

## Linking ‘values’ to EU trade policy – a good idea?\*

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### 1. *The theme*

EU trade policy is increasingly linked to ‘values’ since the Lisbon treaty but already before. The present contribution argues that these linkages have to be much more carefully considered, justified and circumscribed. It will discuss the linkages, not the values themselves – there is no reason to question these values. What matters is how best to pursue the values beyond the EU with what type of EU policy and, hence, why what linkages are appropriate or not. Not each and every linkage or ever more linkages are automatically to be applauded. Indeed, this is bound to be unworkable and in any event ineffective and costly. This contribution cannot provide a fully- fledged framework. It is first of all a call to carefully reflect whether, when and how to go for what linkages.

### 2. *The question raised*

The debate on ‘the future for Europe’ is a proper occasion to reflect on EU trade strategy linkages with ‘values’. Moreover, this reflection also fits the debate on the Trade Policy Review by the European Commission<sup>1</sup>. Since the Lisbon treaty, if not before, one witnesses a creeping tendency of creating ever stronger *linkages* of various EU non-trade policy areas with EU trade policy. The various EU non-trade policy areas – not exhaustive – include human rights, sustainable development (environment & climate, plus labour and social protection) and foreign policy. These are very respectable policies with, mostly, admirable objectives and fully worth pursuing. The query elaborated here is whether these various value-driven policies ought to pursue their lofty aims *by means of* EU trade policy instead of separately from trade policy in some respects. In turn, that query can only be answered if the linkages are much more carefully *identified* than today, if the linkage in each and every case is *justified* by considerations of a more specific nature than just generalities about ‘values’ and if the pursuit of the said values is tested on what policies – and not only trade policies - are most suitable in the light of the EU public interest. After all, these linkages are about values respected *abroad* – important as they are, they cannot automatically be equated with the EU public interest in every respect. And yet nowadays they are, with no questions asked. Indeed, prudent and smart choices will have to be made to conduct value-driven strategies along different, complementary channels and EU trade and investment policy is only one of those. This also implies that there must be scope and legitimacy for

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<sup>1</sup> European Commission, Trade Policy Review – an open, sustainable and assertive trade policy, COM (2021) 66 of 18 Febr 2021, see [www.trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159438.pdf](http://www.trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf)

balancing different elements of the EU public interests, short of the policy risking, at times, to become unworkable or counterproductive.

Traditionally, the EU's desire to influence other countries in human rights, in sustainable development and in typical foreign policy issues used to rest on diplomacy, advocacy by political and other groups as well as protests in public space. Beyond diplomatic pressures and protests, foreign policy may revert in extreme cases to sanctions aimed at high-placed individuals (and/or their financial property in the EU, if any) and via embargoes and boycotts.<sup>2</sup> For all regular diplomacy, what has happened in the last decade and a half is that linkages are created with EU trade and investment policy. The Lisbon treaty would seem to legitimise, if not impose, such linkages.

Art. 21/2 TEU says that the "Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations". This provision is rather general and may or may not imply a division-of-labour between such external policies. Cooperation may just as well include a properly-thought-out and agreed division-of-labour between various policies. Art. 21/2(d) reads "... foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty" whereas Art. 21/2(f) says [to] "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development". In Art. 21/3 TEU this is explicitly linked to Part Five of the TFEU. Finally, the Council and the Commission "shall ensure consistency between the different areas of its external action."<sup>3</sup> Consistency again can be read in different ways. An agreed division-of-labour between respective external policies respects consistency explicitly. However, more often than not, when it comes to recent EU trade policy, the 'consistency' provision is interpreted such that e.g. EU trade and investment policy has to pursue the said values in bilateral, plurilateral and multilateral diplomacy and in all legal texts, wherever possible, including active and detailed enforcement. In other words, consistency has been interpreted as a *merger* of all external policies with respect to 'values'. It is far from obvious that this 'merger' can be justified by the EU public interest.

The Lisbon mindset has emboldened players that used to work via foreign policy or other stand-alone 'soft' EU policies, and the players with a moral stake or interest in them, to switch to other strategies. These new strategies have in common that EU trade and investment policy tends to be used as a linchpin or a leverage for the pursuit of value-driven policies. Such efforts by actors attempting to stimulate value-driven policies have three characteristics: (a) to borrow and/or exploit the reputation of EU trade policy; (b) attempt to leverage its strength; and (c) to explore actively options of greater legal enforcement in the framework of EU trade policy. All three qualities mentioned are lacking in the case of 'soft'

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<sup>2</sup> See A. Ott & G. Vanderloo, The nexus between the CFSP and the CCP, in: S. Blockmans & p. Koutrakos, ed.s, EU CFSP Handbook, 2018, E.Elgar, pp. 230-253.

