

Analysis of the China-EU Comprehensive Agreement on Investment from Perspectives of EU Competences and Decision-Making Procedures

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Abstract: *The China-EU Comprehensive Agreement on Investment (CAI) based on the current world economic situation and demands of economic development of both sides, lasted for 7 years of negotiation with 35 rounds of reports, finally reached an agreement in principle on the CAI. The analysis of the competences and legislative procedure of CAI reveals the EU values and the exclusive European competences in the field of common commercial policy. Also, by analyzing the legislative process of the agreement, it is possible to see the division of power within the EU institutions, the rigor of the EU decision-making and the future of the agreement.*

Keywords: *China-EU Comprehensive Agreement on Investment (CAI); EU competences; Decision-making procedure*

The *China-EU Comprehensive Agreement on Investment (CAI)* is the new landmark document in the field of economic cooperation between China and the EU, as well as an external expression of the EU competence and trade philosophy. By analyzing the negotiation process and content of the Agreement, the values, supranational power and decision-making procedures of the EU can be more vividly displayed, and the characteristics of the EU as an international organization with its own system. Its significant role in the world economy and trade can be also clearly reflected.

1. Introduction to the Background and Signing Process of the China-EU Comprehensive Agreement on Investment

1.1 Background of Signing

1.1.1 Demands of Cooperation

As for the EU, it has been emphasizing economic sovereignty in recent years, and its economic cooperation with the United States has wavered, especially after former Donald Trump, the former President of the United State, took office, the EU has to pay more attention to cooperation with China due to its unilateral trade protectionism. At the same time, the cooperation of the RCEP has also aroused the EU's sense of crisis towards the Chinese market. On the other hand, the rapid and steady recovery of The Chinese economy in the face of the epidemic has strengthened the EU's confidence in Chinese market. In 2020, the actual use of foreign investment in China increased by 5.7%, bucking the trend despite a sharp drop in global Foreign Direct Investment (FDI).^[1]

For China, the EU is also an indispensable trading partner. For a long time, China has further emphasized the importance of foreign investment and business, and continued to promote legislation on them.^[2] Under the impact of the epidemic, China needs more investment and trade to energise its economic development. At the same time, China is pushing forward with its economic system reform and needs impetus and opportunities for liberalisation and reform of many mechanisms in the trade sector. Cooperation with the EU, one of the most free and transparent trading entities in the world, is undoubtedly a big help to absorb experience and deepen reforms. In addition, before the negotiations on the CAI began, China had already signed bilateral Investment Agreements with 26 other EU countries except Ireland, which laid a certain foundation for cooperation in the field of trade. Therefore, there is a greater need for a unified and systematic mechanism and legal framework to promote further cooperation between China and EU.

1.1.2 Room for China-Eu Cooperation

Both China and the EU are among the world's top three huge economies. In 2020, China ranked second in FDI inflow after the US, and first in FDI outflow. The EU ranked first in FDI in both 2017 and 2018. Both sides have huge economic volumes and foreign investment market. In addition, China and the EU are long-standing trading partners, with an average daily turnover of over 1.5 billion euros.

In 2019, the combined GDP of China and EU countries (including the UK) accounted for about 34% of the global total, which means there has a vast market and economic development potential. However, in 2020, EU countries only accounted for about 3% of the total investment in China, while in 2021, China-EU trade accounted for 16.2% of the total in the EU. These statistics show that there is still a lot of room for further development in trade and investment cooperation between China and the EU.

1.2 Negotiation Process

In December 2012, China and the EU reached consensus at the 14th China-EU Summit, and officially announced the launch of negotiations on the CAI in November 2013. Since the first round of negotiations between China and the EU began in January 2014, the Agreement has gone through 35 rounds of negotiations over 8 years and was finally concluded in December 2020. Both sides committed to complete the process of review and signing of the agreement within two years.

However, on 20 May 2021, the European Parliament adopted a resolution freezing the relevant procedures of the CAI by a majority of 599 votes in favor, 30 against and 58 abstentions. At present, the Agreement has still not entered into force.

2. The EU's Competences as Reflected in the China-EU Comprehensive Agreement on Investment

The Agreement is divided into six sections, including four main areas as investment liberalization, regulatory framework, investment and sustainable development, and dispute settlement, covering issues such as fair competition, a greater level of market access, and sustainable development of labor and environment.^[3]

2.1 EU Values and Trade Principles Embodied in the CAI

The values and principles of the EU are the basis and prerequisite for the fulfillment of its competences. As one of the most outward-looking economies in the world, the EU has the lowest tariff and the largest single market area in the world. It supports free trade and is committed to creating an open and orderly market, a level playing field and the highest international trade standards, and hopes to promote the liberalization of trade and investment in the world. At the same time, the EU is in full consultation with its citizens, business companies and other stakeholders. All trades and transactions under review are displayed on its website in order to pursue transparency. In addition, the EU attaches great importance to sustainable development and human rights protection. The establishment of the EU is based on the six basic principles of human dignity, freedom, democracy, equality, rule of law and human rights, and these principles are also valuing that the EU follows in trade and promotes to the world.

