

# USALI Perspectives

## The EU Harms Itself by Disregarding Civil Society

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The EU-China CAI is another missed opportunity to stand up for transnational civil society cooperation

Last March, I published a [commentary](#) about how the recently concluded European Union-China Comprehensive Agreement on Investment (CAI) left civil society by the wayside. In a little-noticed clause in the Chinese [schedules of commitment](#), China reserved the right to derogate from crucial non-discrimination clauses of the CAI, allowing it to impose more restrictive measures against EU non-profit organizations than domestic ones. The clause mentioned, for example, a possible future obligation to appoint Chinese citizens to senior executive

positions at European non-profit offices in China. The clause caused quite a stir among European NGOs, foundations, and even business chambers, which China also requires to register as NGOs under its [Overseas NGO Management Law](#).

How could the European side have accepted such a stipulation, which blatantly contradicts [European commitments](#) to the freedom of association, including “an independent civil society” and “enabling civic space”? Responding to widespread

criticism, the European Commission and national governments sought to downplay concerns. The [commission's answer](#) was as simple as it gets: Investment agreements do not and should not concern non-profit organizations.

### **A Values-Based Trade Agenda?**

As I have demonstrated in a follow-up [study for the European Greens](#) published in December 2021, this line of argument not only grossly oversimplifies the matter but also sends a blunt message to non-profits that their interests in being protected from arbitrary discrimination do not count. Although CAI would not directly alter the [legal situation for European non-profits](#) in China, its ratification would amount to *de facto* acceptance of China's heavily securitized approach to civil society governance. The EU would also be pre-emptively acquiescing to additional restrictions, however discriminatory or onerous they might be. The very existence of the non-profit organizations clause shows the Chinese side is well aware of NGOs' relevance in the context of trade and investment negotiations.

Even if CAI currently appears [unlikely to be ratified](#) by the European Parliament, the agreement says a great deal about the EU's China strategy – or lack thereof. The commission wanted to

have it all: [President von der Leyen](#) claimed that CAI will “provide unprecedented access to the Chinese market for European investors, enabling our businesses to grow and create jobs,” while also signifying an “important landmark ... for our values-based trade agenda.” In [response to civil society contestation](#) of earlier trade negotiations with [Africa](#), [Latin America](#), and the US (over the now-abandoned [Transatlantic Trade and Investment Partnership](#) or TTIP), the commission made exuberant promises to make the CAI negotiations more transparent, to engage in “a deeper dialogue with civil society at large” and, not least, to use negotiations “as levers to promote, around the world, values like sustainable development human rights, fair and ethical trade, and the fight against corruption.”

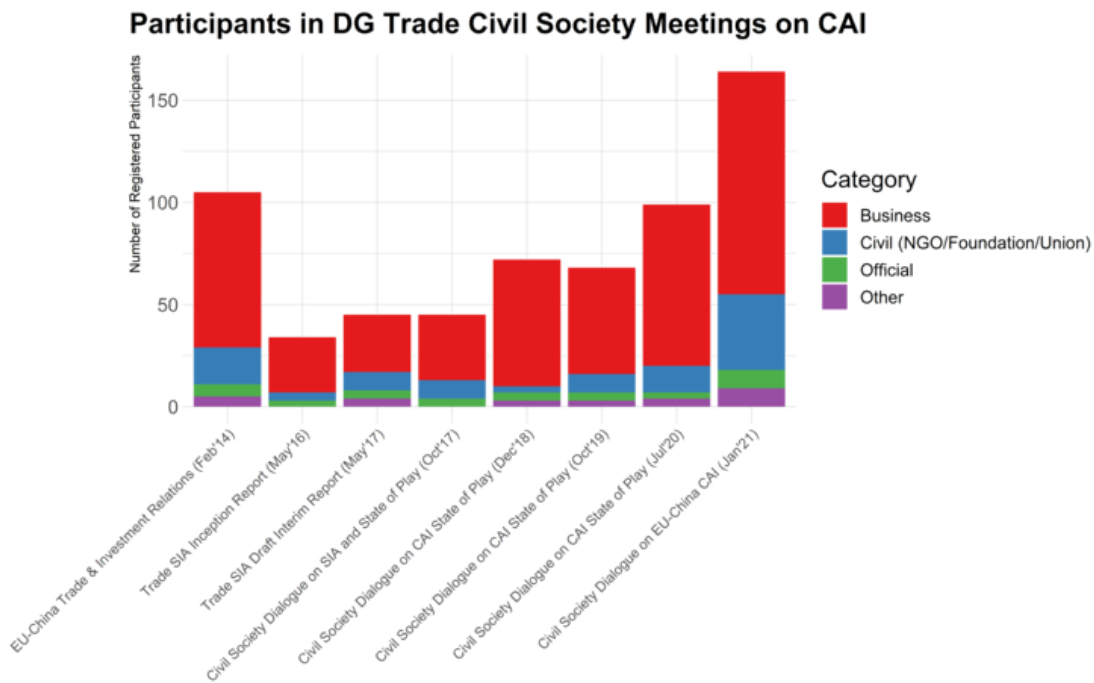
### **CAI Exemplifies Civil Society Blind Spot**