<sup>3</sup> Interestingly, , there is no reference to international labour rights or standards in Art. 21 TEU. Probably, this is implied by the pursuit of human rights in a socio-economic setting as human rights are generally thought to cover labour rights as well.

non-trade policies.<sup>4</sup> Neither does the EU dispose of the means and credibility of ‘hard power’ in world politics. The upshot is that, nowadays, there are ever more ambitious ‘trade and sustainable development chapters’ in FTAs, much more direct links between trade and human rights (that used to be stand-alone or in PCAs<sup>5</sup>) and a much closer link between trade policy and a wide notion of foreign policy, even formalised in the Lisbon treaty.

These developments are accepted rather uncritically by many, sometimes even brandished as ‘progress’ in European Integration. There has been too little detached reflection on whether these linkages – in such a general form - are a good idea and help promote the EU interest.<sup>6</sup>

### *3. Relevant highlights from the Trade Policy Review*

The Trade Policy Review (op. cit.) is once again affirmative on very ambitious linkages. Although there are many commendable proposals or confirmations in the Review, it is not only confirming the linkages between values and EU trade policy but seems to widen the approach in some respects. Because of the combination of the EU as the most prominent player in global trade and FDI, with a convincing back-up by the EU single market, it speaks of the common commercial policy as “a unique lever”. A lot of the Review focuses on the green transition together with social equity. By means of ‘open strategic autonomy’ the EU’s ability to make its own choices is emphasized (which seems fully appropriate) “and shape the world around it through leadership and engagement, reflecting its strategic interests and values” (p. 4) which sounds too ambitious and with a considerable risk of ‘overreach’. “The EU works with partners to ensure adherence to universal values...[including].. core labour standards [which confirms prevailing policy, JP] ..and social protection in line with the European Pillar of Social Rights” (p. 6). However, although social protection is becoming more accepted in the world, also amongst developing countries, that is still a far cry from setting the rights in the EU Pillar as the goal for countries outside Europe. Social protection, and even more so the full list of the Social Pillar, is an archetypical example of the right-to-regulate for every WTO partner<sup>7</sup> as it depends on domestic social forces, the country’s willingness to redistribute and the level of development. In other words, there is a fundamental difference between a consensus about core labour standards (even as a legal obligation in a FTA) and striving for (better) social protection – certainly at the high level of the Social Pillar – which is captured by cooperative ‘engagement’ at best but usually by no more than ‘exchanging best practices’.

The Review also advocates “.. promoting sustainability standards across global value chains”, among other things by “promoting responsible business conduct and greater transparency

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<sup>4</sup> Except, as noted, in extreme cases for foreign policy.

<sup>5</sup> Partnership and Cooperation Agreements between the EU and trading partners, often (but not only) in conjunction with an EU FTA.

<sup>6</sup> In a H2020 consortium called RESPECT (see [www.respect.eu.eu](http://www.respect.eu.eu)) the question is addressed how effective EU trade policy is in pursuing EU non-trade objectives. The author is involved in this project. By definition, it takes the linkages and EU strategy as given. As discussed below, empirical analysis by RESPECT researchers to date has failed to find robust evidence that the strategy has led to improvements in indicators measuring progress in attaining EU values in countries with which the EU has trade agreements.

<sup>7</sup> Explicitly recognised by the Commission on p. 13, bottom

and traceability in supply chains". EU legislation on sustainable corporate governance is forthcoming and it will be interesting to observe how far the EU will choose to go, and whether that can be matched by other key trading partners (otherwise, the upshot will be more friction, not better value-chains). It would seem that this is best done in a plurilateral manner, via the OECD, the G-20 or in other credible coalitions – and with commitments from international business – and not by the EU alone. Meanwhile, the European Parliament voted with an unusually large majority in favour of a call on the European Commission to table in the spring of 2021 EU draft legislation on ‘due diligence’ about their value chains<sup>8</sup>. The ambition is clear from at least three aspects: (i) it is not only on human rights but also on the environment and good governance ; (ii) firms have to publish a due-diligence strategy, assessing risks and are required to ‘cease, mitigate and prevent’ risks, whilst being liable in case of shown deficiencies ; (iii) not only for larger firms and those in high risk sectors but both for EU and non-EU firms accessing the internal market. The strong point of this proposal is that it is clearly ‘trade-related’ and directly concerns EU consumers and producers as well as the latter’s non-EU competitors in the single market.