The EU's trade agreements with third parties are not only to promote economic cooperation and development, but also to spread European values and principles. These principles are reflected in the CAI. In the field of market access, China and the EU offer each other the greatest possible opening commitments^[4], including most favoured nation treatment, national treatment and a negative list, to ensure that companies can enjoy national treatment when entering other sectors or markets except those listed on the negative list. This is the first time for China to open up access to the vast majority of manufacturing industries, and the first time for the whole industry to make a negative list of opening-up commitments. In addition, the Agreement embodies the concept of free and equal treatment by laying down very clear rules on Chinese state-owned enterprises, the obligation of transparency of subsidies and the prohibition of forced technology transfer and other acts that prevent fair competition. Moreover, the EU press released on the agreement states: "The CAI will bind the parties into a values-based investment relationship underpinned by sustainable development principles^[5]." China has agreed on sustainable development provisions with its trading partners for the first time in a number of areas such as labour, environment and climate, which includes the implementation of the United Nations

Framework Convention on Climate Change and the Paris Agreement, and the effective fulfillment of ratified ILO conventions and the establishment of relevant implementation guarantee mechanisms by an independent panel of experts. Also, it concerns about the open and transparent settlement of disputes with the participation of civil society, reflecting the concept of human rights and the rule of law.

2.2 The EU's Competences as Embodied in the CAI

Legal personality is a condition for EU to independently fulfill international obligations and enjoy its rights. Article 47 of the Treaty on European Union (TEU) states that “The Union shall have legal personality^[6]”, thus the EU has various independent capacity, such as the right of external relations and treaty-concluding power.

Due to its legal personality, the EU has the competence to make policies in the field of common commercial policy and conclude international treaties on behalf of the EU member states based on the basic treaties of the European Union, which are the exclusive competence of the EU.

The EU competences refer to the power and functions, which are stipulated in the basic treaties of the EU. Article 3.6, of the TEU states that “The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties^[6].” By defining the scope of competences and jurisdiction of EU and member states, a reasonable and balanced distribution of powers is achieved to improve efficiency and promote the process of European integration. The EU's competence derived from the sovereign concessions of the member states, and are constrained by the principle of conferral, the principle of subsidiarity and the principle of proportionality, which is divided into five parts: exclusive competence, shared competence, coordinated competence of economic and employment policies, competence of supportive, coordinated and supplement the actions, and common foreign and security policy.

The negotiation and conclusion of CAI reflect the exclusive competence of the EU in the field of common commercial policy, that is, according to Article 2 of the Treaty on the Functioning of the European Union (TFEU), in this field, only the EU can legislate, adopt legally binding acts and enter into international agreements with third parties with exclusivity. Member States may legislate or make binding documents independently only if so empowered by the EU or in order to implement EU legislation. Article 3 (1) of the TSEU stipulates: “The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy^[7].” In accordance with the relevant provisions of article 207.1 of the above-mentioned treaty, “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies^[7]. ” The Agreement between China and the EU is mainly involved in the direct investment of both parties and trade protection in the areas of cooperation, including the facilitation of capital flows, preferential market access for the establishment of companies and transparency in the granting of government subsidies, environmental and labour protection in the area of investment and dispute settlement measures, reflecting the exclusive competence of the EU in the area of common trade.

3. Decision-making Procedure and “Freezing” of China-EU Comprehensive Agreement on Investment

3.1 The EU Decision-making Procedure to Which the CAI Applies

Treaties are one of the main sources of law of the European Union, which can be divided into the following three types: the basic treaties between the European Community and the European Union for the establishment and development, the secondary treaties concluded between member states for the implementation of the basic treaties of the European Union, and the supplementary treaties concluded by the European Community or its member states (in whole or in part) with third party such as countries or international organizations^[8]. CAI is the third one, which has the same effect as the institutional legislation of the EU. As an agreement concluded by the EU within its exclusive competence, the AGREEMENT has direct effect on the member States and their citizens.

