treatment of Chinese investors in recent high-profile cases, and the importance of security alliances. The article concludes that those EU States are at a higher risk of being respondents in arbitrations initiated by Chinese investors whose BITs with China include modern ISA clauses, cover the pre-establishment phase, and lack non-precluded measures clauses. However, EU States should wait for the outcome of the *Huawei v Sweden* arbitration before deciding whether the amendment or termination of the existing BITs with China is needed.

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SETTING THE CONTEXT: A CHANGING GEO-ECONOMIC LANDSCAPE

It is no secret that the US-dominated Neoliberal world order of the 1990s and early 2000s is changing and that the post-Cold War economic order has been 'under increasing strain since the 2008 financial crisis'.[1] Besides more recent crises, such as the 2019 coronavirus epidemic (COVID-19) and the 2022 Russian invasion of Ukraine, the gradual rise of China as an economic,[2] normative,[3] and lending power[4] has resulted in more protectionist measures in areas of the world that traditionally championed economic liberalization, such as the USA, the UK, and the European Union (EU).[5] This new world order is marked by 'increased invocations of security exceptions in ways that make it difficult to disaggregate motivations of protection and protectionism.'[6]

The EU's recent Investment Screening Regulation,[7] adopted pursuant to fears of Chinese acquisitions of critical industries in the EU,[8] follows this trend. This Regulation is meant to create a more transparent and coordinated investment screening policy in the EU, but it does *not* oblige EU Member States to adopt investment screening mechanisms. Whilst the EU Screening Regulation can be criticized for not having enough 'bite',[9] the truth is that several EU members that had no prior investment screening mechanisms have recently adopted such measures pursuant to the EU Regulation.[10] Currently, 21 out of 27 EU countries have national laws or measures on the screening or review of foreign investments in certain sensitive sectors.[11] In 2021, the UK Parliament also passed the National Security and Investment Act,[12] pursuant to which a Chinese-owned Netherlands investor (Nexperia BV) was ordered to retrospectively sell 86% of its shareholding in a local semiconductor company.[13]

[1] Anthea Roberts, Henrique C Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655, 656.

[2] OECD, 'China's Belt and Road Initiative' (2018) <https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf> accessed 1 July 2023.

[3] Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reform: China's Proposal' (2019) EJIL:Talk! <https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal/> accessed 1 July 2023.

[4] Axel Dreher and others, *Banking on Beijing. The Aims and Impacts of China's Overseas Development Program* (CUP 2022) who argue that the infusion of Chinese capital into receiving economies is often laden with conditionalities and unforeseen consequences, such as in the case of countries like Sri Lanka or Ethiopia.

[5] Yukon Huang, 'The US-China Trade War Has Become a Cold War' (2021) Carnegie Endowment for International Peace <https://carnegieendowment.org/2021/09/16/u.s.-china-trade-war-has-become-cold-war-pub-85352> accessed 1 July 2023. See also Karsten Friis and Olav Lysne, 'Huawei, 5G and Security: Technological Limitations and Political Responses' (2021) 52 Development Change 1174, 1177 on the shift in US attitudes towards China during the Trump administration; see also the non-market economy 'guillotine' clause included in art 32.10 of the USMCA.

[6] Roberts, Moraes and Ferguson (n 1) 657. See also OECD, 'Freedom of Investment Process. Investment Policy Developments in 62 Economies Between 16 October 2020 and 15 March 2021' <https://www.oecd.org/daf/inv/investment-policy/Investment-policy-monitoring-March-2021-ENG.pdf> accessed 1 July 2023.

[7] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of FDIs into the Union, OJ L 791.

[8] For an overview of FDI in the EU until 2017 and their source, see European Commission, 'Commission Staff Working Document on Foreign Investment in the EU' (2019) Brussels, SWD (2019) 108 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52017SC0297> accessed 1 July 2023.

[9] See Andreas Moberg and Steffen Hindelang, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment' (2020) 57 Common Market Law Review 1427.

[10] See eg, Szilárd Gáspár-Szilágyi, 'Country Report on Hungary and Romania' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions* (Springer 2020).

[11] European Commission, 'List of Screening Mechanisms Notified by Member States' 28 June 2023 <https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en> accessed 1 July 2023. The report mentions 19 such measures out of 27 EU Member States. The types of laws will greatly differ, and some countries do not have specific ex-ante screening mechanisms but can block investments ex-post. For a commentary see Steffen Hindelang and Andreas Moberg (eds), *A Common European Law on Investment Screening*, Yearbook of Socio-Economic Constitutions 2020 (Springer 2021).

[12] 'UK National Security and Investment Act 2021' <https://www.gov.uk/government/publications/acquisition-of-newport-wafer-fab-by-nexperia-bv-notice-of-final-order> accessed 1 July 2023.

[13] UK Department of Business, Energy & Industrial Strategy, 'Publication of Notice of Final Order' (16 November 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118369/NWF_Final_Order_Public_Notice_16112022.pdf> accessed 1 July 2023.

As Meunier argues, the political challenges posed by recent Chinese investments in the EU and the USA can, on the one hand, be partly attributed to the novelty of Chinese foreign direct investment (FDI), similar to the American media's obsession with the 'explosion' of Japanese investments into the USA in the 1980s. On the other hand, they are partly a result of the unique traits of the Chinese political system, which means that often one cannot ascertain whether an investment is 'purely a commercial decision responding to market incentives' or whether 'there is an ulterior motive to the deal?'.[14]

Be that as it may, the proliferation of national review and screening mechanisms also runs the risk of overly restricting the inflow of foreign capital in times of crisis when capital is much needed. Furthermore, such mechanisms can increase executive power over investment and trade to the detriment of the other two powers,[15] and—as discussed in this article—can trigger the international responsibility of EU States under the 25 bilateral investment treaties (BITs) in force between China and 26 EU Member States (see Annex 1).[16]

Traditionally, BITs include substantive guarantees, such as national treatment, MFN treatment, fair and equitable treatment (FET), and compensation for expropriation, among others. Most also include various forms of investor–State dispute settlement (ISDS) mechanisms, including treaty-based investor–State arbitration (ISA). Therefore, at a surface glance, the potential for EU Member States to face international claims initiated by Chinese investors because of domestic screening policies and decisions is high, as evidenced by the recent *Huawei v Sweden* request for ICSID arbitration, following the exclusion of Huawei from the development of 5G mobile networks in Sweden.[17] Such cases will then feed into existing fears about the Chinese 'takeover' of key EU industries.[18]

In order to check whether EU States should indeed fear a rising number of ISA claims initiated by Chinese investors following the former's review and screening measures, this article critically looks at the various BIT levels and other variables that could influence the bringing of such arbitral claims.

To this end, Section 2 presents the various BIT-level variables that can influence Chinese investors in bringing investment treaty arbitral claims, such as the presence and types of ISA clauses, the types of investment being made, and whether the BIT covers both the pre- and post-establishment phase or only the latter.[19] Special attention will be given to the so-called 'non-precluded measures' (NPM) clauses,[20] which allow host States to deny the benefits of

[14] Sophie Meunier, 'Beware of Chinese Bearing Gifts. Why China's Direct Investment Poses Political Challenges in Europe and the United States' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP 2019) 351. Meunier describes further issues with Chinese investments abroad, such as the lowering of labour standards, the hollowing out of the industrial core through the repatriation of assets, and the acquisition of dual-use technology. See also Maxim Usynin, 'China's Investment Treaties with Arctic States: Time for Revision?' in Yoshifumi Tanaka, Rachael Johnstone and Vibe Ulfbeck (eds), *The Routledge Handbook of Polar Law* (Routledge 2023) who looks at the challenges posed by predominantly first-generation BITs between China and the Arctic States. See also Jeffrey Henderson, Magnus Feldmann and Nana de Graaff, 'The Wind from the East: China and European Economic Development' (2021) 52 Development and Change 1047.

[15] Some investment screening mechanisms might only allow for limited judicial review of executive decisions to block foreign investments.

[16] UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, 'China' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> accessed 1 July 2023. The agreement with Belgium and Luxembourg is concluded as one agreement. Ireland is the only EU State without a BIT with China.

[17] ITALAW, *Huawei v Sweden*, ICSID Case No ARB/22/2, Request for Arbitration (7 January 2022) <https://www.italaw.com/sites/default/files/case-documents/italaw170044.pdf> accessed 1 July 2023.

[18] Leonie Kijewski, 'Germany Reaches Compromise on China's Hamburg Port Investment, Reports Say', *Politico* (25 October 2022) <https://www.politico.eu/article/report-germany-deal-china-hamburg-port-investment-cosco/> accessed 1 July 2023.

[19] See Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' (2021) 22 Journal of World Investment and Trade 561.

[20] Tobias Ackermann, *The Effects of Armed Conflict on Investment Treaties* (CUP 2022), 'Security Exceptions' 219. See also William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 308.

the substantive standards of protection when a measure is 'necessary to' or 'relates to' the protection of (essential) security interests or public order. As the article focuses on the initiation of arbitral claims by Chinese investors, it will not discuss the possibility of State-to-State arbitration, a very underutilized dispute settlement mechanism in international investment law (IIL).[21]

Section 3 maps out the existing BITs between EU Member States and China, checking for the presence and types of BIT-level variables identified in Section 2. Since the future of the Comprehensive Agreement on Investment (CAI) between the EU and China is uncertain,[22] it is important that we assess the existing BITs between China and EU Member States.

Section 4 of the article focuses on other variables that can affect the bringing of Chinese arbitral claims, such as the number of Chinese investments in the EU and the apparent 'aversion' of Chinese investors to ISA. It will also focus on some recent high-profile cases in which Chinese investors were denied the possibility to invest in certain critical industries, such as the recent blocking of Huawei in Romania[23] and Sweden. The analysis of these cases is important to identify the types of treatment of foreign investors based on national security considerations that could result in the international responsibility of the host State and to highlight in some cases a very important variable: security alliances.

The last section is meant for conclusions and suggestions. It will be argued that in the case of new Chinese investments, the likelihood of potential ISA cases against host EU Member States will be low as most of the BITs concluded between EU Member States and China do not cover the pre-establishment phase. For already established investments, ISA claims will not be possible under older generation BITs (unless amended like the Swedish BIT) as they do not provide for ISA or provide for only limited ISA concerning the amount of compensation due to expropriation. However, under the newer BITs, ISA will be possible, and the national treatment, MFN, and FET clauses will most likely be used, with a combination of the prohibition for expropriation. Even so, one also needs to factor in other variables such as the diminishing number of Chinese investments in the EU or a certain 'aversion' of Chinese investors towards international arbitration.

This research is important because the existing EU Member State BITs with China might not be adapted to rising security concerns, and they have the potential to be the basis of onerous arbitral claims brought against EU Member States. This could then require the inclusion or redrafting of security clauses in existing Member State BITs with China, or even the BITs' eventual termination which would also reduce the protection of EU investors present in China.

THE BIT-LEVEL VARIABLES

Whether a Chinese investor can bring a treaty-based arbitral claim against an EU Member State because of the latter's review or screening measures, and whether the EU State can

[21] See Murilo O Lubamdo de Melo, 'Host States and State-State Investment Arbitration: Strategies and Challenges' (2017) 14 Brazilian Journal of International Law 81.