Instead, the negotiation process with China highlighted Europe's disregard for civil society when dealing with a powerful trading partner. Following the logic of “keeping business and politics separated,” the European Commission's Directorate-General for Trade (DG Trade) negotiated the investment agreement with a narrow focus on offensive European business interests and without sufficient consultation and input from other departments and independent experts.

As in other EU trade negotiations, the merely perfunctory inclusion of civil society actors also meant that the social and environmental externalities of the proposed agreement were only superficially assessed. The obligatory Social Impact Assessment (SIA) was outsourced to a consortium of for-profit consultancies and framed as a report “in support of an Investment Agreement.” According to my interviews, human rights experts involved in the drafting process were frustrated by the lack of diligence and genuine engagement with European and Chinese civil society actors, some of whom have deep knowledge about China and actually

could have been an asset during the negotiations.

DG Trade did convene a series of open “Civil Society Dialogues” on CAI. In my research, I went through DG Trade’s online archives of CAI-related meetings and categorized registered “civil society” participants according to their organizational identity. As Figure 1 reveals, the vast majority of “civil society” groups were business associations or corporate lobbyists, while the much smaller group of NGOs, foundations, and unions was dominated by organizations dealing with general EU trade issues rather than China specialists.



Source: DG Trade’s archive of civil society dialogue meetings, compiled and classified by the author, September 2021 © Bertram Lang

As the situation for civil society organizations striving for engagement with Chinese actors has become increasingly cumbersome, Western utterances, such as the 2016 EU Delegation's vaguely worded low-level statement in response to China's passage of its Overseas NGO Management Law, have signaled to Beijing that restrictions and discriminatory measures targeting non-profit organizations and activists are acceptable as long as the (short-term) business interests of corporate players are protected.

This hands-off approach stands in open contradiction to the EU's overall commitment to strengthen the role of civil society in international affairs. It also weakens Europe's normative power, which relies on a plurality of actors and voices in its foreign policy. As China's global impact and the need for more substantive expertise in this regard are increasingly acknowledged across Europe, it is imperative to think about how civil society expertise can be fostered and better integrated into policy-making processes.

### **What Can Be Done?**

The EU can only uphold its lofty normative principles if they are genuinely integrated in those fields where the EU is taken seriously as an international actor. This definitely does not include foreign and security policy,

decision-makers have tacitly accepted the shrinking of spaces for civil society dialogues. Inconsequential diplomatic

but does include market regulation (for example, ensuring better monitoring of supply chains via access rules to Europe's highly attractive single market) as well as trade and investment policy. The slogan of a "values-based trade agenda" already reflects this idea – in theory.

However, with a small negotiating team narrowly focused on corporate interests, DG Trade is visibly unable to take other important societal issues into account. European trade policy needs to walk the talk by systematically integrating country expertise and sectoral knowledge from civil society at all stages of the negotiation process. Conversely, EU negotiators should account adequately for an agreement's potential effects on non-profit organizations, due to their specific vulnerability to government restrictions. Especially in sensitive negotiations with non-democratic governments, this requires a mix of open-door and closed-door meetings in which civil society organizations can either voice their concerns or provide confidential recommendations regarding the non-business implications of envisioned agreements.

Most modern investment agreements do explicitly cover not-for-profit entities

(and so does CAI). The problem is that enforcement by non-profits is almost impossible under the current dispute resolution mechanisms where proceedings are extremely costly and uncertain affairs and require high upfront investments that only large multinational companies can afford. The EU has been at the forefront of efforts to improve this flawed system with the establishment of a new [investment court](#)

[system](#) model. In this vein, the EU should also fight for a “level playing field” for non-profit investments compared to commercial ones. As it stands, CAI is a missed opportunity to protect transnational civil society cooperation and philanthropic funding in ways similar to commercial investments.



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