Other EU ambitions in the Review include leading the WTO in adopting rules making globalisation more sustainable and fairer as well as strengthen the EU regulatory impact globally. The former is on values and the latter can at times be on values. Selectively, the latter might work by deeply investing in standards coalitions in the relevant areas – here the EU has a degree of credibility as long as it maintains its cooperative approach. But making the WTO rules more sustainable and fair is bound to be extremely difficult, more still than for other WTO reforms like the Appellate Body, as many developing countries tend to dislike cost-raising global regulation, especially if details are subject to litigation.

Finally, on FTAs and their TSD chapters<sup>9</sup>, the Commission sees FTAs as “platforms for enhanced cooperation pursuing our values and interests” (p. 9). Also here the question is the proper balance between mutual obligations (and their enforceability) and mutual cooperation. Before and certainly after the panel on Korean laws on labour unions (and freedom of association), under the EU/Korea FTA <sup>10</sup>, the call for greater enforcement of obligations of partners has been echoed frequently. Also the Review speaks of a “greater effort to ensure the effective implementation and enforcement of sustainable development chapters..” but then adds again a pretentious point: “. to level-up social, labour and environmental standards globally” (p. 10).

All of the above shows the interwovenness, if not the merger, of the pursuit of EU values via ‘hard’ trade policy and via a wide notion of foreign policy, including cooperation and diplomacy. But this recent ‘acquis’ precisely begs the question: should ‘values’ be pursued *in an integrated form with EU trade policy*, so generally, or shouldn’t there be (i) an identification of what aspects of what values are critical for the EU, and which aspects in a more aspirational form with scope for diplomacy and/or can better be addressed by means

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<sup>8</sup> See EurActiv of 11 March 2021., <https://www.euractiv.com/section/economy-jobs/news/meps-demand-ambitious-law-on-human-rights-due-diligence> . The vote was 504 against 79.

<sup>9</sup> TSD = Trade and Sustainable Development

<sup>10</sup> See section 6, below.

of cooperation? (ii) shouldn't one justify whatever linkage with trade and investment exists or should any value which is not 'trade-related' still be included in EU commercial diplomacy?, and (iii) are EU trade policy actions linked to 'values' circumscribed and if so, how, and how far should this (not) go?

#### 4. Drawbacks of strong linkages between values and EU trade policy

The new experience of a range of *linkages* with EU trade policy originated from advocates arguing precisely that stand-alone policies were regarded as too weak and ineffective. Therefore, the linkages with EU trade policy are justified by the expected power or effectiveness of EU trade policy for this new purpose. Bringing 'values' into EU trade policy has been said to increase the legitimacy of the latter. This argument looks more like an excuse, at least as long as the said values are not at issue. There is no obvious reason why the same values which legitimise EU foreign policy, would lend (greater) legitimacy to EU trade policy once the two are explicitly linked. Such legitimacy is a function of the values themselves, and the preference of the European society, not from the linkage with trade policy.

Of course the frustrations of many about EU foreign policy did not help: EU Member States have not endowed the EU level with the powers-with-teeth and voting by less-than-unanimity (hindering effective decision-making). Sooner or later, advocates working in the EU foreign policy context were bound to come to the conclusion that, internationally, the pursuit of values by EU stand-alone policies did not work well enough and required the clout of EU's powerful trade policy, leveraging a large and rich single market<sup>11</sup>. Yet, this search for a coupling of EU 'values' to trade policy should stand the test of supporting the EU interest. On this critical point there is a perennial problem. More often than not, advocates are *not* interested in a broad overall perspective of the EU interest as served by EU trade and investment policy.<sup>12</sup> They typically look narrowly at what '*their*' areas of interest might gain: (a) more clout (even if 'borrowed'); (b) clauses or subsections or dedicated chapters of FTAs, (c) the (for them) welcome inclination to assume a "strategic" look at EU policy-making in their fields, or, as can be read in the Lisbon treaty, an insistence on '*consistency*' between those various areas and EU trade policy. However, once values – and their implementation – of trading partners are part and parcel of EU trade policy in a legalistic framework, a 'strategic' look and 'consistency' of various external policies are bound to lead to various, and at time sharp, contradictions and even conflicts. One wonders whether this approach actually serves good bilateral relations with trading partners.