[22] William Y Yee, 'Is the EU-China Investment Agreement Dead?' *The Diplomat* (2002) <https://thediplomat.com/2022/03/is-the-eu-china-investment-agreement-dead/> Arlington, Virginia, accessed 1 July 2023. It is important to note that under art 15.1 of the Final and Institutional provisions under the proposed CAI, the agreement would not supersede or terminate the existing BITs between China and the EU Member States <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/9da7748a-f15d-4a58-9039-1f767d1dc9f1/details> accessed 1 July 2023.

[23] Thomas Dincă, 'Huawei reclamă la Bruxelles că România îi blochează accesul la 5G' <https://www.profit.ro/stiri/politic/huawei-reclama-la-bruxelles-ca-romania-ii-blocheaza-accesul-la-5g-orban-exclude-huawei-dar-revine-rapid-19573081> accessed 1 July 2023.

defend itself against such a claim, will depend on a set of BIT-level variables. Let us first look at the more general BIT-level variables, followed by the so-called NPM clauses.

General variables affecting a potential claim

The first and most important variable is whether the BIT includes an ISA clause, and if so, the type of arbitration clause. As Vaccaro Incisa argues, older Chinese BITs (50% of a total of 120 Chinese BITs in force he analysed) *do not* provide for ISA or limit China's consent to arbitrate to the amount of compensation due to expropriation. The newer BITs, apart from two, offer unrestricted access to ISA.[24] Thus, under an older, first-generation BIT a Chinese investor would have no or few avenues to bring a claim against the host State.[25] Bringing arbitral claims can also be made more difficult by Chinese BITs often not mentioning expressly 'indirect expropriation', thus making it difficult for a tribunal to adjudicate on measures tantamount to expropriation.[26]

Secondly, we need to understand at which point in time in the life of an investment the national measures based on security concerns can affect the investment as not all BITs cover both the pre- and post-establishment phase. As some BITs will not cover the pre-establishment phase, 'the measures taken by governments for the review of investments in the pre-entry phase will not be reviewable by an investment tribunal'.[27] However, all international investment agreements (IIAs) cover the post-establishment phase. This variable is closely linked to the types of screening measures, as some measures might relate to new investors/investments, while others might affect existing investors/investments (see 'The treatment of chinese investors and security alliances' section). Thus, national screening and review measures can cover: (i) the so-called 'greenfield investments' (brand new investments)[28]; (ii) the merging with existing businesses or their acquisition (M&A), the dominant Chinese practice in the EU until recently[29]; (iii) the blocking of a long-standing investor established in the host State from participating in certain public bids, from applying for certain licenses, or supplying certain components/services, as the recent example of Huawei in Sweden shows[30]; and (iv) some new screening mechanisms around the world, such as the 2021 National Security and Investment Act of the UK and the 2021 Australian amendments to its FDI review mechanism,[31] allow for the retrospective screening of already established investments, 'even in the absence of a relevant new transaction'.[32] These measures will increase 'the potential for conflict with IIAs and thus ISDS claims'.[33]

Thirdly, also related to the pre- and post-establishment variable, the definition of 'investor' and 'investment' is important for the purposes of this discussion. Some IIAs might include 'potential investors', thus extending the protections offered by the IIA to investors who have yet to establish themselves in the host State (the pre-establishment phase). The same goes for the

[24] G Matteo Vaccaro-Incisa, *China's Treaty Policy and Practice in International Investment Law and Arbitration* (Brill 2021) 133. See also Brian Mercurio and Dini Sejko, 'Holes in the Silk: Investor Protection under China's Belt and Road Initiative' (2019) 14 Global Trade and Customs Journal 251, 253.

[25] For the discussion surrounding a potential *Maffezini*-type situation see Sections 3 and 5.

[26] Shen Wei, 'Decoding Chinese Bilateral Investment Treaties' (CUP 2021) 280, who mentions that the 2006 China-India BIT 'was of symbolic significance in the sense that it recognized the concept of indirect expropriation' for the first time in Chinese BITs.

[27] Giorgios Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 507–43, 512.

[28] See Bian (n 19).

[29] Agatha Kratz and others, 'Chinese FDI in Europe. 2021 Update' (2021) Metrics Report, Rhodium Group <https://rhg.com/research/chinese-fdi-in-europe-2021-update/#:~:text=In%202021%2C%20Chinese%20VC%20investment,unlikely%20to%20rebound%20in%202022> accessed 1 July 2023, 3.

[30] See *Huawei v Sweden*, ICSID Case No ARB/22/2, Request for Arbitration.

[31] See Australian Government, The Treasury, 'Evaluation of the 2021 Foreign Investment Reforms.' (2021) Final Report, <https://treasury.gov.au/sites/default/files/2022-02/p2022-244363.pdf> accessed 1 July 2023.

[32] Tania Voon and Dean Merriman, 'Incoming: How International Investment Law Constrains Foreign Investment Screening' (2022) Journal of World Investment and Trade 1, 12.

[33] ibid 12.

definition of 'investments' as some IIAs might only extend the protection offered by them or by some of the standards of protection to 'established' investments (the post-establishment phase).

Fourthly, depending on whether we are talking about older or newer generation BITs, newer generation BITs can include carve-outs for certain sectors of the economy, which are not covered by the treaty commitments, and which do not necessarily have to be reciprocal in nature. Thus, a Chinese investor might not be able to bring a claim if the BIT does not cover the specific economic sector it is trying to invest in.

It is also worth mentioning that some IIAs include the so-called 'investment screening' clauses. For example, the former NAFTA in Article 1138(1) excluded from ISDS host State decisions to prohibit or limit investment on national security grounds. Similar 'investment screening' clauses can be found in some Canadian IIAs. For example, the 2012 BIT between Canada and China in Annex D.34 states that national investment screening measures on grounds of security, following the *Investment Canada Act*, shall not be covered by the BIT's State-to-State arbitration and ISDS provisions. Nonetheless, the tribunal in *Global Telecom v Canada*[34] held that a similar provision found in Article II(4)(b) of the Canada–Egypt BIT, which excluded from the BIT's ISDS provisions a decision not permitting 'the acquisition of an existing business enterprise or a share of such enterprise' was *inapplicable* to the circumstances of that case.[35] The tribunal argued that the conversion of non-voting shares into voting ones was not an 'acquisition' within the meaning of Article II(4)(b) of the BIT.[36] This indicates that even relatively straightforward terms will have a life of their own once interpreted by an arbitral tribunal and each individual term included in an 'investment screening' clause will have to be interpreted.

As an interim observation, it can be concluded that the possibility of a Chinese investor bringing an ISA claim against an EU Member State for the latter's blocking/screening of the former's investment/potential investment is influenced by:

- the presence and type of ISA clauses;
- the IIA's coverage of pre- and post-establishment and the relationship of such clauses with the scope of coverage of the national screening measures; and
- the presence and scope of carve-outs.

NPM clauses and national security

Following the opening up of China after the 1979 reforms of Deng Xiaoping[37] and the collapse of the Iron Curtain, the Neoliberal Order was premised on trade and investment liberalization, the idea being that increased economic interdependence would lead to the promotion of peace and cooperation, raising the costs of potential conflicts.[38] The Cold War having ended, security concerns in international economic relations became less pressing, representing a mostly unused exception in international trade and investment law. For example, Article XXI of the GATT—which provides a general exception to the GATT based on 'essential security interests'—had been rarely used.[39] The same under-utilization of security exceptions is also noticeable in IIL.[40]

[34] *Global Telecom Holding S.A.E. v Canada*, ICSID Case No ARB/16/16.
[35] Voon and Merriman (n 32) 32.
[36] *Global Telecom Holding S.A.E. v Canada*, ICSID Case No ARB/16/16, Award 27 March 2020, paras 329–30.
[37] Michael Wood, 'The Story of China. A Portrait of a Civilisation and Its People' (Simon & Schuster 2021) ch 19.
[38] Roberts, Moraes and Ferguson (n 1) 657.
[39] For eg, the trade restrictions applied by the then European Communities (EC), Canada, and Australia to Argentina (Falkland Wars), the US trade embargo against Nicaragua in 1985 (the Contras), and the 1991 EC trade measures adopted against the former Yugoslavia during the Yugoslav wars. See WTO, 'WTO Analytical Index. GATT 1994' <https://www.wto-ilibrary.org/content/reports/25193368/10/read> accessed 1 July 2023, 600–05.
[40] Lizzie Knight and Tania Voon, 'The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China' (2020) 21 Journal of World Investment and Trade 104, 109.

However, since the latter part of 2010s, one can witness the growing importance of security considerations in international economic relations. For example, in trade law, the usage of security exceptions is on the rise as evidenced by the US' unilateral imposition of tariffs on Chinese steel and aluminium imports or the sanctions taken by the EU, the USA, and other countries against Russia for its invasion of Ukraine.[41] Moreover, recent US measures do not only aim to stop the exportation of various critical technologies,[42] but they also aim to 'reshore' certain industries.[43] The EU is also working on the proposed European Chips Act,[44] and it is proposing a new Anti-Coercion Instrument.[45]

Security considerations are also becoming more prominent in investment law and investment relations. For example, the powers of the US Committee on Foreign Investment (CFIUS) to screen and block certain foreign investments have been expanded,[46] and the EU is proposing measures to screen certain 'outward' foreign investments.[47]

However, due to the different architecture of IIL, the dynamics between existing legal commitments and the usage of security considerations are somewhat different compared to trade law. As is well known, IIL rests on a tangled web of over 2500 BITs, plurilateral investment treaties, and preferential trade agreements with investment chapters in force, collectively called IIAs.[48]

Most IIAs will not include exceptions based on national security or public order, while a minority include such exceptions[49]; their wording and scope, however, will often differ. In the literature, such clauses are collectively known as NPM clauses, which limit 'the applicability of investor protections under the BIT in exceptional circumstances'.[50] According to Pathirana and McLaughlin, the NPM clause is 'a vital tool that is increasingly insisted upon by [IIA] drafters and negotiators in order to balance public interests and private interests and investment concerns and non-investment concerns.'[51]

In their seminal 2008 article on NPM clauses, Burke-White and von Staden provide a thorough mapping of NPM clauses and their interpretation by ISA tribunals up to that point in time.[52] NPM clauses can be found in different parts of IIAs, some being in the main text of the treaty, while others are included in protocols and annexes. Regarding their *coverage*, some clauses will apply generally to the whole text of the agreement, while others might only apply to a specific standard of protection. Regarding the *permissible objectives* that can be invoked by the host

[41] Ackermann (n 20) 219

[42] Richard Newcomb and others, 'US Enhances Export Control Enforcement with Nationwide Initiative Focused on Advanced Technologies' (21 February 2023) DLAP Piper <https://www.dlapiper.com/en-us/insights/publications/2023/02/us-enhances-export-control-enforcement-with-nationwide-initiative-focused-on-advanced-technologies> accessed 1 July 2023; Sujai Shivakumar and others, 'A Seismic Shift: The New U.S. Semiconductor Export Controls and the Implications for U.S. Firms, Allies, and the Innovation Ecosystem' (14 November 2022) CSIS <https://www.csis.org/analysis/seismic-shift-new-us-semiconductor-export-controls-and-implications-us-firms-allies-and> accessed 1 July 2023.

