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# What Does the ‘Suspension’ of the EU-China Comprehensive Agreement on Investment Initiative Mean for the Credibility and Consistency of the Commission’s ‘Values-Based’ Trade Agenda?

Only a few months after Commission President Von der Leyen announced the finalization of the EU-China Comprehensive Agreement on Investment (CAI) as an ‘important landmark in our relationship with China and for *our values-based trade agenda*’, efforts to ratify the deal have been suspended.<sup>1</sup> This suspension rapidly became inevitable. The Netherlands and other countries have already recognized the ongoing human rights abuses of Uyghurs in China (e.g., mass detention of over a million people without due process, forced separation of children from their families, forced sterilization and abortion and forced assimilation) as genocide.<sup>2</sup> As part of the EU’s Common Foreign and Security Policy, the Council, acting on a proposal from the High Representative, adopted (symbolic) sanctions for these human rights violations at the end of March.<sup>3</sup>

The reaction from Beijing was swift. Several Members of European Parliament (MEPs) were blacklisted by the Chinese government, including the head of the European Parliament’s China delegation, Reinhard Bütikofer. This escalation not only showed that China has no interest in changing course on human rights, but also ensured that the Commission could not move forward on seeking ratification of the investment deal, as it is all but assured that the European Parliament would not give its consent to any potential Council decision concluding the agreement while any of its Members were being targeted by Beijing.

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<sup>1</sup> Emphasis added, European Commission, *EU and China Reach Agreement in Principle on Investment* (Website of DG Trade 30 Dec. 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233&title=EU-and-China-reach-agreement-in-principle-on-investment> (accessed 7 May 2021).

<sup>2</sup> Dutch parliament, *Motie van het lid Sjoerdsma c.s. over uitspreken dat in China genocide plaatsvindt op de Oeigoerse minderheid* (website Tweede Kamer 25 Feb. 2021), <https://www.tweedekamer.nl/kam-erstukken/detail?id=2021Z03872&did=2021D08405> (accessed 7 May 2021).

<sup>3</sup> Council Decision 2021/481 of 22 Mar. 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuse [2021] OJ 2 99/25.

The situation in Xinjiang province (and indeed the suppression of democracy in Hong Kong) was well known before Von der Leyen claimed that strengthening economic ties to China, despite its worsening human rights record, was part of a 'values-based' trade agenda. Despite the fact that China refused to commit to upholding the eight International Labour Organization (ILO) Core Conventions or to any labour or environmental oversight mechanisms, and despite the fact that no agreement had yet been reached on the choice of dispute settlement mechanism for the agreement, a crucial component of such agreements, the Commission went ahead with the CAI anyway. What does this tell us about this 'values-based' trade agenda of the Commission and indeed about how the EU approaches trade and human rights linkages?

First of all, one must suspect that suspension was done reluctantly and served simply as a recognition that ratification at the EU level was not realistic given the political opposition. Suspension by the Commission was, in other words, not done because it had suddenly changed heart over the CAI in light of these human rights abuses (which pre-dated the conclusion of the negotiations), but rather because it had reached a political dead end.

Second, the CAI saga demonstrates how the Commission prioritizes and balances geopolitical strategy, the interests of EU businesses operating in China (so-called 'offensive' interests), internal public policy and security interests (as part of 'defensive' interests), and the EU's commitment to human rights protection in third countries. The CAI is an initiative seven years in the making, largely driven by a desire to secure economic interests of European businesses in China and to compete with US services in the Chinese market. The CAI is more comprehensive in scope than the existing Member State Bilateral Investment Treaties (BITs) in that it adds market access (based on negative lists) to the commitments of the parties and has commitments on forced technology transfer. This was sought after by European businesses in light of local content requirements and other restrictions on investment prevalent in China. These 'offensive' interests were clearly deemed to be more important than potential public security risks or other defensive interests that may be at stake as a result of giving extended protection under the CAI to the increasing amount of Chinese investments in the EU in, inter alia, the energy and infrastructure sectors. What is more, the Commission sought to square this initiative with its external human rights policy by conducting a much criticized sustainability impact assessment and by adding a weaker than usual sustainable development chapter to the agreement, which excludes any mention of even a dialogue on human rights and waters down the standard level of labour and environmental protections included in other recent EU agreements.<sup>4</sup> In other words, the Commission ignored the elephant in the room when reaching this agreement with China.