Moreover, whether good or no good for these *other* areas, few seem to ask the question whether the coupling of values with EU trade policy is good *for EU trade policy and the objectives behind it*. A crude assessment would be: (i) it greatly complicates EU trade policy

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<sup>11</sup> Indeed, the EU High Representative Joseph Borrell does exactly that using terms such leveraging and the clout of EU trade policy. See Borrell's blog on the EEAS website of 10th March 2021 [https://eeas.europa.eu/headquarters/headquarters-homepage/94670/trade-policy-lever-eu-geopolitical-global-players\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/94670/trade-policy-lever-eu-geopolitical-global-players_en)

<sup>12</sup> The Trade Policy Review is skimpy though clear on the great economic benefits of EU trade policy ; see sections 2.2 and 3.2.3.

– in particular , FTAs – and decision-making about FTAs in the EU, (ii) tends to introduce or magnify politicisation of a kind that differs distinctly from politicisation of trade interests and can be costly to the EU, and, finally, (iii) does not yield much, if anything, in these value-loaden areas, compared to stand-alone or inclusion in a PCA. In other words, coupling values with trade policy may be costly and brings little or nothing. The RESPECT project (see footnote 6) has attempted to apply some ‘hard’ empirical analysis to the third question, even though this is extremely difficult to do. The academic literature on the effectiveness of using trade policy for demanding respect for ‘values’ by trading partners is inconclusive.<sup>13</sup> In a rigorous empirical analysis emerging from RESPECT,<sup>14</sup> with a very large data set, no robust empirical evidence of a causal effect of including non-trade provisions in EU preferential agreements is found: coupling values to EU trade policy does not seem to help the pursuit of such values with the EU’s trading partners. In addition, the first two drawbacks (i) and (ii) mentioned above are well-known and can be observed by everybody.

The main effect of the linkages is a continuous *attention* for these issues (regarded as a virtue in itself by many such advocates) but this ‘satisfaction’ may well come at a cost in bilateral relations and even for the advocates themselves,<sup>15</sup> numerous meetings with the ‘civil society’ (with many repetitions<sup>16</sup>) and considerable, at times heated, controversy amongst constituencies in the EU and in or indeed with partner countries. An increasing tendency is that the outcome of trade negotiations is judged more and more on the articles/clauses about the value-loaded areas, with far too little (*if any*, in some quarters) attention for the trade and investment accomplishments with partners. This asymmetry between values and the trade substance of proposed agreements is sharpened further because headings critical on values easily find their way to the news media - which helps one-issue advocates - whereas the many technical but frequently important issues of trade policy substance and their possible effect on the EU economy get snowed under or are conveniently ignored (except by trade experts). Indeed, the emphasis on the values, even in tenuous links with a few highly specific articles (and e.g. applicability of ICS) or isolated technicalities in annexes of EU FTAs, tends to override assessments of the trade and FDI aspects. The associated lobbying on values by one-issue advocates makes much inflated claims and generates very general negative headings about the ‘importance’ of minor or trivial aspects for EU values with trading partners, without any attempt to assess the treaty as a whole. The lobbying is literally narrowed down to one-issue targeting, never mind the

<sup>13</sup> The reader is referred to I. Borchert, P. Conconi, M. Di Ubaldo & c. Herghelegiu (2020), The pursuit of Non-Trade Policy Objectives in EU Trade Policy, for the RESPECT project , April; and P. Conconi (2018), Linking trade policy to non-trade issues: selected survey of the literature, for the RESPECT project; see [www.respect.eui.eu/publications](http://www.respect.eui.eu/publications) for both. Other references are found in the following footnote.

<sup>14</sup> A. Ferrari, M. Fiorini, J. Francois, B. Hoekman, L. Lechner, M. Manchin and F. Santi (2021), EU trade agreements and non-trade policy objectives, draft, under the RESPECT project. The values referred to are civil rights protection, environmental protection (including climate) and the protection of labour rights. The causal effects of including non-trade-provisions in EU preferential agreements is verified by using ‘synthetic control methods’.