[43] Randy Altschuler, 'Three Key Strategies to Drive American Manufacturing Reshoring' (20 April 2023) <https://www.forbes.com/sites/forbestechcouncil/2023/04/20/three-key-strategies-to-drive-american-manufacturing-reshoring/> accessed 1 July 2023.

[44] European Commission, 'European Chips Act' (2023) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-chips-act_en> accessed 1 July 2023.

[45] Council of the EU, 'Trade: Political Agreement on the Anti-Coercion Instrument' (28 March 2023) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-chips-act_en> accessed 1 July 2023.

[46] US Executive Order 14083 of 2022 and The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).

[47] Arkadius M Strohoff and Sandra Schuh, 'Outbound Foreign Investment Regime on the Horizon in the EU' (18 April 2023) <https://www.pinsentmasons.com/out-law/analysis/outbound-foreign-investment-regime-on-the-horizon-in-the-eu> accessed 1 July 2023.

[48] For up-to-date information, see UNCTAD Investment Policy Hub database that identifies 2219 BITs and 336 Treaties with Investment Provisions currently in force, bringing the total to 2555s IIAs in force <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 1 July 2023.

[49] ibid. According to UNCTAD 400 out of 2584 mapped treaties include an essential security exception.

[50] Burke-White and von Staden (n 20) 311.

[51] Dilini Pathirana and Mark McLaughlin, 'Non-precluded Measures Clauses: Regime, Trends, and Practice' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds) *Handbook of International Investment Law and Policy* (Springer 2020) 3.

[52] Burke-White and von Staden (n 20).

State, some clauses will only refer to national security, while others will refer to public order, public health, safety, and morals, and/or international peace and security.[53]

There are further differences between NPM clauses, based on the *nexus requirement* between the host State measures and the permissible objectives. Some will include a more stringent, Article-XXI-GATT-type nexus requirement ('necessary to'), while other clauses will refer to less stringent nexus requirements, such as measures 'related to' the protection of the permissible objective.[54] Lastly, depending on the wording of the NPM clause, one can differentiate between *self-judging* and non-self-judging NPM clauses.[55]

This discussion is important because the presence, exact wording, and type of NPM clauses included in BITs between China and the EU Member States can influence whether a host EU State will be able to use it as a defence for or justification of their measures to block Chinese investments on national security grounds. For the purposes of the analysis in the 'Assessing the BITs concluded by EU Member States with China' section, I will follow Ackermann's analytical approach and differentiate between Article-XXI-GATT-type NPM clauses (which he calls 'WTO-like security exceptions') that include the formulation of 'essential security interests'[56] and 'necessary to', and other types of NPM clauses (which he calls 'typical' NPM clauses).[57] The latter will tend to have less stringent nexus requirements and refer to several permissible objectives, such as public order, safety, and health.

This distinction between NPM clauses is needed, as some NPM clauses 'copy-paste' Article XXI of the GATT, even though traditionally BITs did not contain general or security exceptions 'of the kind seen in agreements of the WTO'.[58] Thus, it is likely that an investor–State tribunal might refer to WTO Panel or Appellate Body reports to decipher the meaning of a similar clause under a BIT.[59]

Like all treaty clauses, NPM clauses will have a life of their own once they are interpreted by an adjudicative body, such as an investor–State tribunal. Unlike in the WTO regime, where a central adjudicative body (the now paralysed WTO Appellate Body)[60] ensures some level of coherence and consistency, in IIL no central adjudicative body exists to ensure the uniform interpretation of treaty clauses. Whilst by now there is quite a high number of ISA cases,[61] NPM clauses and the issue of national security have only arisen in a handful of them.[62] Even so, some divergences have occurred. Some of the main points of contention that have arisen over the years

[53] ibid 332–36.

[54] ibid 342–48.

[55] The Tribunal in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India*, PCA Case No 2013/09 (UNCITRAL), Award on Jurisdiction and Merits, 25 July 2016, para 219 held that 'it is well established by judgments of the International Court of Justice […] and investment arbitration awards that, unless a treaty contains specific wording granting full discretion to the State to determine what it considers necessary for the protection of its security interests, national security clauses *are not self-judging*' [emphasis added].

[56] The WTO Panel in the recent *Russia—Traffic in Transit, Ukraine v Russia* (WT/DS512/R, 5 April 2019) held that under art XXI GATT 'essential security interests', which is evidently a narrower concept than 'security interests', may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally' (para 7.130) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True> accessed 1 July 2023.

[57] Ackermann (n 20) 221. On the usage of WTO style general exceptions clauses in investment law, see Andrew D Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' (2018) Yearbook on International Investment Law & Policy 2017.

[58] Knight and Voon (n 40) 108.

[59] On the usage of WTO jurisprudence in investment arbitration, see Niccolò Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement' at 121-148 and Michelle Q Zang, 'Engagement Between International Trade and Investment Adjudicators' in Szilárd Gáspár-Szilágyi, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes. Convergence or Divergence?* (CUP 2020) at 149-163.

[60] Peter van den Bossche, 'Farewell speech of Appellate Body member Peter Van den Bossche' (2019) <https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm> accessed 1 July 2023.

[61] UNCTAD counts 1190 known, treaty-based ISA cases until 31 December 2021 <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 1 July 2023.

[62] The more recent ones being *Deutsche Telekom v India*, PCA Case No 2014-10 and *Devas v India* (n 47). For a recent discussion of this case and *Deutsche Telekom v India* see Prabhash Ranjan, 'Essential Security Interests in International

concern the interpretation of the 'nexus' requirement, the types of situations that could affect national security, the 'self-judging' character of NPM clauses, and the relationship between NPM clauses and the customary defence based on 'necessity'.

For example, the *CMS v Argentina*,[63] *Sempra v Argentina*,[64] and *Enron v Argentina*[65] tribunals have been rightfully criticized for conflating the NPM clause under the US–Argentina BIT with the customary international law defence based on necessity.[66] Thus, pursuant to the same factual background and using the same treaty text, the previously mentioned three tribunals found the NPM clause to be inapplicable, whilst the *LG&E v Argentina*[67] tribunal found the clause to be applicable to the dispute.[68] In the more recent *Devas v India* ICSID arbitration, the tribunal rightly differentiated between the customary 'state of necessity' defence and the NPM clause found in the Mauritius–India BIT.[69]

The 'nexus' requirement can also pose challenges, as some IIAs include the stricter requirements of a measure being 'necessary for' the protection of national security interests, whilst others will include a more relaxed requirement of the measure being 'related to' the protection of public order. Once again, who interprets such clauses[70] is often as important as what the clauses include.

In the controversial *Eco Oro v Columbia* case,[71] whilst the issue was not national security but environmental protection, the tribunal held that Article 2201 of the Canada–Colombia trade agreement—worded in a fashion similar to Article XX of the GATT[72]—allowed Colombia to adopt or enforce a measure for the protection of the environment. However, the general exceptions clause did not exclude liability for compensation.[73] Furthermore, for those WTO-like NPM clauses that are more or less 'copy-pastes' of Article XXI of the GATT, the 'self-judging' nature of such clauses remains a contentious question.[74]

As an interim observation, we can identify the following national security-related variables that could influence whether a Chinese investor brings an ISA claim against an EU Member State and whether the EU State is capable of mounting a successful defence based on national security grounds:

Investment Law: A Tale of Two ISDS Claims Against India' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP, 2019).

[63] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No ARB/01/8.

[64] *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16.

[65] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3.

[66] Burke-White and von Staden (n 20) 337; Pathirana and McLaughlin (n 51) 14.

[67] *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 6 October 2006.

[68] ibid paras 226–29.

[69] *Devas v India* (n 55) Award on Jurisdiction and Merits, para 254 in which the Tribunal states that 'the Respondent is right in pointing out that the "preservation of rights" under Article 11(1) of the Treaty *has nothing to do* with the "state of necessity" defence […] under customary international law' [emphasis added].

[70] See Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus' (2015) 109 American Journal of International Law 761.

[71] *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.

[72] On the meaning of 'necessary for' in Article XX GATT, see Donald H Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 World Trade Review 347.

[73] *Eco Oro v Colombia* (n 71) para 831. See also Anonymous, 'Majority in Eco Oro v. Colombia Finds Violation of Minimum Standard of Treatment, Holds that a General Environmental Exception does not Preclude Obligation to Pay Compensation' *Investment Treaty News* (2021) <https://www.iisd.org/itn/en/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/> Geneva, Switzerland, accessed 1 July 2023. art XX GATT-type general exceptions clauses were also one of the main issues in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21 (art 2201 Canada–Peru BIT), in which the tribunal excluded the application of the police powers doctrine of the host State, by interpreting the general exceptions clause as the only exceptions applying to the case. See Stephanie Schacherer, 'Bear Creek v. Peru' *Investment Treaty News* (2018) <https://www.iisd.org/itn/en/2018/10/18/bear-creek-v-peru/> Geneva, Switzerland, accessed 1 July 2023.

[74] Knight and Voon (n 40) 108. The United States, for example, holds the view that essential security exceptions in trade and investment agreements are self-judging. See James Mendenhall, 'The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements' in Karl P Sauvant and others (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) at 310-403.

a) the presence of an NPM clause in the BIT;
b) the type of NPM clause if present: Article XXI GATT-type or 'typical';
c) the wording of the 'nexus' element;
d) whether the NPM clause applies to the whole treaty or only certain standards, such as the national treatment clause; and
e) whether the NPM clause is self-judging.

ASSESSING THE BITS CONCLUDED BY EU MEMBER STATES WITH CHINA

China has so far concluded 163 IIAs (both BITs and PTAs with investment chapters) and has BITs in force with all EU Member States, except Ireland. The oldest Chinese BIT in force with EU States was concluded with Sweden in 1982 (amended in 2004) while the newest one was signed in 2009 with Malta. According to Shen Wei, who analysed all 163 Chinese IIAs, the old-generation Soviet-style Chinese BITs (pre-1998) 'were marked by a reluctance to apply strong investment protection standards' and included limited access to international arbitration.[75]

From 1998 onwards, with the signing of the Barbados–China BIT, China departed from this model and put more emphasis on BITs as legal instruments that can protect Chinese investments abroad, using substantive and procedural standards similar to those used by other capital-exporting nations. Then, following the 2008 financial crisis, China's pace of signing BITs has significantly slowed down.[76]

For the purposes of our discussion, we are interested in Chinese BITs concluded with EU Member States at the more granular level, considering the variables mentioned in 'the BIT-level variables' section. With the help of my research assistant, Mr Christian Plascencia Gonzales, we mapped out the 25 Chinese BITs concluded with EU Member States, all of which are still in force (the BIT with Belgium and Luxembourg was concluded as one BIT, see Annex 1 to this article). We looked for the following variables: (i) the presence and type of treaty-based ISA clauses; (ii) protection extended to the pre-establishment phase; (iii) specific carve-outs for the substantive standards of treatment; (iv) the inclusion of Article XXI GATT-type NPM clauses; (v) the inclusions of 'typical' NPM clauses; (vi) the 'nexus' element found in the NPM clauses; (vii) whether the NPM clause applies to the whole BIT or only to certain substantive standards; and (viii) the self-judging nature of NPM clauses.