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<sup>4</sup> Jessica Lawrence et al., *EU-China Comprehensive Agreement on Investment: A Scoping Study*, Heinrich Böll Stiftung (2020), <https://www.boell.de/en/2020/12/09/eu-china-comprehensive-agreement-invest>

Yet, the fact that sanctions were imposed by the Council shortly after Von der Leyen's announcement shows that the 'consistency' required by Article 21 (3) of the Treaty on the European Union (TEU) between foreign and commercial policy remains a challenge even over matters of clear geopolitical importance. The Lisbon Treaty was in part championed because it would lead to greater coherence in EU external relations. It was also meant to make the EU's commitment to non-economic interests in EU external relations more explicit. Yet, the EU's treaty structure failed to prevent the Commission from blundering into the obvious political troubles that lay ahead. In fact, one may even question if the current constitutional set-up for 'trade and ...' interlinkages was unhelpful.

First, the extent to which the EU institutions are legally required under the EU Treaties (in particular Articles 3 (5) and 21 (3) TEU and Article 51 (1) Charter of Human Rights?) to integrate human rights protection within common commercial policy measures such as the CAI is still an open question. Van Elsuwege has argued that 'the integration of human rights in EU external trade relations is a constitutional obligation and not a mere policy choice'.<sup>5</sup> Indeed, the Charter, in contrast to the European Convention on Human Rights (ECHR), does not contain any reference to the territorial scope of its application. Yet he concedes that this obligation does not go beyond conducting a human rights impact assessment for agreements such as the CAI as a procedural requirement on the basis of the General Court's ruling in *Front Polisario* and is hampered by the broad margin of discretion of EU institutions in the management of EU external relations granted by the CJEU courts.<sup>6</sup> In essence, the General Court found in that case that, while EU institutions cannot be held responsible for the human rights violations of third countries, in deciding to conclude a Free Trade Agreement (FTA) they had an obligation to consider whether goods were 'produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate'.<sup>7</sup> When the European Ombudsman concluded that the European Commission had conducted maladministration by not conducting a human rights impact assessment in relation to the envisaged FTA with Viet Nam, she found that 'when negative impacts are identified, either the negotiated provisions need to be modified or mitigating

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ment-scoping-study (accessed 7 May 2021). The SIA was prepared by Ecorys Nederland and others, [https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156862.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156862.pdf) (accessed 28 June 2021).

<sup>5</sup> Peter Van Elsuwege, *The Nexus Between the Common Commercial Policy and Human Rights*, in *Law and Practice of the Common Commercial Policy* 417 (Michael Hahn & Guillaume Van Der Loo eds, Brill | Nijhoff 2020).

<sup>6</sup> *Ibid.*, at 423–424; Case T-512/12, *Front Polisario v. Council* EU:T:2015:953.

<sup>7</sup> Case T-512/12, *Front Polisario*, para. 231.

measures have to be decided upon before the agreement is entered into'.<sup>8</sup> This position is not shared by the Commission.<sup>9</sup>

Second, the division of powers within the EU both institutionally and between the EU and the Member States may have contributed to a push for the CAI. Trade and (to a large extent) international investment policy is an exclusive EU competence and therefore cherished by the Commission. Policy should not be driven by division of powers, but one cannot help but notice that prioritizing human rights or other foreign policy objectives would have affected the Commission's ability to exercise the EU's powers in the area of trade and investment. Interestingly, these other interests were not able to effectively block negotiations, which suggests that either they were deemed to be less important than the economic interests of European businesses in China or that they were not able to effectively counter the Commission's well-oiled policy machinery in the area of the common commercial policy.

