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Huawei and ISDS: 5G Infrastructure and Investment Claims

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Chinese involvement in 5G infrastructure development has been an issue of concern for policy makers globally. This post addresses the question of whether the Chinese multinational Huawei would have an investment claim against the German government were they to prohibit its participation in 5G deployment. Germany is selected as a case study due to the significant presence of Huawei in the country's telecoms networks, its central position in the European economy and due to the legal framework established by the China-Germany BIT, which offers unique opportunities for ISDS actions in this context.

What would happen if Germany took the US approach to regulating Huawei?

Huawei is the world's biggest telecommunications network equipment supplier. It has operations in more than 170 countries, with global revenues reported in 2018 at the level of $107 billion. Huawei's investments in research and development in Germany, specifically, grew from an initial 31 million euros in 2013 up to 112 million euros in 2017, amounting in this period alone to more than 450 million euros. According to a study conducted by a consulting firm, the German Institute for Economic Research (DIW), the Chinese telecommunications group is a major and growing investor in the German telecommunications market. In 2018, Huawei's German operations generated 2.3 billion euro's worth of business employing directly and indirectly 28,000 people.

Addressing concerns about the security implications of the company's investments in early 2020, Germany decided to allow Huawei to continue to be involved in mobile technology development. Angela Merkel's Christian Democratic Union backed a strategy paper in February 2020 that could potentially curtail Huawei's involvement in Germany's 5G rollout by barring untrustworthy companies deemed to be subject to state influence from the process, but these recommendations stopped short of banning Huawei technology outright.

In the UK, Huawei will be banned from supplying equipment to the sensitive parts of the network (known as the core). The 'core' is where voice and other data is routed to ensure it gets to where it needs to be. In addition, Huawei will only be allowed to

supply up to one third of equipment in allowing this core functionality of telecom networks and it will be excluded from areas near military bases and nuclear sites. The US on the other hand, in 2012 prohibited companies from using Huawei networking equipment and the company was added to the US Department of Commerce's Bureau of Industry and Security Entity List in May 2019, following an executive order from President Donald Trump (and legislation) effectively banning Huawei from US communications networks (even though at the time of writing and a year after announced, the ban has not actually come into force).

Germany's position is closer to the UK approach, rather than the US one, allowing continued Huawei investment in 5G deployment, but limiting the depth of its entanglement in key infrastructure. What would Huawei's options be in investor state dispute settlement (ISDS) if Germany adopted the US approach and tried to shut the company completely out of technology development in its jurisdiction? The China-Germany bilateral investment treaty (BIT) of 2003 offers a contemporary take on ISDS. The treaty provides that if a dispute cannot be settled within six months of the date when it has been raised by one of the parties, it shall, at the request of the investor, be submitted for arbitration to ICSID. The treaty (as other contemporary treaties) provides that investments shall benefit from national and most favoured nation (MFN) treatment. A Protocol to the treaty provides information on the interpretation of exceptions to protection on the basis of public policy and security interests.

A German ban would open the way to an investment tribunal

Huawei has made its intentions of using ISDS clear, in case bans (for example in the Czech Republic, Canada or Germany) violate its expectations as a foreign investor. The first hurdle to be overcome by any investor wishing to access ISDS is establishing the jurisdiction of the tribunal. This is commonly achieved by showing that the investor (or the investment) comes within the protection of a BIT, establishing *prima facie* that a violation of the terms of the treaty has occurred, and that this violation is the result of a state act. Huawei certainly meets the definition of investor and investment under the China-Germany BIT.

As to the offending measure, an investment dispute requires a legally significant connection between the measure and a specific investment. Note however that it is not necessary that the state measure in question is directed specifically at a particular investment, only that it has an effect on it; and general measures that affect an investment can form the basis of a claim. In this part, our discussion is speculative as Germany has not yet moved to ban Huawei. Were it to go down the American route and instigate a legislative measure banning the company from continued involvement in R&D, investment and product deployment in the German telecommunications market, this would constitute a state act impacting on an investment with the potential to violate treaty commitments. This, in association with the status of Huawei as a protected investor would allow for a successful outcome to any determination of jurisdiction by an investment tribunal. Conversely, an ISDS avenue is not available for Huawei in the US, as there is no comparable investment treaty between these two

countries, nor would the determination be reached with ease in the case of the UK, due to differences in the wording of the China-UK BIT.