The most important variable is *the presence and the type of ISA clause*, as without one a Chinese investor cannot bring an international arbitral claim against an EU host State. Out of the 25 agreements, four (with Italy, Denmark, Austria, and Bulgaria) have no ISA clauses, all these agreements having been signed in the 1980s when China did not or included very limited ISA clauses. The original agreement with Sweden (1982) also did not include ISA, but this was modified in the 2004 Amendment Protocol, which in Article 6 *bis* now provides for ICSID or UNCITRAL arbitration. It follows that the four EU States that have signed BITs without ISAs, will face no international treaty-based arbitration (unless an unlikely broad interpretation of the *Maffezini* doctrine might occur, *see* below).

As Shen Wei and Vaccaro-Inciza have stated, the older Chinese BITs either did not include ISA or they restricted its application to the amount of compensation for expropriation.[77] The latter is the case with the older (1980s, early 1990s) BITs with Poland, Slovakia, Croatia, Estonia, Slovenia, and Lithuania, which restrict ISA to the amount of compensation

[75] Wei (n 26) 274.
[76] ibid 277–79.
[77] ibid 279 and Vaccaro-Incisa (n 24) 133–34.

to be paid for expropriation, with the exception of the China–Lithuania BIT (1993), which also includes 'other disputes agreed' (Article 8.2(b)). The preferred forum in these early BITs is ICSID. The 1994 BIT with Romania allows for ICSID arbitration if the disputing parties so agree, and the 1991 BIT with Hungary allows for ICSID arbitration via a subsequent agreement if China becomes an ICSID member.[78] Whilst one could argue that, for example, the rescinding of an existing license due to a retrospective screening measure could be tantamount to expropriation, as Shen Wei has stated, first-generation Chinese BITs do not specifically mention indirect expropriation. Thus, it might be difficult to bring such a claim under the pre-2000 BITs, apart from the more permissive BITs of Hungary and Romania.

The post-2000 agreements are more liberal and provide for mainly ICSID, and sometimes *ad hoc* and UNCITRAL arbitration. Most of them require an EU investor that would like to bring an arbitral claim against China to first exhaust the local Chinese administrative procedures (but not the other way around!).[79] Thus, countries like the Netherlands, Germany, Latvia, Finland, Belgium, Luxembourg, Spain, Czechia, Portugal, France, and Malta are at an increased risk of ISA against them. The only post-2008 agreement (with Cyprus) requires the cumulative conditions for China to have the local administrative review procedures exhausted and the investor not having submitted a dispute before a Chinese court, whilst for Malta the Chinese investors must exhaust local procedures.

However, there is also the 2001 *Maffezini* expansive interpretation of MFN clauses,[80] which—if favoured by a future arbitral tribunal—could result in the importation of potentially more favourable ISA clauses from EU Member State BITs with other countries than China into BITs between China and EU members. According to Vaccarno-Inciza, China expressly barred the expansive interpretation of the MFN clause in its IIAs signed after 2008. However, only the China-Malta BIT was signed after 2008.[81] This issue was also recognized by Usynin when discussing the Chinese BITs concluded with States in the Arctic.[82]

Whether or not an MFN clause could be used to import more favourable ISA clauses from another BIT, as the *BUCG v Yemen* tribunal argues, this cannot be decided 'in the abstract' but must take into consideration the specific wording of the MFN clause.[83] The *BUCG* tribunal decided that the MFN clause in the China–Yemen BIT only referred to 'treatment accorded to investors' in the territory of the host State, the ordinary meaning of which pursuant to Article 31 VCLT would not allow for an expansive interpretation that would include procedural provisions from another BIT.[84]

We must also consider the *pre-establishment* variable since many screening measures also target investors that have yet to enter the host State and have yet to make the investment. Of the 25 agreements, only one, Article 3.3 of the BIT with Finland (2004) provides for

[78] China signed the ICSID Convention in 1990 and ratified it in 1993. Available at ICSID's official website <https://icsid.worldbank.org/about/member-states> accessed 1 July 2023.

[79] Fredrik Lindmark, Daniel Behn and Ole Kristian Fauchald, 'Explaining China's Relative Absence from Investment Treaty Arbitration' in Daniel Behn, Ole K Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration. Empirical Perspectives* (CUP 2022) 439–44.

[80] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 26 January 2000 in which the tribunal held that the more favourable ISDS provisions from the Chile–Spain BIT could be extended to the case brought under the Argentina–Spain BIT, due to the latter's MFN clause, subject to certain public policy considerations (para 56).

[81] Vaccaro-Incisa (n 24) 134.

[82] Usynin (n 14).

[83] *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/13/30, Decision on Jurisdiction, 21 May 2017, para 114.

[84] ibid paras 115–22. See also Mercurio and Sejko (n 24) 256. I would like to thank Dini Sejko (The Chinese University of Hong Kong, Hong Kong), Moamen Elwan (Clyde&Co, Dubai, UAE), Güneş Ünüvar (Max Planck Institute, Luxembourg), Hesham Elwakeel (Cairo University, Egypt), and Relja Radović (BDK Advokati, Belgrade, Serbia) for their suggestions on whether a *Maffezini*-type situation could arise under Chinese BITs that do not specifically mention ISA.

protection 'with respect to the establishment' of the investment, and not just protection during the life, management, and winding up of the investment. Two BITs, the 1985 one with Italy and the 2009 one with Malta, do not cover the pre-establishment phase *per se*, but they do include clauses meant to facilitate the travel of foreign investors for travels connected to the investment. In other words, except for Finland, the other EU states should not be overly concerned that their measures affecting the pre-entry phase of Chinese investments will result in an international arbitral claim against them. The same, of course, is not true for post-establishment measures.

The *carve-outs for the various substantive standards* of protection are also important. If for example, a specific sector is excluded from the BIT's coverage, then the tribunal should decline its jurisdiction. Apart from the Swedish BIT, all the others include some form of carve-outs, predominantly for the NT and MFN standards, but often also for FET and rarely for full protection and security (FPS). These tend to be quite standard and refer to double taxation agreements, customs unions (important for the EU), and measures affecting frontier trade (important for China).[85] There are no real carve-outs, however, for specific sensitive economic or industrial sectors. This increases the risk of Chinese claims.

The next important variable was the presence/absence and type of NPM clauses. As mentioned in the 'General variables affecting a potential claim' section, there are several variables to consider here, as the successful defence of an EU Member State on national security or public order considerations rests on these. Of the 25 BITs analysed, 21 do not include any type of NPM clauses; neither GATT Article-XXI-type clauses nor 'typical' NPM clauses. These states would need to rely on defences under customary international law, such as the defence of necessity, which would be extremely difficult to prove and if not invoked, tribunals would not consider it. Another possibility would be to rely on the police powers doctrine, the 'legitimate and *bona* fide' exercise of which has been recognized by some investment tribunals as not amounting to expropriation.[86]

Only the BIT with Finland (2004) in Article 3.5 provides for an Article XXI GATT-type clause and refers to measures 'necessary to' protect 'essential security interests'. As discussed in the 'General variables affecting a potential claim' section, three cumulative components need to be fulfilled. The nexus requirement, just like in WTO law, is a stringent one, and tribunals will often look at the existence of a less intrusive option.[87] Then, the term 'essential' makes the defence even more difficult, as not all security interests would be caught.[88] Only the 'essential' ones. Furthermore, under the term 'security' some tribunals might not accept measures meant to protect the economy. Furthermore, the Finnish clause is not 'self-judging', and the ISA clause is broadly worded. Couple this with the idea that the Finnish Nokia or the Swedish Ericsson should be made European champions for 5G networks,[89] and one can say that Finland is quite exposed to a potential ISA claim from Chinese investors, and Sweden is in the process of tackling one.

The Finnish BIT also includes an Article XX GATT-type clause in Article 3.6 for measures necessary to protect 'public order', which have to meet similar, cumulative conditions as the ones included in Article XX of the GATT. Using this defence would also be quite difficult: the nexus requirement is strong ('necessary to'), public order needs to be defined, and

[85] See Vaccaro-Incisa (n 24) 232–33.
[86] Mitchell, Munro and Voon (n 57) referring to several cases in n 37.
[87] See Regan (n 72).
[88] See (n 56). *Russia—Traffic in Transit, Ukraine v Russia* (WT/DS512/R, 5 April 2019).
[89] See Alex Webb, 'Finland's Champion Nokia is Letting the Side Down' (*Bloomberg UK*, 2020) <https://www.bloomberg.com/opinion/articles/2020-12-29/in-huawei-5g-battle-finland-s-champion-nokia-is-letting-the-side-down#:~:text=Finland%27s%20Champion%20Nokia%20Is%20Letting%20the%20Side%20Down%20on%20Huawei,to%20start%20getting%205G%20right> accessed 1 July 2023. See also Friis and Lysne (n 5) 1187.

the requirements of the Chapeau need to be met.[90] Both Finnish WTO-type clauses only cover FET, MFN, and NT, but that gives quite a lot of room for manoeuvre to Chinese investors.

The BITs with Germany (2003) and Portugal (2005) include typical NPM clauses that refer to measures that 'have to be taken' to protect public order, security, health, and morals. The Portuguese clause only applies to MFN treatment, whilst the German one covers FET, NT, and MFN. The exact meaning of the nexus requirement of 'have to' would be subject to the interpretation of the arbitral tribunals, which could follow an interpretation similar to that of 'necessary to', even drawing a parallel to that concept under Article XX of the GATT. Under this interpretation, the host State should choose the least restrictive measure to reach the protected objective.[91] However, different interpretations could also be followed, under which the concept of 'have to' could be more stringent or less stringent than the 'necessary to' nexus requirement. It should also be added that neither the German nor the Portuguese clauses include the more restrictive formulation of the public security objective being 'essential'.

The 2012 Amendment Protocol to the 1985 Austrian BIT includes a typical NPM clause, providing an exception to MFN treatment and NT, allowing for measures taken for 'reasons of' public order, safety, morals, and public health. Such measures would possibly be easier to prove for the host State due to the more relaxed nexus requirement and the lack of any further conditions attached to the public security interest being protected. However, this clause is not expressly self-judging (see Annex 1).

In conclusion, not all EU Member States are equally exposed to potential Chinese ISA claims pursuant to FDI screening measures they have taken. Italy, Denmark, Austria, and Bulgaria would not face any claims as no ISA clauses exist in their BITs with China. Poland, Slovakia, Greece, Croatia, Estonia, Slovenia, and Lithuania are also quite well protected by old-style ISA clauses which only cover the amount of compensation in cases of expropriation. Hungary and Romania, although having older style BITs, have more permissive ISA clauses. The rest of the countries are more exposed, as they have permissive ISA clauses, and most of them have not included any NPM clauses, and the carve-outs for substantive standards are quite toothless.

However, none of these agreements—apart from the Finnish one—cover the pre-establishment phase. Thus, only those review/screening measures that affect existing investments will be covered. Whilst the Finnish BIT does have a GATT Article XXI and XX-type clause, the nexus requirement is very strong, and the clauses are not self-judging making their practical usefulness questionable. Furthermore, it is the only agreement that covers also the 'establishment' of the investment and has quite a permissive ISA clause. Finland, therefore, seems to be the most exposed EU State.