<sup>15</sup> Research on non-state actor engagement in EU trade agreements in the RESPECT project has found that the “growing number of FTAs and the associated civil society mechanisms are only adding to the fatigue of actors who are already critical of the usefulness of these mechanisms”. Quoted from Submission of the RESPECT consortium to the European Commission, DG Trade, consultation for the New Trade Strategy, November 2020

<sup>16</sup> Such meetings are announced in the regular EU Trade newsletter, see [www.eu-tradenews@ec.europa.eu](mailto:www.eu-tradenews@ec.europa.eu) .

fact that it is brought into a trade agreement!<sup>17</sup> When a trading partner is known to violate EU values to a greater extent, the lobbying simply seeks to discredit the very idea of trade negotiations, and certainly a FTA. Some groups declare bluntly that the EU shouldn't trade with them at all. Dependent on how far one wishes to go, such a positioning can lead to trade policy intolerance of up to 50 – 60 countries, or more, including some sizeable economies.

#### 5. *Risks and consequences of 'consistency'*

The insistence on 'consistency' is a useful guiding principle for policy-making *inside* the EU. But this cannot and should not be 'exported' so easily to *external* relations or EU diplomacy, where there are always relations with outsiders having different interests, preferences, traditions, sensitivities and negotiation strategies. Of course, when dealing with unwilling trading partners, such linkages are likely to be resisted or watered down or can be a reason to drag their feet in starting or concluding negotiations. If the clout of the EU's single market is regarded as attractive by them, as is likely, partners may be paying lipservice, or merely reiterate the obligations of MEAs and/or ILO core conventions they have ratified, without much if any value-added.<sup>18</sup> Of course, there are also 'willing' trading partners. Some trading partners may have similar views as the EU on values, including most of their specific advocates. But the large majority of WTO partners will either not want to see these values so explicitly linked to trade and investment, or will count on 'soft' enforcement as the EU has thus far always done.

A shift to hard and credible EU enforcement policies on the value-laden part of the trade relationship is bound to have a chilling effect on future negotiations of FTAs or on the eagerness of partners to begin scoping of the FTA options. Already a series of FTA negotiations are stuck partway into the negotiations and one should not be surprised if more would follow. But the problem also pops up in the case of treaties already concluded but not yet ratified. CETA is one sad example, where an accomplished trade treaty is kept in limbo by national parliaments, as it is (treated as, rightly or wrongly) a mixed agreement. However, the real reason of problems in some Member States is a direct function of the value linkages having crept into CETA. Everybody knows that Canada is, a rather civilised and trusted EU partner in trade *and* shares EU values, consistently already for decades. Yet for one-issue groups this seems irrelevant. They often opt for a single-minded strategy to discredit CETA on account of just a few aspects about which absurdly exaggerated claims are loudly expressed in press campaigns. Quite a few NGOs simply aim at killing CETA, one of the best FTAs ever. All they search for is a possibility in one of 27 Member States' and some regional parliaments to vote 'no', a purely destructive strategy. And the Lisbon treaty as well as the explicit linkage of values with trade policy by the EU (most explicitly since "Trade for all"<sup>19</sup>)

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<sup>17</sup> It is true that farm lobbies used to practice similar tactics but that can hardly be taken as a recommendation.

<sup>18</sup> This point is frequently made in the debate. However, see M. Bronckers & G. Gruni (2021), Respecting the sustainability standards in EU free trade agreements, *Journal of International Economic Law* (forthcoming), for an argument that the incorporation of MEAs and the ILO Conventions in the EU -Mercosur draft FTA agreement does have value-added.

<sup>19</sup> European Commission (2015), Trade for all, towards a more responsible trade and investment policy, see [www.trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://www.trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

acts as a handmaiden for such lobbying, even though this was probably never intended by the Commission. Thus, the value-based ‘consistency’ is falling onto its own sword.