Does a ´security risk´ excuse discrimination?

National security considerations will entail discriminating against foreign investors and will in most instances clash with undertakings in BITs or multilateral instruments to offer MFN and national treatment, which aim specifically at preventing discriminatory measures adopted by the host state against investors of other contracting parties. Many international investment agreements explicitly include national security exceptions, acknowledging that countries can legitimately be wary of any investments that may jeopardize their national safety. However, the challenge in applying such exceptions is how states can achieve balance between national security and national treatment and MFN obligations.

Due to the obvious conflicts between security considerations and investor protections, most BITs provide carefully for general exceptions, making it difficult to avoid standard international law obligations. Nonetheless, especially in case of non-discrimination, there is recognition among tribunals that public interests may necessitate differentiating between investors (Lemire v Ukraine). The logic of excusing discrimination is founded on an argument based on necessity. A necessity doctrine in general terms can contain two distinct defences. The first derives from non-precluded measures (NPM) clauses, found in some BITs, and the second springs from the customary international law defence of necessity as embodied in Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts (CMS v Argentina). Treaty standards come with some limited option for derogation depending on context. A series of exceptions based on those provided in the WTO/GATT system provides the basis under which many BITs allow contracting parties to deviate from normal trading rules in the interests of life, health and resource conservation (Article XX), including security (Article XXI). These deviations are extended to allow exceptions to MFN and national treatment on grounds of security but have rarely been invoked in practice.

Jurisprudence focuses not only on the presence of discrimination per se, but also on the reasons for it, with discrimination on the basis of state legitimate interests being accepted in some cases even in the absence of specific treaty exceptions to national of MFN treatment (see Total v Argentina, Paushok, SD Myers). A traditional 'security interest' exception in international agreements (on a surface reading of its application) vests states with the power to nullify an international obligation based upon the right to defend their essential security interests. The defence is in fact well recognized under customary international law (International Law Commission's Draft Articles on State Responsibility, Gabcikovo-Nagymaros). The threat to the national interest must be 'extremely serious, representing a present danger'. Nevertheless, the scope for the state's measures is narrowly limited and any actions must constitute the only recourse to defend the essential security interest identified. Crucially, as in Deutsche Telekom v India, tribunals will not accept that a determination of what constitutes essential security interests is at the discretion of the host state.

As a result, any national security or public policy-based derogation from treaty standards remains a nebulous and uncertain basis on which to excuse what would otherwise be seen as discriminatory treatment. Would a Huawei ban based on an assessment of the company as a 'security risk' due to links with the Chinese government come under the umbrella of public security and order, precluding it from being designated as less favourable treatment? The tribunal would need to balance the very real investment of Huawei in Germany against a perception of threat by German authorities and decide whether overt discrimination is in this case capable of being excused. I address these issues in further detail in my forthcoming chapter in the Handbook of International Investment Law and Policy.

The price tag on the exercise of sovereign discretion

Assuming one believes Chinese investment to be a danger, if Huawei is successful in using ISDS to counter bans built on national security concerns, does this prove that investment arbitration is a threat to national wellbeing? The answer depends on whether one is in favour of unfettered policy discretion. Curtailment of such discretion is not an unusual objective for investment treaties, the novelty comes from the target of potential actions (in this case a developed western state). When parties are unpredictable or considered a political risk, external constraints on their policy-making help stabilize the investment environment, providing an additional layer of protection for businesses. ISDS does not make democracy irrelevant. What it does instead is place a price tag on the exercise of sovereign discretion. The problem is that in Huawei's case, the price may be high indeed.

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