Nevertheless, as mentioned, a potential *Maffezzini*-type expansive interpretation of the MFN clause could result in the importation of more favourable ISA clauses from BITs concluded by EU Member States with States other than China. Furthermore, the chances of a claim being brought by a Chinese investor against EU States are not only predicated on existing BITs, but depend on other variables as well, such as the scale of Chinese FDI in the EU (more investments mean a higher likelihood of cases), the types of treatment the investors have received during domestic screening or review processes, and the importance of security alliances. Let us turn to these in the 'Other variables' section.

[90] Similar to the art XX GATT Chapeau.
[91] See Burke-White and von Staden (n 20) 346–47.

OTHER VARIABLES

In a growing climate of protectionism, it is important that we do not overreact and completely antagonize investments from one country. Striking a balance between the need to have foreign capital in uncertain economic times and national security interests is not an easy one.[92]

In this section, let us first look at the scale of Chinese FDI in the EU, to ascertain whether the likelihood of a 'deluge' of ISA cases against EU countries is backed up by the volume of Chinese investments and the number of Chinese-controlled companies in the EU. Then, we will look at several recent high-profile examples that involved the screening and even blocking of Chinese investments in EU countries. Knowing how EU States 'treat' Chinese investments is key because these measures can form the base of a treaty-based ISA claim. Furthermore, some of these cases will evidence the importance of security alliances and their effects on the blocking of Chinese investments.

The number of Chinese investments in the EU

Looking at the numbers first, according to the 2021 MERICS Report on 'Chinese FDI into Europe', Chinese FDI into the EU 27 and the UK had fallen from a high of EUR 47.4 billion in 2016, to EUR 10.6 billion in 2021 (see Figure 1). The value of Chinese FDI inflows in 2021 was 33% higher than in the previous year, but it remained on its multi-year trajectory of decreasing Chinese FDI into the EU and overall decreasing Chinese FDI in the rest of the world.[93] The report also notes that traditionally most of the Chinese FDI into Europe arrived via M&A.

However, in 2021, there was an increase in greenfield investments with many investments moving into the production of EV batteries. The biggest investment was the acquisition of Phillips Household Appliances by Hillhouse Investment, a Hong Kong-based private equity firm.[94] Furthermore, the number of investments from Chinese state-owned enterprises (SOEs) had fallen to a historical low, whilst Chinese venture capital investments had more than doubled in 2021. There were also sensitive investments which were under national scrutiny in Italy, Germany, Denmark, and the UK into areas such as agriculture, nuclear power, satellites, semiconductors, drones, and advanced materials.[95]

Some other trends are also noticeable in the EU Commission's 2019 'Staff Working Document on Foreign Direct Investment in the EU'. Whilst this document only includes data up to 2017, the report concludes that in 2016, for example, 29% of non-EU controlled EU companies had investors from the USA and Canada, followed by those from EFTA states (see Figure 2). Mainland China, Hong Kong, and Macao (China in the broad sense) only came in at fifth place, with 9.5% of the non-EU-controlled companies, owning assets totalling only 3% of the assets of non-EU-controlled EU companies.[96] The EU Commission's 2022 second-quarter FDI Bulletin also strengthens these earlier findings. According to the bulletin, FDI in the EU in the second quarter of 2022 had increased and almost 40% came

[92] See Theodore H Moran, 'Foreign Acquisitions and National Security: What Are Genuine Threats? What Are Implausible Worries' in Zdenek Drabek and Petros Mavroidis (eds), *Regulations of Foreign Investment Challenges to International Harmonization* (World Scientific Publishing 2013) vol 21, 373–74. Moran introduces a framework consisting of three types of threats from FDI.

[93] Kratz and others (n 29) 5.

[94] ibid 5–6. See also Ben Zwirs and Derya Guzel, 'Philips Completes Sale Domestic Appliances' (2021) <https://www.philips.com/a-w/about/news/archive/standard/news/press/2021/20210902-philips-completes-sale-of-domestic-appliances-business-to-global-investment-firm-hillhouse-investment.html> accessed 1 July 2023.

[95] ibid 14.

[96] European Commission, 'Commission Staff Working Document on Foreign Direct Investment in the EU' SWD (2019) 108 final, 11.

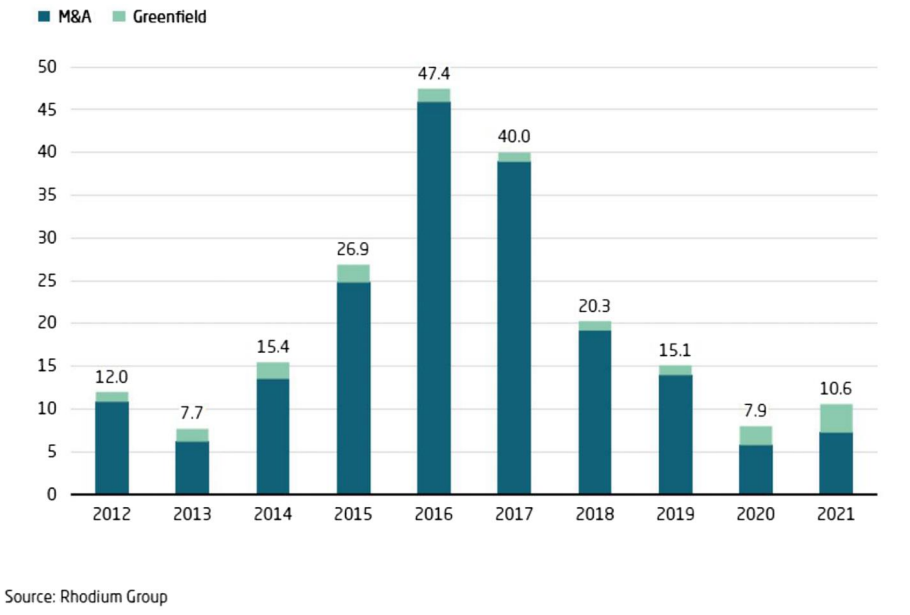

Figure 1. Annual Value of Completed Chinese Transactions in Europe, in EUR Billion.
Source: Agatha Kratz and others, 'Chinese FDI in Europe. 2021 Update' (2021) MERICS Report, Rhodium Group, 5.

from companies located in North America. Yet, there was a 35.7% *drop* in foreign deals from the broader China.[97]

If we look at these various sources of data, then one can conclude that the ownership of EU company assets by Chinese investors is not as high as one might assume, the percentages being in the lower single digits.[98] The number of EU companies controlled by Chinese investors in the broad sense grew from 5000 in 2007 to 28,000 in 2017.[99] Whilst this number is not negligible it is far smaller than those controlled by the US and Canadian companies, who are quite active in bringing ITA claims against EU Member States. The US companies have by the end of 2021 initiated 16 ITA claims against EU Member States (Central and Eastern European) and Canadian investors launched seven such cases.[100]

As an interim observation, one could say that those EU States that have newer and more permissive BITs (see Annex 1 and Assessing the BITs Concluded by EU Member States with China section) might not be overly exposed to potential Chinese claims, since there is a decreasing trend of Chinese FDI into the EU and the number of EU companies controlled by Chinese investors is quite low. However, several points need to be made.

First, we need to reconcile two seemingly opposing developments: the small number of ISA claims launched by Chinese investors, with the rather high percentage of those claims being brought against EU States. On the one hand, given China's very large number of IIAs

[97] EU Commission, 'Trends in Foreign Deals and Greenfield Investments in the EU' Foreign Investment Bulletin, April–June 2022 <https://publications.jrc.ec.europa.eu/repository/handle/JRC130267> accessed 1 July 2023. I thank Nardo Michela (EU Commission, Brussels, Belgium) for referring me to the FDI Bulletins.

[98] Datenna, a private intelligence company, is currently providing data-driven economic intelligence on EU-China relations, using a more granular approach to the Chinese ownership of EU companies <https://www.datenna.com/about> accessed 1 July 2023.

[99] European Commission (n 96) 13.

[100] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, 'China' <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/35/canada/investor> accessed 1 July 2023.

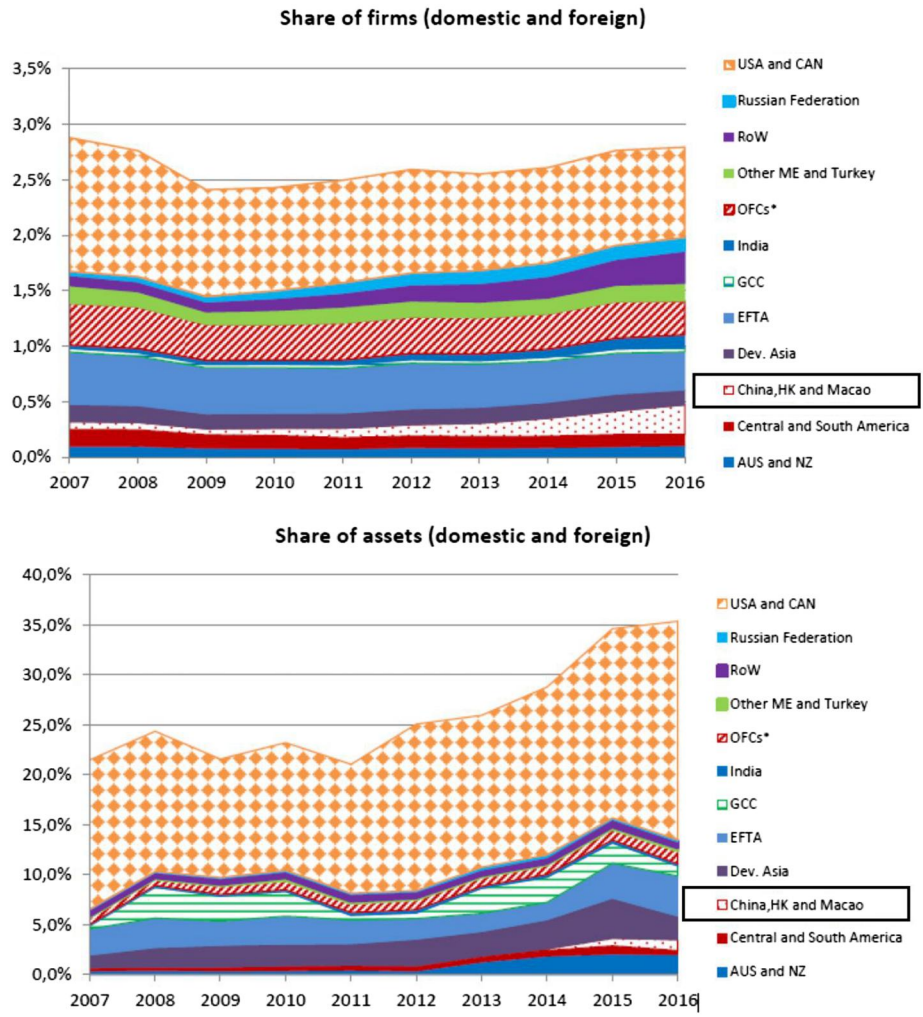

Figure 2. Share of Non-EU Firms of All Firms and Assets by Origin (2007–2016).
Source: European Commission, 'Commission Staff Working Document on Foreign Direct Investment in the EU' 14.

and the large amount of Chinese outward FDI in the wider world, it is surprising that there are very few treaty-based ISA claims brought by Chinese investors or by foreign investors against China. This 'lack of affinity' of Chinese investors for international arbitration[101] is explained by some authors on grounds of culture or lack of expertise with ISDS,[102] while others use more legalistic explanatory variables, such as the presence of pre-dispute mitigation clauses (such as mandatory administrative review procedures in China), the presence of cooling-off periods, temporal jurisdictional limitations, and alternatives to treaty-based arbitration (such as international commercial arbitration, and the usage of domestic courts).[103]

[101] Vaccaro-Incisa (n 24) 50.
[102] Guiguo Wang, 'China's FTAs: Legal Characteristics and Implications' (2011) 105 American Journal of International Law 493, 503.
[103] See Lindmark and others (n 79).