#### 6. *Alternatives: not easy but possibly more effective*

Two contributions to RESPECT are looking in earnest at 25 years of EU/China cooperation in sustainable development.<sup>20</sup> The EU and China have no FTA and an early attempt to negotiate a PCA (between 2007 and 2011) failed. One should also realise that China still was a developing country in the late 1990s. There can be no debate on whether China constitutes a great challenge in EU trade policy, and this extends to values. What one observes in the case of sustainable development, however, is that a gradual convergence developed between the two partners in terms of overall aims of ‘green’ development (environment e.g. air, water, soil, forests as well as climate change mitigation) and that this was followed - with a significant delay - by genuine policy and regulatory action, in turn slowly followed by more credible enforcement. Once convergence of aims is found or developing between trading partners, steady long-run *cooperation* can do a lot to support partners to effectively pursue such objectives. The steadfast and resourceful cooperation on sustainable development between China and the EU during decades can only be explained by both partners’ belief in their “strategic partnership” initiated in 2003. Precisely China is an instructive illustration. Does the EU genuinely expect China to conclude a ‘deep and comprehensive’ FTA (as was once discussed in the EU/China summit declarations of 2014 and 2015) with a far-reaching sustainable development chapter and enforceable provisions on details, as with Canada or Japan? Does one truly expect that China would accept to go through the kind of enforcement attempts via a panel of lawyers as in the case of labour provisions in the laws of South Korea,<sup>21</sup> derived from provisions of the EU/Korea FTA?

But that does *not* mean that many useful forms of cooperation and serious Dialogues cannot be maintained and deepened, and that such efforts would not yield progress in terms of the values the EU cherishes. As indeed they did!<sup>22</sup> However, what one cannot reasonably expect is that China (with the CCP in the lead) is or wants to become “like us”, that is, in values very much like the EU. That may be regrettable but it is a fact of life, and indeed a reflection of how and why trading partners differ. One may strongly disagree with the autocratic way the Party (CCP) is ruling literally all aspects of life, even inside private companies nowadays, and inside universities, too. The EU has had Human Rights Dialogues with China since 1995, separate indeed from trade, with varying success in some economic and social rights but

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<sup>20</sup> One is W. Hu & J. Pelkmans, Encouraging social progress in China, EU/China cooperation for sustainable development (forthcoming spring 2021) and the other is J. Pelkmans (2021), EU stimulus for China going green, exemplifying EU wider trade policy and NTPOs (forthcoming spring).

<sup>21</sup> See the Panel on Trade Unions and Labour Relations in South Korea, report of 20 Jan 2021, see [www.trade.ec.europa.eu/doclib/docs/2021/january/tradoc\\_159358.pdf](http://www.trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf). It should be noted that China has not ratified the ILO (core) Convention on the freedom of association, presumably because it seeks to maintain full (autocratic) control, fearing that ratifying this convention, and possibly that on collective bargaining, might undermine its domestic social and political system.

<sup>22</sup> See e.g. Weinian Hu & Jacques Pelkmans (2020), Can Dialogues advance EU-China trade relations?, *CEPS Research Report* 2020-05, November, [www.ceps.eu/ceps-publications/can-dialogues-advance-eu-china-trade-relations](http://www.ceps.eu/ceps-publications/can-dialogues-advance-eu-china-trade-relations). We conclude that there are many useful examples of EU/China Dialogues, with concrete progress, also in value-related areas.



none whatsoever in civil liberties. The question then arises what the EU and other leading trading partners best do, and whether such actions should be leveraging trade, investment or the access to the internal market. Why should trade and investment be leveraged? For signalling how important this message is for the EU? Or for those in China who might benefit from ratification and proper implementation? The signalling is easy but basically a theatre play for the home front in Europe. But if the leveraging is considerable, China is bound to consider it as adverse and respond, no doubt, and the approach becomes costly for the EU, and presumably for EU companies in China, without much (if any) effect for the relevant beneficiaries in China.

In most instances, the differences are probably less extreme than between China and the EU but the fundamental issue is not very different: consider in earnest whether or not to pursue values and trade on separate, perhaps parallel, tracks, thereby avoiding two-way negative influences such as tensions on values, causing difficulties in deepening trade and investment, and accomplishing neither better economic intercourse nor a greater respect for values. Deviating from this general advice should only be done in the relatively few instances where a prior scoping – but now specifically on values – of the substance of a possible trade agreement between the EU and a partner clearly indicates that negotiations can be undertaken without undue mutual damage.

The EU does practice some very positive forms of (regulatory) cooperation outside FTAs that is linked to ‘values’, such as the FLEGT initiative.<sup>23</sup> Big players (such as Indonesia and China) in this area are involved and committed, with rigorous regulatory systems and independent certification. It combines effective market access commitments with sustainability in supplier countries, and is a truly joint programme. The initiative illustrates that trade linkages can be used to pursue values but a necessary condition is that there is agreement among the parties as to underlying objectives – in this case sustainable forestry practices.