The negotiation and signing of the Agreement are based on the fulfillment of the EU's competences and follows the EU's decision-making procedures stipulated in the basic EU treaties. In contrast to the common procedure of EU legislation, according to the provisions of Article 207.3, Article 207.4 and Article 218 of the TFEU and the summary compiled by the author, as an international agreement signed by the EU and China, negotiations and signing shall be promoted by the following procedure:

(1) The European Commission shall make recommendations to the Council, which shall authorize the opening of negotiations (As for CAI, this step was completed in October 2013). The Council and the Commission shall be responsible for ensuring that the negotiated contents conform to the internal policies, rules and principles of the EU;

(2) The Council may issue specific directives to the Commission and appoint, by agreement, a special committee to follow up on specific negotiations;

(3) The European Commission, together with the Special Committee, shall be responsible for conducting specific consultations and negotiations, and shall report regularly to the Special Committee and the European Parliament on the progress of the negotiations;

(4) Upon completion of the negotiations between the China and EU (As for CAI, this step was completed by December 2020), the European Commission submits the text of the Agreement in principle to the European Parliament and the European Commission for discussion. Then the procedure of translating and checking of the legal text will be started. The legal text will be translated into 23 EU languages and Chinese, making a total of 24 languages for review by the Member States. Both sides will also consult on adjustments to some of the textual issues such as wording and details (As for CAI, currently suspended here);

(5) After the verification of the legal texts, the presiding officials of both sides will initial the text of the Agreement to indicate the completion of the proofreading of the legal texts;

(6) The European Commission submits to the Council a resolution on the signing of the Agreement drafted by it; after its adoption, both sides will formally sign the agreement, and then implement the ratification procedures within China and the EU. Then the Agreement will formally enter into force.

Special attention should be paid to the fact that, since the content of the Agreement falls within the competence of the EU, approval by a qualified majority vote in the Council is required, that is, approval by more than 55% of the Member States and 65% of the population of the EU. In addition, during the ratification procedure between China and the EU after the signing of the Agreement, the European Parliament will apply the "assent procedure" to express its approval or disapproval of CAI without modification. Only after the "consent" of the European Parliament can the European Council take a formal decision and CAI enter into force.

3.2 "Freezing" of China-EU Comprehensive Agreement on Investment

As mentioned above, after the Single European Act and The Treaty of Lisbon, the role of the European Parliament in EU legislation has been expanded. On 20 May 2021, the European Parliament adopted a resolution "freezing" the China-EU Comprehensive Agreement on Investment. In accordance with the EU's procedures and competences for concluding international agreements with third parties, the European Parliament has the competence to discuss the Agreement after it has been submitted by the Commission. It also has the power to "reject the Agreement with one vote" at the final ratification stage. That means, although this parliamentary resolution does not have the force of law, it is bound to have a huge impact on the attitude of the EU regarding CAI. The "freeze" resolution also makes it clear that the European Parliament will not ratify the Agreement during the final consent procedure if there is no further resolution of the issue between China and Europe.

According to the Parliament's official press release of the European Parliament, MEPs condemned the unfounded sanctions imposed by the Chinese authorities on European individuals and entities, and questioned the human rights. Although at present, the "freeze" resolution of the European Parliament has not produced substantive legal effect, China and the EU are facing not only economic differences, but also political differences, which are more complex and multilateral. Given the importance of the European Parliament in the EU legislative process and the limits of its legislative powers, if such differences cannot be well resolved, CAI is likely to fail to be adopted at the EU level, resulting in the achievement of the seven years of negotiations being in vain.

4. Conclusion: Significance and Future Prospects of China-EU Comprehensive Agreement on Investment

The China-EU Comprehensive Agreement on Investment is an important agreement reached by China and the EU after 35 rounds of negotiations over the past eight years. It embodies the expectations of both China and the EU for deeper economic cooperation and development. The high level of investment and transparency stipulated in the Agreement are incentives to the world's multilateral trading system and free market. Further cooperation between China and the EU in the area of investment and trade will also add impetus to the economic development of both sides and the world.

Looking at the development and content of the Agreement from the perspective of the EU offers a more comprehensive understanding of the uniqueness of the EU as a "supranational" organization, the complexity and rigor of its competences and implementation methods, and the values of the EU displayed in the agreement. However, the current disagreement between the European Parliament and China concerns politics. The Greens, the Renaissance Europe and the Social Democrats in the European Parliament have all said that they will not agree to CAI unless China lifts sanctions. In December 2020, China and the EU pledged to complete the ratification process of the Agreement within two years. Now, with two years approaching, there is no clear change in the attitude of the European Parliament. It is still unknown how China-Eu bilateral relations will develop in the future and when CAI will be ratified and implemented. We hope that the AGREEMENT will enter into force smoothly as soon as possible and play the huge role it should do.

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