On the other hand, whilst Chinese investors have brought less treaty-based ISA claims against EU Member States than US and Canadian investors have, the percentage of claims brought against EU Member States is higher in the case of China. According to UNCTAD, out of 13 claims brought by Chinese investors against host States, four[104] were against EU states (30.7%), and their database does not yet include the recent *Huawei v Sweden* claim. For claims brought by US and Canadian investors, these figures are much lower. Until the end of 2021, there were seven such cases brought by Canadian investors against EU Member States out of a total of 63 (11%) and 17 US investor claims out of a total of 204 (8.3%). Thus, we might see a shift in attitudes and Chinese investors might bring more claims.

Secondly, the Commission's Working Document cautions us that both state (SOEs) and non-state-owned enterprises may be influenced or supported by their state of origin, which means that the motives behind the acquisition might not be purely commercial, but also strategic.[105] In the case of China, the boundaries between SOEs and non-SOEs are blurred and the involvement of the Chinese Communist Party (CCP) in the decision-making of Chinese companies is not fully known,[106] as evidenced by the 2021 'disappearance' of Jack Ma, the CEO of Alibaba, one of the biggest Chinese companies.[107]

As argued by Henderson and others, even though some EU SOEs also invest abroad, 'what ultimately distinguishes Chinese SOEs from their European counterparts is the nature of the states to which they are ultimately responsible'[108] and larger Chinese companies 'are required to incorporate representatives of the CCP'.[109] Thus, the motives behind a Chinese investor bringing a treaty-based ISA claim might be different than one brought by, for example, a Canadian investor. These might be strategic cases pushed forward by the Chinese State or the investor might be able to draw on significant State resources to pay the high costs of arbitration.

Thirdly, the bulk of Chinese investments between 2000 and 2020 was 'overwhelmingly' concentrated in five EU and one former EU country, namely the UK, Germany, Italy, France, Finland, and the Netherlands.[110] This increases the likelihood that these countries might become the targets of ISA claims initiated by Chinese investors. As discussed in the 'Assessing the BITs concluded by EU Member States with China' section, Finland is in a more vulnerable position as its BIT with China also covers the 'establishment' of investments. Italy should not really be concerned, as its 1985 BIT does not include ISA. The Germany–China BIT might also offer some protection to Germany as the conditions of the NPM clause found in that BIT might be easier to fulfil than the Article XXI GATT-style

[104] Apart from *Huawei v Sweden* (n 17), none of the other cases involve security issues or blocked Chinese investments. The ongoing *Alpene Ltd v Republic of Malta* (ICSID Case No ARB/21/36) concerns the investments of an Iranian national in the Maltese banking sector via a Hong Kong-based shell company, and involves criminal charges brought against the Iranian national owner. See Jack Ballantyne, 'Malta faces first ICSID claim—Global Arbitration Review' (2021) Global Arbitration Review (subscription based) <https://globalarbitrationreview.com/article/malta-faces-first-icsid-claim> accessed 1 July 2023. The ongoing *Wang v Finland* (UNCITRAL) concerns a case of an alleged wrongful imprisonment. The 2019 *Jetion and T-Hertz v Greece* (UNCITRAL) was discontinued. The 2012 *Ping An v Belgium* (ICSID Case No ARB/12/29) was decided in favour of the State and concerned the nationalization of a bank in which the claimant had invested following the 2008 financial crisis.

[105] European Commission (n 8) 61, referring to the ChemChina acquisitions in Switzerland, Italy, and Germany.

[106] See Meunier (n 14) 351. On the difficulties surrounding the negotiations of a US–China BIT due to the issue of Chinese SOEs, see Xinquan Tu, Na Sun and Zhen Dai, 'Issues on SOEs in BITs. The (Complex) Case of the Sino-US BIT Negotiations' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP 2019) at 194-204.

[107] Similar to the mysterious disappearance and reappearing of Mike Poon, the alleged Chinese investor behind the acquisition of a stake in the Toulouse-Blagnac airport in France. See Meunier (n 14) 351.

[108] Henderson, Feldmann and de Graaf (n 14) 1052.

[109] ibid. On the discussion of whether a Chinese SOE is remote enough from the State as concerns its day-to-day management, see *BUCG v Yemen* (n 83) Decision on Jurisdiction, paras 37–44.

[110] Henderson, Feldmann and de Graaf (n 14) 1048.

NPM clause in the Finnish BIT (see Assessing the BITs concluded by EU Member States with China section).

The treatment of Chinese investors and security alliances

The treatment received by Chinese investors during these national screening processes can ultimately trigger the responsibility of EU States under the existing BITs with China. These national measures, however, do not exist in a void and are often influenced by other, non-legal concerns.

The first one is *economic* in nature. Unlike in the case of trade and the EU's fairly united voice in trade-related matters, when it comes to FDI one cannot speak of a fully united block. EU Member States have very different levels of development. Therefore, the need for foreign capital in certain Member States is stronger than in others, especially following the 2008 financial crisis. Such States might be more willing to accept Chinese investments even in sensitive sectors of their economy.[111] This divergent need for FDI is one of the reasons behind the lack of 'bite' of the EU Screening Regulation which only 'establishes a framework' for the screening by Member States of foreign FDI into the EU 'on grounds of security or public order' (Article 1.1). However, it does not in any way limit the right of each Member State to decide whether to screen a particular foreign investment (Article 1.3). This means that the treatment of Chinese investors will differ from Member State to Member State, and what one Member State might accept, others might block.

The second concern is one of *security alliances*. Even if some EU Member States might be willing to allow a certain Chinese investment, many of them are also NATO members that have strategic ties with the USA. Thus, pressure from the USA on its allies to block certain Chinese investments will also heavily influence an EU State's decision to block them.[112] However, measures adopted pursuant to such pressures could result in breaches of the BITs.

With the above in mind let us look at some high-profile cases that involved the screening or outright blocking of Chinese investments to ascertain how these State measures could trigger the responsibility of EU States under the BITs with China.

Romanian measures and the importance of security alliances

Strategic security ties with military allies might influence a country's decision to block a Chinese investment. A secret Memorandum of Understanding (MoU) between the USA and Romania was declassified in 2019 (even though the text is quite hard to come by) in which the two signatories acknowledge that 'a careful and complete evaluation of 5G vendors is necessary'.[113] According to the MoU, a rigorous evaluation of the vendors should look at (i) whether the vendor is subject to control by a foreign government; (ii) whether the vendor has a transparent ownership structure; and (iii) whether the vendor has a history of ethical corporate behaviour and is subject to a legal regime that enforces transparent legal practices.[114]

Whilst the MoU does not mention Huawei specifically,[115] it is no secret that the MoU was signed with Huawei in mind; not only did the major news outlets report this as such but

[111] A case in point being Portugal's electricity generation and distribution companies owned by the Three Gorges and State Grid SOE, owned 100% by the Chinese State. See Henderson, Feldmann and de Graaf (n 14) 1052.

[112] Radu Marinas, 'Romanian President Signs Bill into Law to Ban Huawei from 5G' *Reuters* (2021) <https://www.reuters.com/business/media-telecom/romanian-president-signs-bill-into-law-ban-huawei-5g-2021-06-11/> London, accessed 1 July 2023.

[113] I only managed to find a scan of the document on the following Romanian language news article, Mihai Gongoroi, 'Memorandumul 5G cu SUA, desecretizat: România trebuie să evalueze furnizorii de echipamente' *Mediafax* (2019) <https://www.mediafax.ro/economic/memorandumul-5g-cu-sua-desecretizat-romania-trebuie-sa-evalueze-furnizorii-de-echipamente-document-18534516> Bucharest, Romania, accessed 1 July 2023.

[114] ibid.

[115] For a discussion of the different approaches taken by the United States and EU countries to Huawei, see Friis and Lysne (n 5) 1175. They argue that unlike in the United States, where the 'securitization' of Huawei and 5G was used as a launchpad

the website of the US Embassy in Romania in a 2020 communication starts with 'Huawei is the wrong way on 5G development'.[116]

This MoU resulted in the Romanian Parliament passing Law 163 on 11 June 2021, Article 3(2) of which requires 5G operators and developers to obtain prior authorization from the Prime Minister of Romania, who shall act on the advice of the Supreme Council for the Defence of Romania.[117] Even though Law 163 does not mention Huawei or China, in Article 5, it incorporates word by word the afore-mentioned conditions found in the MoU between Romania and the USA.

These measures taken by Romania, and similar measures taken by Poland were followed by a letter dated 11 September 2020 from Huawei to the EU Commission's Executive Vice-President Vestager, arguing that these legislative initiatives would lower competition in the EU and breach several EU fundamental freedoms and basic principles (proportionality and non-discrimination), and they would also breach WTO law.[118]

Interestingly, Huawei did not mention a potential breach of the Chinese BITs with Poland and Romania. Whilst Huawei is not mentioned directly in Law 163/2021, the investor could argue that indirect discrimination occurred. Furthermore, the China–Romania BIT's ISA clause is fairly liberal[119] and the BIT includes no NPM clause (see Annex 1), not allowing Romania to use a national security-based defence. The China-Romania BIT, however, only applies to the post-establishment phase and does not include a national treatment clause.[120] Thus, if Huawei is attempting to make an investment in Romania, then this attempt will not be protected by the BIT. However, Huawei is already established in Romania.[121] Thus, there is the potential for an ISA claim, but this would most likely be based on potential breaches of the FET and MFN obligations.

The measures taken against Huawei are not the only measures taken by Romania that have Chinese investments in mind. Euractiv reported in early 2021 that the Government of Romania issued a memorandum that would 'block the awarding of public infrastructure contracts to companies coming from countries that do not have a bilateral trade agreement with the EU'.[122] China has no trade agreement either with the EU or with Romania (the latter would be impossible after Romania's accession to the EU). This has resulted in a project led by the country's Public Procurement Agency (ANAP) calling for an Emergency Government Ordinance to amend the country's public procurement laws.[123] If such an Ordinance is passed, following the arguments in the previous paragraph, the potential for an ISA claim exists, but only if a Chinese company is already established in Romania and stopped from bidding for an infrastructure project.

for a broader confrontation with China, EU states limited securitization to 5G technology, 'rather than applying to China as a whole'.

[116] US Embassy in Romania, 'Building a Secure 5G Future' <https://ro.usembassy.gov/building-a-secure-5g-future/> accessed 1 July 2023. This type of non-diplomatic rhetoric was used by US officials in other situations as well. See Friis and Lysne (n 5) 1178.