### *7. The linkage with foreign policy*

The linkage of trade with foreign policy is quite risky as well, and one wonders whether it is necessary or even desirable. Apart from querying whether it is wise to merge trade and foreign policy so explicitly when formulating EU’s 2019 China strategy,<sup>24</sup> an illustration from the US may be instructive as well. Of course, the US is not China. And readers may find the example extreme but that underlines the point. WTO members had always treated ‘national security’ issues as separate from trade. The provision under which countries may impose trade measures to safeguard national security interests (Art. XXI GATT) was barely ‘used’ or relied upon in a minimalistic fashion, thereby enabling trade policy and foreign policy to be conducted on separate tracks almost without exception. Until Trump decided otherwise. Trump and Lighthizer purposefully (over)stretched Art. XXI GATT in ‘justifying’ serious and plain protectionist tariff action in steel and aluminium produced in the EU on the basis of a so-called threat to US national security. Not only was the substantive underpinning absent,

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<sup>23</sup> FLEGT is the forest law enforcement governance and trade action plan, on sustainable timber having access to e.g. the EU market, with the right certificates. See for example EU FLEGT Facility at [www.euflegt.efi.int](http://www.euflegt.efi.int).

<sup>24</sup> See [https://ec.europa.eu/info/publications/eu-china-strategic-outlook-commission-contribution-european-council-21-22-march-2019\\_en](https://ec.europa.eu/info/publications/eu-china-strategic-outlook-commission-contribution-european-council-21-22-march-2019_en)

the arbitrariness of the measure and the cavalier fashion with which serious and legitimate objections were literally brushed aside, including through US action that made the WTO Appellate Body defunct, demonstrated how poisonous this cocktail of foreign policy, national security and trade had suddenly become. The point here is not that this is likely to be repeated so easily – it is not (although invocation of Art. XXI by Japan against South Korea illustrates this may be a slippery slope) – but rather that the blending of foreign policy with trade policy is a limitless exercise. It has no boundaries at the foreign policy side and, hence, the separation ought to be explicit whilst the bar for exceptional instances to combine the two must be very high (say, war or genocide). The principal reason is that foreign policy, if not separate, will always ‘lead’. Trade policy in the usual WTO sense cannot be expected to ‘lead’ foreign policy. Keeping it in separate tracks, with trade policy in a disciplined WTO framework and thereby providing a considerable degree of predictability, will contain any damage in a functional way. Another example. The danger of blending trade and (here) energy policy with foreign policy is illustrated as well by the US sanctions for Germany, prompted by Nord Stream 2. Germany, unlike the US, is short of energy resources and it seeks to strengthen its security of supply, be it on a commercial basis. There is no doubt that the US has much greater fears about whatever degrees of its own energy dependence than Germany about its own (Germany is used to it), but the US still seeks to sanction Germany for long-run commercial contracts with its top supplier of gas .

#### 8. *Trade policy and values on separate tracks?*

It is quite something else if the EU continues to pursue its values in its relations with partners, but – where useful – *separate* from trade policy. The best combination of such pursuit is cooperation and carrot-based diplomacy. Downgrading or belittling these two (partly overlapping) options is not only unwise but – in and of itself – *not* strengthening the case for a blending of trade and non-trade policies. The advice is to employ joint cooperative approaches with agreed agenda’s regarding such value-laden strategies. Add non-trivial, possibly joint funding with projects that are seen as in the common interest and that serve values. Do not expect that judicial approaches towards values will alter the preference sets of trading partners, except very rarely indeed. On the contrary, a non-trivial risk is that judicial litigation will lead to frictions and leave scars, thereby standing in the way of constructive commercial diplomacy. Moreover, wherever possible, rely and build on plurilateral and multilateral accomplishments as this forms a natural basis for agreements with partners.

Going back to China, in Pelkmans (2021)<sup>25</sup> an analytical exercise is undertaken, *assuming* that China and the EU have a FTA *a la* the EPA with Japan, with a sustainable development chapter as in the EPA. It shows that China has ratified no less than 12 MEAs (many more than specified in the EPA chapter). On the ‘green’ side of sustainable development, the only (sub)articles from the EPA (if it would apply to EU/China) that would be partly unfulfilled would be some issues of ‘responsible business conduct’ such as CSR and due diligence (actually, both are coming up also in China, encouraged by the government). On the social

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<sup>25</sup> See note 20.

side, China has not ratified 4 of the 8 core ILO conventions. It appears that two<sup>26</sup> of these absent four would be considered close to “regime change” by the CCP, and therefore are totally taboo. Ratifying the two on forced (child) labour might perhaps be a possibility.