What is more, division of powers may also explain the choice in the CAI to include the fairly weak provisions in the 'sustainable development' chapter, while remaining silent on human rights from the perspective of the Commission. As the Court made clear in *Opinion 2/15*, 'sustainable development' is now 'an integral part of the common commercial policy' and the EU's internal division of powers allows the EU to pursue its current policy of including 'trade and sustainable development' chapters under the umbrella of the Common Commercial Policy. This means that the inclusion of such chapters as they currently stand (with no commitments on human rights) comes at no price internally for the EU, yet offers the obvious advantage of allowing the Commission to pursue offensive economic interests while maintaining it pursues a 'values-based' trade agenda. The provisions of these chapters need to fit within the boundaries set by the Court in *Opinion 2/15*. Commitments therefore should *not* 'regulate the levels of social and environmental protection in the Parties' respective territory' but should at most 'govern trade' by making liberalization subject to the condition that the Parties comply with their already existing international obligations concerning social protection of workers and environmental protection.<sup>10</sup> While the standard provisions used in these chapters are not meaningless, as Marín Durán has argued,<sup>11</sup> the fact of the matter is that third countries with few to no international commitments in these areas have little to

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<sup>8</sup> European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, para. 25.

<sup>9</sup> Van Elsuwege, *supra* n. 5, at 424.

<sup>10</sup> *Opinion 2/15 (EU-Singapore FTA)* ECLI:EU:C:2017:376, para. 166.

<sup>11</sup> Gracia Marín Durán, *Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues*, 57(4) *Common Mkt. L. Rev.* 1031–1068 (2000).

risk by agreeing to these provisions even if their track record on ‘values’ the EU cherishes is not good.

*Opinion 2/15* dealt with trade-related environmental and social matters and not human rights. Whether the integration provisions on human rights result equally in simply enabling rather than substantively restricting the EU’s ability to act in this field under the common commercial policy remains to be seen. Provisions on human rights may have been a non-starter for China and this may underline the Commission’s priorities in its willingness to sideline it, but such provisions would not obviously fall within the scope of the common commercial policy either.

From the perspective of the Commission, the added worth, therefore, of the current ‘values-based’ approach is that it also comes at little expense to offensive commercial interests. It is, in other words, not too much to ask from countries the EU is negotiating with to commit to such chapters. The Commission can simply add provisions on social or environmental protection in negotiations to the extent feasible and to the extent that it does not harm offensive interests. This means pursuing the CAI while ignoring human rights concerns or adding weak sustainable development chapters to trade and investment agreements. The ambition of these chapters is driven by avoiding costs to offensive interests and the idea that fostering dialogue within trade agreements can advance such interests. In other words, through such dialogue Europe can lead by example and convince other parties to work together on environmental, social, and human rights issues.

The question though is how credible the EU thinks it can be if it believes it can achieve these goals essentially for free. And what impression does the EU give when it talks of human rights and social protection, but negotiates trade and investment agreements with China and Viet Nam? Or when the EU talks of being a global leader in the fight against climate change yet is now seeking to split the Mercosur association agreement to overcome political opposition against a trade deal with the Bolsonaro government because of concerns over deforestation in the Amazon? Third countries may be left with the impression that the EU does not actually care about these issues, but that it is simply rhetoric necessary for domestic politics.<sup>12</sup> This may give the unfortunate impression that violation of these values does not come at a price as far as the Commission is concerned. Such a conclusion would be both problematic for whatever is left of the EU’s ‘normative’ power as well as its credibility internally and externally.

L.A.

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<sup>12</sup> Jessica Lawrence, *The EU in the Mirror of NPE: Normative Power Europe in the EU’s New Generation Trade and Investment Agreements*, in *World Trade and Local Public Interest: Trade Liberalization and National Regulatory Sovereignty* (Csongor Istvan Nagy ed., Springer 2020).