[117] LEGE Nr 163 11/06/2021, text available in Romanian at <https://legislatie.just.ro/Public/DetaliiDocument/243213> accessed 1 July 2023.

[118] Letter of Huawei EU Public Affairs to the European Commission's Executive Vice President Vestager, 11 September 2020 <https://www.asktheeu.org/en/request/8633/response/28723/attach/6/Letter%20from%20Huawei%20to%20EVP%20Vestager%20Redacted.pdf?cookie_passthrough=1> accessed 1 July 2023.

[119] art 9(2) of the Romania–China BIT allows for ICSID arbitration if the disputing parties so agree.

[120] The Romania–China BIT (1994) and its Additional Protocol (2007) includes an FET, FPS, and MFN clause in art 3, but not the national treatment obligation. Thus, the discrimination argument would need to focus on the MFN treatment.

[121] See the official website of Huawei Romania <https://www.huawei.com/ro/corporate-information/local-states> accessed 1 July 2023.

[122] Bogdan Neagu, 'Romania Issues "memorandum" Blocking Chinese Firms from Public Infrastructure Projects' (*EURACTIV*, 2021) <https://www.euractiv.com/section/economy-jobs/news/romania-issues-memorandum-blocking-chinese-firms-from-public-infrastructure-projects/> accessed 1 July 2023.

[123] ANAP, Proiect, 'Ordonanță de Urgență privind modificarea și completarea legislației în domeniul achizițiilor publice' available in Romanian <http://anap.gov.ro/web/wp-content/uploads/2021/03/Proiect-OUG-achizitii-publice_state-terte_propunere.pdf> accessed 1 July 2023.

Sweden and Huawei

The ongoing *Huawei v Sweden* investor–State dispute is proof that the treatment of Chinese investors based on national security concerns can result in an arbitration under an EU Member State BIT with China. This case is all the more curious as it relies on the first such BIT (1982) between a now[124] EU Member State and China. Whilst the original 1982 BIT in Article 6 only referred to State-to-State disputes, Article 6 *bis* introduced by the 2004 Amendment Protocol allows for ISA pursuant to ICSID and the UNCITRAL Rules. This article lies at the base of the Written Notification of a Dispute sent by Huawei on 31 December 2020 to the Kingdom of Sweden.[125]

The case is curious on other grounds as well. First, it shows that even the actions of a developed, capital-exporting member of the EU can result in an international investment dispute.

Secondly, this case is not concerned with the blocking of a Chinese company that is *planning* to invest in the EU. Instead, the case concerns a well-established company in an EU Member State, Huawei Technologies Sweden AB, that opened its first R&D centre in the EU in Sweden in 2000.[126]

Thirdly, unlike in the case of Romania, where the country's legislature passed various laws meant to stop Chinese investments in certain sectors (5G networks, public infrastructure), in this case, we are dealing with the actions of the *executive*, a government agency. The Swedish Post and Telecom Agency (PTS) invited mobile network operators to an auction concerning GHz bands for 5G networks. In the press release for the bidding invitation, PTS required a pre-examination of applicants that had to take place in consultation with the Swedish Security Services and the Swedish Armed Forces.

Fourthly, unlike the Romanian legislation that did not directly name Huawei, the Swedish agency adopted a Decision in which authorized 5G mobile network operators and developers who were granted a license were not to use products supplied by Huawei or ZTE (another Chinese telecommunications company[127]).

Based on these facts, the Chinese investor is alleging a breach of the BIT's fair and equitable treatment, MFN treatment, and expropriation/nationalization clauses. Without going into an in-depth legal analysis, if the recently constituted tribunal[128] is to uphold its jurisdiction, the chances are that Huawei will have a strong case for the breach of the FET and MFN standards. Whilst the former is not specifically defined in Article 2(1) of the China–Sweden BIT,[129] as Di Mascio and Pauwelyn have argued, under FET countries are required to refrain from discriminating, which is not limited to origin-based discrimination and does not call for a relative comparison of domestic and foreign investors. Furthermore, unlike trade law's focus on economy-wide efficiency and competition, 'non-discrimination in investment law originated and remains embedded in the idea of individual fairness'.[130]

[124] Prior to 1995, Sweden was not a member of the EU.
[125] See *Huawei v Sweden* (n 17).
[126] ibid 2.
[127] In 2018, the United States banned both Huawei and ZTE products from being used in the Armed Forces. In 2021, current US President Joe Biden signed the Secure Equipment Act, to prevent Chinese companies like Huawei and ZTE to receive new equipment license from US regulators. The Act was approved unanimously by the Senate and with a 420-4 majority by the House of Representatives. See David Shepardson, 'Biden Signs Legislation to Tighten U.S. Restrictions on Huawei, ZTE' *Reuters* (2021) <https://www.reuters.com/technology/biden-signs-legislation-tighten-us-restrictions-huawei-zte-2021-11-11/> London, accessed 1 July 2023.
[128] The presiding arbitrator is Prof. Gabrielle-Kaufmann Kohler. The wing arbitrators are Prof. Jane Willems and Prof. Zachary Douglas.
[129] Such clauses are also referred to as 'unqualified FET' clauses.
[130] Nicholas Di Mascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart of Two Sides of the Same Coin?' (2008) 102 American Journal of International Law 48, 68.

In this case, Huawei, which has long been established in Sweden, is specifically named by the Swedish authorities, it is excluded from participating in the public bids, and other companies bidding for the 5G contract cannot use Huawei's products. Thus, such measures put the company at a disadvantage with both local and other foreign investors and could amount to 'arbitrary' and/or 'unbiased' treatment, both of which have been held by previous arbitral tribunals to be a breach of the FET standards.[131] Furthermore, the Claimant could focus on the previously mentioned idea of 'individual fairness'. The State, however, could argue that the differences in treatment were not 'unjustified' as the differential treatment of Huawei was due to the Swedish measure's purpose to protect national security. If this argument of the State were to fail and the tribunal concludes that the FET standard had been breached, then Sweden would probably need to build a defence on customary rules of international law, such as the police powers doctrine, since the China–Sweden BIT does not include an NPM clause.

German reluctance to block Chinese investments

According to Cheng Bian, in recent years, some high-profile cases appeared in Germany as well. Germany has taken a cautious approach and at the moment of writing Bian's article (2021), no official rejections of Chinese investments in Germany had been found.[132] This compromising approach is also visible in the very recent takeover of 24.9% of the shares of the Port of Hamburg by the Chinese state-owned COSCO, not 35% as originally planned, following an investigation by the German authorities.[133] The 2021 MERICS report mentions several ongoing screenings in Germany, such as the potential takeover of Elmos Semiconductor by SAI MicroElectronics.[134]

Even though there were no official rejections until 2021, according to Bian some of the cases garnered a lot of opposition and media attention. For example, the acquisition of Kuka (a cutting-edge robotics company) by the Chinese Midea for EUR 4.5 billion was faced with overwhelming objections from the public and the management of the German company.[135] Still, the investment was cleared.[136] The proposed takeover of Aixtron, a semiconductor producer, by the Chinese Fujian Grand Chip Investment Fund, was first cleared by the German authorities, only to have the approval later rescinded and the review reopened, due to a similar takeover by the same investor in the USA being blocked. Before the review was completed, the Chinese investor abandoned the deal.[137] According to Bian, the most popular German assets sought by Chinese investors were in the fields of energy, advanced manufacturing, and machinery.

Whilst the German approach seems cautious and compromising, one cannot deny that public pressure existed in these high-profile cases and in the Aixtron case in the end the Chinese investor dropped the bid. What about a potential ISA claim? Even though the 2003 Germany–China BIT includes a more liberal ISA clause (Article 9.3), both reviews of Chinese takeovers concerned the *entry* into the German market of a Chinese investor. The

[131] See eg, *SD Myers, Inc v Government of Canada*, United Nations Commission on International Trade Law, para 263 (13 November 2000). Commenting on *Global Telecom v Canada*, Voon and Merriman argue that for the breach of the FET standard by a host State screening measure, other factors are also important such as transparency of the decision-making process, due process, and evidence in investment screening. See Voon and Merriman (n 32) 26–28. See also Mitchell, Munro and Voon (n 57) 60–63.

[132] Bian (n 19) 581.

[133] Kijewski (n 18).

[134] Kratz and others (n 29) 14.

[135] For a discussion on the role of non-Chinese corporate elites as potential brokers between EU companies and their Chinese counterparts, see Nana De Graaf and Diliara Valeeva, 'Emerging Sino-European Corporate Elite Networks' (2021) 52 Development and Change 1147, 1165.

[136] Bian (n 19) 572; Meunier (n 14) 355.

[137] ibid 582.

BIT, however, does not cover the pre-establishment phase. Furthermore, Ad Article 3(b) of the Protocol found at the end of the Germany–China BIT, includes an NPM clause. As discussed in 'Assessing the BITs concluded by EU Member States with China' section, an arbitral tribunal could interpret the nexus element of 'have to' as being similar to the concept of 'necessary to'. However, it could also adopt interpretations which are more or even less stringent than the 'necessary to' nexus requirement. Furthermore, unlike the NPM clause found in the China–Finland BIT, the German NPM clause does not mention 'essential' security. Whilst the clause is not self-judging, this part of the clause would be easier to prove than the Article XXI GATT-type Finnish clause.

CONCLUSION

One must be cognisant of the broader geopolitical shifts that are taking place in the world when writing these concluding remarks. Writing prior to COVID-19 and the War in Ukraine, but after the US–China Trade War, Roberts, Moraes and Ferguson have noted that the new Geo-economic Order is marked by a rise in economic nationalism and protectionism, a focus on relative economic gains as opposed to absolute economic gains, ongoing challenges faced by international adjudicatory mechanisms, and the 'securitization' of issues previously not in the realm of security concerns.[138] Thus, a host EU State which is currently more open to Chinese investments, might change its policy if certain goods, services, or investments become 'securitized', such as various dual-use goods or critical infrastructure and technologies.

When asking the question whether there is a need to worry, the answer will invariably differ according to the perspective one takes. From the *perspective of Chinese investors*, it is fairly obvious that the recent EU-level and Member State-level measures taken for national security purposes mean that for the foreseeable future, certain new investments will be directly blocked, certain existing investments and investors will not be able to take part in various public bids, and as the German examples show, some investments will be withdrawn even when no official blocking decision has yet been issued. *New Chinese investments and investors* will find it difficult to bring a potential ISA claim, because most of the BITs concluded between EU Member States and China do not cover the pre-establishment phase, apart from the Finnish BIT. For *already established investments* ISA claims will not be possible under the older generation BITs (unless amended like the Swedish BIT) as they do not provide for ISA or provide for only limited ISA concerning the amount of compensation due to expropriation. However, under the newer BITs, ISA will be possible, and the national treatment, MFN, and FET clauses will most likely be used, with a combination of the prohibition for expropriation in case various operating licenses are retrospectively withdrawn.

From the perspective of the *host EU States*, multiple variables need to be considered, not all of which are legal in nature. First, not all EU States block Chinese investments or have a mechanism in place to screen them. Secondly, as we have seen, the number of EU companies owned by Chinese investors is not as high as one might think and Chinese FDI in the EU States and the UK has been falling since 2016. Whilst this does not exclude the likelihood of Chinese ISA claims pursuant to national security reviews, it does somewhat lower the statistical probability of cases. Furthermore, if we combine this with a certain 'aversion' of Chinese investors towards international arbitration, then the likelihood of cases falls even more. Nevertheless, as *Huawei v Sweden* shows, some ISA claims are to be expected, especially if Huawei is successful in winning the case or settling it 'out of court'.

[138] Roberts, Moraes and Ferguson (n 1) 659–60.

The older Chinese BITs do not include ISA or include very limited ISA. Therefore, those EU States (Italy, Denmark, Austria, and Bulgaria) will not face claims from Chinese investors, unless a tribunal would be willing to give an extremely broad interpretation of the MFN clause under the *Maffezini* doctrine, so as to allow for the usage of an ISA clause from another EU Member State BIT with a third country, when the original BIT includes no express consent to arbitration.[139] Such a very broad interpretation seems unlikely, but not impossible.

For those States that have a more modern ISA clause, the first line of defence is the absence in most cases of the pre-establishment provisions. However, for already existing investments, like Huawei in Sweden, the reviews and screenings based on national security grounds can trigger the liability of the EU host State. For this latter group of states, the situation from a legal perspective is somewhat more challenging: (i) the post-establishment phase is covered; (ii) the ISA clauses of the post-2000 BITs are quite broad; (iii) most of the standards of protection do not include carve-outs for certain sensitive sectors; and (iv) most treaties do not include any type of NPM clause.

Because of the shifting geopolitical landscape towards less liberalization and more securitization, investment review and screening measures are most likely here to stay. Thus, EU States will need to somehow reconcile their international obligations under IIAs with their screening measures. This could be done by potentially terminating their BITs, amending the BITs to exclude the ISA provisions, including NPM clauses similar to the one in the Finland–China BIT, or by introducing carve-out clauses for investment screening measures.

Terminating their BITs, together with the sunset clauses, is the safest option if the goal is to stop potential claims initiated by Chinese investors. However, it does come with the drawback that EU investors in China will likewise lose the protection offered by the BITs and other foreign investors might perceive the EU as less welcoming to FDI (especially following the termination of intra-EU BITs and the Energy Charter fiasco). The second option of amending the BITs so as to exclude ISA provisions seems less feasible as the substantive standards of protection would be difficult to enforce if the option to resort to international arbitration is not present. The third option comes with the drawback that the cumulative elements of such NPM clauses are very difficult to prove. The last option of amending the BITs to include 'investment screening' clauses, seems less intrusive than the first option and politically more achievable than the second and third ones. However, as the *Global Telecom v Canada* case illustrates (*supra*), every legal term included in such clauses would need to be interpreted by ISA tribunals.

For now, EU States might want to wait until the *Huawei v Sweden* case is concluded. *Huawei v Sweden* will probably be a test case. If the investor is successful (either by settling or proving that the host EU State breached its international commitments), then similar cases could easily follow. As we have discussed, separating Chinese firms from the CCP is often not an easy task. Thus, one could say that future cases could be influenced by the policy the CCP takes. However, it is also worth mentioning that State power in China is often not as concentrated and centralized as one might think, as illustrated by the lending practices of various central, regional, or local Chinese institutions, that often do not know what aid is granted by which institution.[140] Thus, this could lead to a more autonomous decision-making by the Chinese investors on whether to pursue ISA claims

[139] I thank Sergey Usoskin (Usoskin Arbitration, Moscow, Russia) for the discussion surrounding the application of the *Maffezini* doctrine when there is clearly no consent to arbitrate.

[140] Dreher (n 4) ch 1.

Annex 1. The Anatomy of Chinese BITs with EU Member States

EU MS-China BIT	ISA	Pre-establishment	BIT standards include carve-out	GATT XXI type NPM Clause	Typical NPM clause	The 'nexus' element	NPM applies to whole BIT	NPM Self-judging
Sweden 29 March 1982 Amendment Protocol 27 September 2004	Yes (ICSID and UNCITRAL) Article 6 bis Protocol China may require exhaustion of domestic admin. review procedure	No	No	No	No	N/A	N/A	N/A
Italy 28 January 1985	No	No, but nationals connected to investment can travel. Protocol Add Article 3	Yes, NT and MFN Protocol Add Article 3	No	No	N/A	N/A	N/A
Denmark 29 April 1985	No	No	Yes, FET, MFN, NT Article 3.5	No	No	N/A	N/A	N/A
Austria 12 September 1985 Amendment Protocol 17 September 2012	No	No	Yes Article 3.3	No	Yes Protocol Add Article 3(b)	'reasons of' public order, safety, morals, health	MFN, NT	No
Poland 7 June 1988	Yes, but only the amount of compensation for the expropriation Article 10.1 No references to ICSID or UNCITRAL	No	Yes, FET, MFN Article 3.3	No	No	N/A	N/A	N/A
Bulgaria 27 June 1989 Additional Protocol 26 June 2007	No	No	Yes, MFN, NT Article 1 Add Protocol	No	No	N/A	N/A	N/A
Hungary 29 May 1991	Yes, via subsequent agreement if China becomes an ICSID member (in Protocol)	No	Yes, FET, FPS, MFN Article 3.3	No	No	N/A	N/A	N/A
Slovakia 4 December 1992 Additional Protocol 7 December 2005	Yes, UNCITRAL (Art 9.2 (b)), but only for compensation for expropriation	No	Yes, MFN Articles 1–3.3 Add Protocol NT Articles 1–3.4 Add Protocol	No	No	N/A	N/A	N/A
Greece 25 June 1992	Yes, UNCITRAL or ICSID if both sign the ICSID Convention, and in both cases by mutual consent (Article 10.4)	No	Yes, MFN Article 3.3	No	No	N/A	N/A	N/A
Croatia 7 June 1993	Yes, but only for amount of compensation for expropriation. FITR clause as well. ICSID Arbitral Rules to be followed (Article 8.3-8)	No	Yes, MFN, FET Article 3.3	No	No	N/A	N/A	N/A

(continued)

Annex 1. (continued)

EU MS-China BIT	ISA	Pre-establishment	BIT standards include carve-out	GATT XXI type NPM Clause	Typical NPM clause	The 'nexus' element	NPM applies to whole BIT	NPM Self-judging
Estonia 2 September 1993	Yes, but only for amount of compensation for expropriation. FITR clause as well. ICSID Arbitral Rules to be followed (Article 8.3-8)	No	Yes, FET, MFN Article 3.3	No	No	N/A	N/A	N/A
Slovenia 13 September 1993	Yes, but only for amount of compensation for expropriation. FITR clause as well. ICSID Arbitral Rules to be followed (Article 8.3-8)	No	Yes, FET, FPS, NT, MFN Article 3.4	No	No	N/A	N/A	N/A
Lithuania 8 November 1993	Yes, but only for amount of compensation and 'other disputes agreed' and using ICSID. If one party is not an ICSID member, then *ad hoc* arbitration. (Article 8.2(b)-7)	No	Yes, FET, MFN Article 3.3	No	No	N/A	N/A	N/A
Romania 12 July 1994 Additional Protocol 16 April 2007	Yes ICSID, if disputing parties so agree (Article 9.2)	No	Yes, FET, MFN Article 1 Add Protocol	No	No	N/A	N/A	N/A
Cyprus 15 January 2002	Yes, ICSID or *ad hoc* tribunal (Article 9.3)	No	Yes, MFN, NT, FET Article 3.4	No	No	N/A	N/A	N/A
Netherlands 26 November 2001	Yes, ICSID and UNCITRAL (Article 10.3) Investor must exhaust domestic administrative procedure in China (Protocol Add Article 10)	No	Yes, FET, FPS, NT, MFN Article 3.6 and Add Article 3 NT, MFN (Protocol)	No	No	N/A	N/A	N/A
Germany 1 December 2003	Yes, ICSID and UNCITRAL Article 9.3 Binding awards shall be enforced in accordance with domestic law	No	Yes, MFN, NT, FET Articles 3.4 and 3 Add Articles 2 and 3 (NT) and 4 Add Article 3 (a) Protocol	No	Yes, Add Article 3(b) Protocol	'Have to be taken' public order, security, health, morals)	FET, NT, MFN	No
Latvia 15 April 2004	Yes, ICSID (Article 9.2) If China is Respondent, then domestic admin review procedure must be exhausted (Protocol)	No	Yes, MFN, NT, FET Article 3.5	No	No	N/A	N/A	N/A
Finland 15 November 2004	Yes, ICSID and UNCITRAL, investor's choice (Article 9.2) If China is Respondent, then domestic admin review procedure must be exhausted (Add Article 9 Protocol)	Yes Article 3.3	Yes, FET, MFN, NT Article 3.7 and Add Articles 2, 3 NT, MFN (Protocol)	Yes Article 3.5 (essential security interests)	Yes Article 3.6 (public order + Chapeau)	'Necessary for'	FET, MFN, NT	No

(continued)

Annex 1. (continued)

EU MS-China BIT	ISA	Pre-establishment	BIT standards include carve-out	GATT XXI type NPM Clause	Typical NPM clause	The 'nexus' element	NPM applies to whole BIT	NPM Self-judging
Belgium-Luxemburg 6 June 2005	Yes, ICSID (Article 8.2) If China is the Respondent, then domestic admin review procedure must be exhausted (Add Article 8 Protocol)	No	Yes MFN (Article 3.3) and NT (Add Article 3, Protocol)	No	No	N/A	N/A	N/A
Spain 14 November 2005	Yes, ICSID and UNCITRAL, investor's choice (Article 9.2) If China is Respondent, then domestic admin review procedure must be exhausted (Add Article 9 Protocol)	No	Yes, MFN, NT in Article 3.4 and NT in Add Article 2 and 3 Protocol	No	No	N/A	N/A	N/A
Czech R. 8 December 2005	Yes, ICSID and UNCITRAL, investor's choice (Article 9.2) If China is Respondent, then domestic admin review procedure must be exhausted (Add Article 9.3 Protocol)	No	Yes, MFN, NT, FET in Article 3.3 and MFN, NT in Article 3.4 and MFN in Article 3.4	No	No	N/A	N/A	N/A
Portugal 9 December 2005	Yes, ICSID and UNCITRAL, investor's choice (Article 9.2) If China is Respondent, then domestic admin review procedure must be exhausted (Add Article 9 Protocol)	No	Yes MFN, NT in Article 3.4 and NT in Add Article 2 and 3 Protocol	No	Yes, Add Article 3.1 Protocol	'Have to be taken' public order, security, health, morals	MFN	No
France 26 November 2007	Yes, ICSID and UNCITRAL Article 7	No	Yes, MFN, NT Article 4.3	No	No	N/A	N/A	N/A
Malta 22 February 2009	Yes, ICSID and UNCITRAL Article 9.2(b) Investors in China must go through administrative review *and* dispute has not been submitted to a national court in China (Article 9.3(a)) Investors in Malta must exhaust local procedures (Article 9.3(b))	No, but facilitate travel for investors Article 3.4	Yes, FET, NT, MFN Article 3.3 (b, c)	No	No	N/A*	N/A	N/A

* N/A - not applicable

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