This is an issue receiving much attention now that the CAI draft treaty<sup>27</sup> has been published. In that draft treaty there are several provisions on international (ILO) labour standards and the following phrase : “...[China agrees to make] .. continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Convention 29 and 105 [on forced labour, JP] if it has not yet ratified them”. This clause is not that dissimilar to clauses in some previous EU FTAs with other partners. But it is first of all not trusted by many European observers, as it would seem to be weak and inconclusive, but also because of the recent panel report on provisions in Korean law on labour unions<sup>28</sup> that was strict on inconsistencies with the ‘freedom of association’. However, the CAI clause is also pulled into foreign policy, against the background of the repression in Xinjiang and Hong Kong, not to speak of Tibet. This illustrates well the core problem of the linkage between EU trade policy and values. If the EU and China would indeed have a FTA, the typical EU response would combine a legal reaction (as in the Korean case) with overall political criticism. The first objection to such an approach is how credible or tough the legal commitments are and whether they would be adhered to. In all likelihood, when negotiating such a FTA , China would refuse texts similar to the EU /Korea or EPA FTAs, so that the EU is then faced with a difficult dilemma: should a FTA be made conditional on strict and ambitious sustainable development chapters, in the knowledge that the EU would “firm up” significance and enforcement, or, water down its approach in the EU/China case (and presumably in some other ones as well)?

The second objection is precisely about blending trade and investment with foreign policy and human rights strategies. The violations by China are *not* at issue – they are bad and throw a very negative light on the CCP regime. And some politicians probably wish to make a symbolic gesture under foreign policy, even in the knowledge that China will not budge, except perhaps tactically if needed. As an expression of foreign policy preferences, clear statements, if not convictions, are undoubtedly the correct way of expressing EU preferences and the EU attachment to such values.

However, when *blending* trade and foreign policy, what would the gesture be? The CAI might well be postponed or buried. As an illustration, consider the European Parliament’s resolution of 21 January 2021 on the crackdown on the democratic opposition in Hong Kong. It is regretted “that the decision on a political conclusion of the CAI has not reflected Parliament’s requests in previous resolutions on Hong Kong to use investment negotiations as a leverage tool aimed at preserving Hong Kong’s ..[..].basic rights and freedoms..[..]. the

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<sup>26</sup> On the freedom of association, and on collective bargaining

<sup>27</sup> See [www.ec.europa.eu/trade/policy/in-focus/eu-china-agreement/](https://www.ec.europa.eu/trade/policy/in-focus/eu-china-agreement/) on 30 Dec. 2020 for the Agreement in principle and additional information.

<sup>28</sup> As in note 21.

EU risks undermining its credibility as a global human rights actor.”<sup>29</sup> The only satisfaction derived from pushing China away from accepting the CAI is *at home* in Europe and principally for one-issue groups and advocates. How would that serve the EU interest? The painstaking efforts to open up the Chinese market in a (more) reciprocal fashion and the better protection of EU enterprises in China would be lost, without any tangible gain on values in China at all. The purpose of the sanctions or other penalties will not be accomplished – it is unlikely to yield anything that helps the Uygurs or the people of Hong Kong. Yet the significant improvement in market access and freedom for EU investments in China would be lost before it would even be enjoyed. It might also be unhelpful, if not worse, for EU enterprises already present in China.

In conclusion, it is unwise to stick to this ‘coupling’ of foreign policy and trade policy, except in extreme situations. Also the pursuit of sustainable development should not be pushed religiously in the framework of FTA commitments, other than linked to MEAs and core ILO conventions, but rather with carrots and constructive cooperation. “Perfection is the enemy of the good”. The example of the CAI is crystal-clear: China will not easily, if ever, change with respect to civil liberties and certain specific labour rights given (perceived or real) threats to the CCP, CAI or no CAI. Giving up the CAI for this purpose is completely pointless.

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<sup>29</sup> Quoted from G. Grieger (2021), EU-China Comprehensive Agreement on Investment, Briefing, European Parliament, February, p. 7 ; see [www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS\\_BRI\(2021\)679103\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf)