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# The Interaction among The Common Commercial Policy, The Common Foreign and Security Policy and Human Rights in EU External Action: The Case of the EU-China Comprehensive Agreement on Investment

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## Abstract

This thesis explores the interaction between the Common Commercial Policy (CCP), the Common Foreign and Security Policy (CFSP) and the European Union's commitment to human rights within the broader framework of EU external action, with the aim of understanding the relationship between these distinct policy areas. The core argument states that, while the Treaties formally separate the competences of the CCP and the CFSP, they pursue a shared goal within the framework of EU external action. In other words, while they remain subject to distinct legal bases and decision-making procedures, they are also rooted in the broader objectives listed in Arts. 3(5) and 21 TEU. This study uses the EU-China Comprehensive Agreement on Investment (CAI) as a practical example to show how the interaction between the CCP, the CFSP and human rights considerations can become relevant during the conclusion of an international agreement. Taken together, the negotiation of the CAI under Art. 207 TFEU, the subsequent exchange of sanctions between EU and China, and the European Parliament's consent power under Art. 218(6)(a)(v) TFEU illustrate how foreign policy and human rights considerations may affect the fate of a CCP instrument without altering its legal basis. The thesis concludes that, coherence within the framework of EU external action indeed arises from the interaction of competences, procedures and institutional powers across different policy fields.



**Key words:** CCP; CFSP; Human Rights; EU External Action; EU-China CAI

## Riassunto

Quando si parla di azione esterna dell'Unione europea, l'attenzione non può essere riposta solamente a semplici interessi economici o obbiettivi di politica estera; al contrario, essa va interpretata come un complesso quadro istituzionale nel quale coesistono competenze, istituzioni e procedure giuridiche differenti. Tra gli ambiti politici che compongono tale quadro, la presente tesi intende analizzare l'ampio spettro dell'azione esterna europea, concentrandosi sull'interazione tra la Politica commerciale comune (PCC), la Politica estera e di sicurezza comune (PESC) e l'impegno dell'Unione europea in materia di diritti umani, con l'obbiettivo principale di comprendere il rapporto che queste distinte aree condividono. In altre parole, quando l'Unione negozia un accordo internazionale con un paese terzo, essa non può che comportarsi sia come una potenza commerciale, perseguendo interessi economici, sia come un attore politico rivolto alla promozione e il rispetto della democrazia, dello Stato di diritto e dei diritti umani nelle proprie relazioni con il resto del mondo. Ed è proprio in questa coesistenza di approcci differenti che la tesi basa la sua domanda di ricerca: *in che modo il quadro istituzionale dell'azione esterna dell'Unione europea regola l'interazione tra la Politica commerciale comune (PCC), la Politica estera e di sicurezza comune (PESC) e l'impegno dell'Unione europea in materia di diritti umani, e quali osservazioni si possono trarre dagli sviluppi relativi al Comprehensive Agreement on Investment (CAI) tra UE e Cina?*

Introdotta dai grandi cambiamenti strutturali consequenti all'entrata in vigore del Trattato di Lisbona, volto a rafforzare il ruolo dell'Unione europea sulla scena internazionale, questa coesistenza di competenze distinte tra PCC, PESC e diritti umani all'interno dei Trattati regola l'intera azione esterna dell'UE. Inoltre, proprio grazie al Trattato di Lisbona, questa pluralità è stata ulteriormente accentuata dal trasferimento degli investimenti diretti esteri (IDE) all'interno delle competenze della PCC ai sensi dell'articolo 207 TFUE, dal consolidamento della PESC all'interno del Trattato sull'Unione europea (TUE) e dall'inserimento dei diritti umani tra gli obiettivi che l'Unione è tenuta a perseguire nelle proprie relazioni con il resto del mondo ai sensi dell' articolo 21 TUE. Nonostante ciò, gli stessi Trattati presentano queste tre dimensioni come parti integranti di un unico sistema capace di regolare l'azione esterna dell'UE ai sensi del principio di coerenza sancito dall'articolo 21, par. 3 TUE, il quale impone all'Unione europea di condurre ogni aspetto della propria azione esterna nel rispetto degli obiettivi elencati nell'articolo 21 TUE e dei

valori fondamentali sanciti dall'articolo 3, par. 5 TUE.[1] Nonostante ciò, i Trattati distinguano formalmente le competenze relative alla PCC e alla PESC attraverso differenti procedure decisionali e basi giuridiche. L'argomentazione centrale della tesi sostiene che queste aree politiche in realtà mirino ad una finalità condivisa nell'ambito dell'azione esterna dell'Unione europea, pur rimanendo soggette a basi giuridiche e procedure decisionali distinte, trovando entrambe fondamento negli obiettivi più ampi enunciati agli articoli 3, par. 5, e 21 TUE. Nello specifico, mentre la PCC è classificata come una competenza esclusiva dell'UE ai sensi dell'articolo 3, par. 1, lett. e) TFUE, ed è esercitata attraverso procedure fondate sul voto a maggioranza qualificata e sul consenso del Parlamento europeo nella conclusione di accordi internazionali nei casi previsti dall'art. 218 TFUE; la PESC è soggetta alle norme e alle procedure specifiche previste dall'articolo 24 TUE, conservando una natura maggiormente intergovernativa che richiede generalmente l'unanimità, e attribuendo al Parlamento europeo un ruolo meno centrale nel processo decisionale. Per quanto riguarda invece l'impegno dell'Unione europea in materia di diritti umani, a seguito del Trattato di Lisbona, essi smisero di rappresentare delle semplici aspirazioni politiche, ma divennero bensì dei veri e propri obiettivi da rispettare durante esercizio dell'azione esterna dell'UE. Allo stesso tempo, i relativi meccanismi di attuazione e tutela degli stessi si differenziano a seconda dell'ambito politico: mentre per la PESC preoccupazioni relative ai diritti umani si traducono nell'adozione di misure restrittive, iniziative diplomatiche o forme di condanna politica; nell'ambito della PCC, invece, esse possono manifestarsi attraverso disposizioni sullo sviluppo sostenibile, norme in materia di lavoro, valutazioni dell'impatto sui diritti umani o clausole di condizionalità. Pertanto, l'analisi proposta nella presente tesi esamina se il quadro giuridico che disciplina l'azione esterna dell'Unione europea promuova effettivamente tale interazione tra differenti settori politici e gli impegni in materia di diritti umani, oppure se si limiti a dichiarare un'integrazione che la sua stessa struttura istituzionale non è in grado di garantire pienamente. Partendo proprio da un'analisi approfondita dei fondamenti normativi che regolano l'azione esterna dell'Unione europea, lo studio si sofferma sugli articoli sopra menzionati, i quali richiedono all'Unione di promuovere, nelle proprie relazioni con il resto del mondo, i propri valori e principi fondamentali, tra cui i diritti umani, la democrazia, lo Stato di diritto e il rispetto del diritto internazionale, assicurando al contempo la coerenza della propria azione esterna.

[1]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5) and 21(3); see also Kassoti, E. and Wessel, R.A. (2023) 'The Normative Effect of Article 3.5 TEU: Observance and Development of International Law by the European Union' in García Andrade, P. (ed.) *Interacciones entre el derecho de la Unión Europea y el derecho internacional público*. Valencia: Tirant lo Blanch, p. 7.

Successivamente l'analisi si sposta verso uno studio della PCC ai sensi dell'articolo 207 TFUE, esaminando le principali innovazioni introdotte dal Trattato di Lisbona e prestando attenzione all'inserimento degli investimenti diretti esteri (IDE) nella lista delle competenze esclusive associate all'Unione europea. Di conseguenza, lo studio prosegue analizzando il quadro istituzionale della PESC, soffermandosi in particolare sull'importante ruolo delle misure restrittive, utilizzate dall'Unione in risposta a serie violazioni dei diritti umani in ambito di politica estera. Inoltre, la seguente tesi si avvale del Comprehensive Agreement on Investment (CAI) tra UE e Cina come esempio pratico per illustrare come l'interazione tra PCC, PESC e considerazioni sui diritti umani possano manifestarsi simultaneamente all'interno di un accordo commerciale estero. Nel loro insieme, i negoziati del CAI ai sensi dell'articolo 207 del TFUE, lo scambio di sanzioni tra UE e Cina connesso alle gravi violazioni dei diritti umani nella regione dello Xinjiang che ne congelarono il processo di ratifica, e il consenso del Parlamento europeo previsto dall'articolo 218, paragrafo 6, lettera a), punto v) TFUE, dimostrano come la politica estera e le considerazioni sui diritti umani possano realmente incidere sulle sorti di uno strumento della PCC, senza modificarne la base giuridica. La tesi sostiene, pertanto, che la tradizionale distinzione giuridica tra PCC, PESC e impegni dell'Unione europea in materia di diritti umani, pur rimanendo rilevante sul piano delle competenze, delle basi giuridiche e delle procedure decisionali, non possa essere considerata assoluta. Al contrario, tali ambiti devono essere esercitati nel rispetto degli obiettivi fondamentali dell'azione esterna dell'UE sanciti dall'articolo 21 TUE, con particolare riferimento al principio di coerenza e all'impegno dell'Unione nella tutela dei diritti umani, mettendo così in evidenza il loro carattere interconnesso. Di conseguenza le osservazioni tratte dagli sviluppi relativi al CAI confermano chiaramente tale conclusione: la scelta di delimitare l'accordo all'ambito della competenza esclusiva dell'Unione sulla PCC ai sensi dell'articolo 207 TFUE si è dimostrato efficace ai fini di evitare un accordo misto e un lungo processo decisionale, ma allo stesso tempo, lo lascia esposto a considerazioni riconducibili alla PESC e alla tutela dei diritti umani, senza peraltro prevedere un adeguato meccanismo di attuazione in grado di conciliare la PCC e la PESC prima della conclusione dell'accordo. Nel complesso, la presente tesi utilizza la situazione di stallo del CAI tra UE e Cina, che ad oggi non è stato né ratificato né formalmente abbandonato, come un chiaro esempio di come l'attuale assetto istituzionale distingua formalmente le competenze relative alla PCC e alla PESC, pur vincolandole al perseguimento degli obiettivi fondamentali sanciti dagli articoli 3, par. 5, e 21 TUE.

Inoltre, grazie alla dimostrazione del proprio potere di approvazione del Parlamento europeo nella ratifica del CAI, la tesi spiega come la coerenza nell'azione esterna dell'Unione non derivi dall'assenza di confini istituzionali, ma bensì dalla stretta interazione tra differenti settori politici e dalla capacità delle istituzioni di esercitare i poteri a loro conferiti dai Trattati per perseguire i più ampi obiettivi dell'azione esterna dell'UE. In definitiva, la rilevanza del CAI risiede precisamente in quest'ultimo aspetto; dimostrando come l'efficacia dell'azione esterna dell'Unione sia subordinata alla capacità della stessa di conciliare e coordinare queste competenze giuridiche distinte, ma profondamente interconnesse, in un contesto internazionale sempre più plasmato da esigenze economiche ed geopolitiche.

# Introduction

The external action of the European Union cannot be understood as a simple expression of either economic interests or foreign policy objectives; instead, it has always been conducted through a complex institutional framework in which different competences, institutions and legal procedures coexist. Among the policy areas of this framework, this thesis identifies the Common Commercial Policy (CCP), the Common Foreign and Security Policy (CFSP) and the Union's commitment to the promotion and protection of human rights as the most relevant dimensions, because of their close interaction in pursuing the Union's external action objectives. As a matter of fact, when the Union negotiates an international agreement with a third country, it acts both as a trading power in pursuit of economic interests and as a political actor promoting the respect of democracy, the rule of law and human rights in its relations with the rest of the world. This coexistence of different approaches can be traced back to the structural changes that the Lisbon Treaty introduced in the legal architecture governing EU external action, namely the reinforcement of the Union's role in the international sphere, while positioning both its principles and objectives at the centre of the Treaties. Moreover, thanks to the Lisbon Treaty, this plurality was indeed deepened after the transfer of competences over foreign direct investment (FDI) into the CCP under Art. 207 TFEU, but also through the consolidation of the CFSP under the Treaty on European Union (TEU), and the inclusion of human rights among the objectives that the Union is required to pursue in its relations with the wider world under Art. 21 TEU. In the Treaties, these three dimensions are presented as a single and coherent system governing the Union's external action, unified by the principle of consistency set out in Art. 21(3) TEU, which requires the Union to ensure consistency in all areas of its external action and internal policies, and the fundamental values of Art. 3(5) TEU, which links the Union's commitment to free and fair trade directly to its obligation to respect international law and protect human rights.[2] However, the same Treaties distinguish the CCP and the CFSP though different decision-making procedures and legal bases. The CCP is classified as an exclusive competence of the Union under Art. 3(1)(e) TFEU, conducted by qualified majority and with the full participation of the European Parliament as the institution requited to give its consent over the conclusion of international agreements under Art. 218 TFEU. On the contrary, the CFSP is subject to specific rules and procedures under Art. 24 TEU, remaining more intergovernmental in nature, and generally requires unanimity in the Council with a less central role for the European Parliament

[2]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5) and 21(3); see also Kassoti, E. and Wessel, R.A. (2023) 'The Normative Effect of Article 3.5 TEU: Observance and Development of International Law by the European Union' in García Andrade, P. (ed.) *Interacciones entre el derecho de la Unión Europea y el derecho internacional público*. Valencia: Tirant lo Blanch, p. 7.

during in the decision-making process. Even the Court of Justice has limited jurisdiction with respect to CFSP matters, with specific exceptions regarding the review of restrictive measures against natural or legal persons as described by the Rosneft case.[3] This institutional asymmetry makes the interaction between the CCP, the CFSP and human rights particularly complex. On the one hand, the boundary between CFSP and non-CFSP competences is preserved through Art. 40 TEU, ensuring that the application of one policy does not affect the procedures and institutional powers of the other. On the other hand, the current geopolitical landscape and its consequential challenges increasingly blur this separation, as trade and investment instruments are more and more used in a geopolitical context, and foreign policy objectives often influence the Union's economic relations with third countries. To provide an example, whereas the use of restrictive measures falls within the scope of the CFSP, their implementation under Art. 215 TFEU frequently produces economic consequences. The Union's human rights commitment further complicates this interaction. Considering that in the post-Lisbon framework, human rights are not merely political aspirations, but rather overarching treaty-based objectives that need to be respected during the conduct of EU external action, their enforcement mechanisms differ across policy fields. Within the CFSP, human rights concerns may lead to restrictive measures, diplomatic action or political condemnation, whereas within the CCP, they may appear through sustainable development provisions, labour standards, human rights impact assessments, conditionality clauses or preferential trade regimes. Therefore, the analysis proposed in this thesis considers whether the legal framework governing EU external action effectively facilitates this interaction between different policy fields and the Union's human rights commitments, or merely declares an integration that its own institutional design does not fully secure. Additionally, it explores the issue concerning the uneven enforcement mechanism that characterises the promotion and the respect of human rights across different areas of EU external action. Consequently, this thesis is guided by the following research question: *how does the institutional framework governing EU external action structure the interaction between the CCP, the CFSP and the Union's commitment to human rights, and what comparative observations can be drawn from the developments surrounding the EU-China Comprehensive Agreement on Investment (CAI)?*

[3]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 24(1); Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Arts. 3(1)(e) and 207; see also Wessel, R.A. (2021) 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' in Kilpatrick, C. and Scott, J. (eds) Contemporary Challenges to EU Legality. Oxford: Oxford University Press, pp. 71–99, p. 75.

With this research question, this study first addresses how these interconnected competences and objectives across the CCP, the CFSP and the Union's human rights commitments are reconciled within the legal system of the Union, with particular reference to Arts. 3(5), 21, 24 and 40 TEU, and Arts. 207 and 218 TFEU. Secondly, the EU-China Comprehensive Agreement on Investment (CAI) will provide some insights on how CCP interests, CFSP dynamics and human rights considerations may come together within a single institutional process and eventually influence the fate of the agreement. The selection of the EU-China CAI was far from accidental, but rather it offers an ideal example for understanding how these policy fields interact in practice. First, it was negotiated as a post-Lisbon CCP instrument after the transfer of FDI as an exclusive competence of the Union under Art. 207 TFEU, and after the judicial clarification provided by the Court's Opinion 2/15 on the limits of such competence.[4] Secondly, the 2019 EU-China Strategic Outlook expressly described China both as a systemic rival and an economic partner of the Union, thereby already introducing CFSP considerations within a relationship primarily framed in commercial terms.[5] Finally, of particular relevance of this thesis, the CAI's ratification process was suspended in May 2021 after a resolution of the Parliament following human rights violations in China and a subsequent exchange of sanctions between the Parties.[6] Bearing this in mind, the CAI is the perfect example to answer the research question, since it was an agreement based on the CCP and whose fate was nonetheless influenced by CFSP and human rights considerations. With respect to the methodology and contributions from the literature, this thesis addresses the research question by adopting a doctrinal legal method, combined with relevant observations drawn from a case study. It also combines the analysis of EU primary law (TEU and TFEU) with related CJEU case law concerning EU external agreements and restrictive measures, including Opinion 2/15, Opinion 1/17, Achmea, Rosneft and the Frente Polisario v Council case among others. Additionally, this study also relies on primary institutional sources, such as Council Decisions and Regulations, Commission Communications, European Parliament Resolutions, and the text of the CAI, together with secondary literature and academic articles.

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[4]Meunier, S. (2017) 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' Journal of Common Market Studies (JCMS) 55/3: 593–610, p. 593; see also Opinion 2/15 Free Trade Agreement between the European Union and the Republic of Singapore EU:C:2017:376, Opinion of the Court, 16 May 2017.

[5]European Commission and High Representative, EU-China – A Strategic Outlook, JOIN(2019) 5 final, 12 March 2019.

[6]European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)).

The main contributions with respect to the CCP are exemplified by Cremona's analysis of Opinion 2/15 and by Meunier's article on the scope and limits of the transfer of competence over FDI.[7] Whereas the main contributions to the CFSP are illustrated by Wessel's and Van Elsuwege's works on the judicial review of the Rosneft case and the Court's jurisdictional boundaries under Art. 24(1) TEU and Art. 275 TFEU.[8] Kube's article on the legal value of Art. 21 TEU, represents the main contribution on the enforceability of human rights in front of a Court of law.[9] Finally, this study is also supported by recent studies, such as Szép's "*geopoliticization*" of EU trade policy and Freudlsperger and Meunier's analysis of the Anti-Coercion Instrument, which focus on the growing links between the CCP and the CFSP.[10] This methodological approach is reflected in the structure of the thesis, which is organised into five chapters, starting from the institutional foundations of EU external action, moving on to the specific interaction between the CCP, the CFSP and human rights, to finally examine how this interaction is expressed in the context of the EU-China CAI. Chapter 1 reconstructs the normative foundations of EU external action, with particular attention to Art. 3(5) TEU and the objectives set out in Art. 21 TEU. It then focuses on the institutional architecture of the CFSP under Art. 24 TEU, and the CCP under Art. 207 TFEU, to conclude with Parliament's role in the procedure for the conclusion of international agreements under Art. 218 TFEU and the principle of institutional balance. Chapter 2 turns directly to EU investment policy, focusing on the post-Lisbon transfer of competence over FDI at EU level under Art. 207 TFEU and its boundaries set out in Opinion 2/15. Chapter 3 analyses the role of human rights within the system of EU external action, starting from the Union's proposed accession to the European Convention on Human Rights and Opinion 2/13, moving on to the legal basis and practice of EU restrictive measures, to finally examine the implications of the Rosneft case on the judicial review of CFSP measures and the structural interaction between the CCP, the CFSP, and human rights commitments in EU external action. With Chapter 4, the thesis reconstructs the developments surrounding the EU-China CAI, starting with the historical background behind EU and China trade and investment relations, and then moving on to the legal nature and key features of the agreement, finally

[7]Cremona, M. (2018) 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' European Constitutional Law Review 14/1: 231–259; see also Meunier, S. (2017).

[8]Van Elsuwege, P. (2017) 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case' Verfassungsblog, 6 April; see also Wessel, R.A. (2021).

[9]Kube, V. (2016) The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU? EUI Working Paper LAW 2016/10. Florence: European University Institute, p. 4.

[10]Szép, V. (2024) 'The Geopoliticization of EU Trade Policy: Exploring the Growing Links Between the Common Foreign and Security Policy and the Common Commercial Policy' European Foreign Affairs Review 29/4: 1–20; see also Freudlsperger, C. and Meunier, S. (2024) 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument' Journal of Common Market Studies 62/4: 1063–1079.

concluding with its ratification stalemate following the events of March 2021 related to the exchange of sanctions between the Parties. To conclude, Chapter 5 brings together all of these different dimensions to provide some insights into how the CAI can be used as an example to show the interaction between these dimensions of EU external action within an actual international trade agreement between the Union and one of its trading partners.

# Chapter 1: The Normative Foundations of EU External Action

# Chapter 1: The Normative Foundations of EU External Action

Considering EU external action as solely revolving around relations with other countries or a simple response to global challenges is not comprehensive enough. On the contrary, it should be analysed as a complex institutional framework that has significantly evolved since the Maastricht Treaty of 1992. Having reached its current form with the Lisbon Treaty of 2007, which amended some aspects of the foundational Treaties to optimise decision-making and increase efficiency, this framework establishes the normative guidelines upon which the Union conducts its relations with third states and international organisations, also defining EU objectives and competences. This chapter intends to examine the normative framework of EU external action while addressing the central theme of this research, which aims to highlight how the institutional framework governing EU external action structures the interaction between the Common Commercial Policy (CCP), the Common Foreign and Security Policy (CFSP), and the Union's commitment to human rights. The Treaty provisions examined in this chapter (Arts. 3(5), 21 and 24 TEU and Arts. 207, 218 TFEU) cannot properly function in isolation from one another, creating a much larger normative system that needs to be carefully understood, before proceeding to any insightful analysis of the EU-China agreement on investment, which will be addressed in Chapter 4.

## 1.1 Article 3 TEU: Defining the Union's Objectives

*"The Union's aim is to promote peace,*
*its values and the well-being of its peoples*" (Art. 3(1) TEU)[11]

Starting from this quotation from Art. 3(1) of the Treaty on the European Union (TEU), it is already possible to establish that this article plays a fundamental role in the definition of the EU's aims with regards to its citizens, representing a foundational principle that regulates the relationship between the EU and the international legal framework, as the provision provides that: "*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law including respect for the principles of the United Nations Charter"* (Art. 3(5) TEU).[12]

[11]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 3(1) TEU.

[12]Ibid., Art. 3(5) TEU.

The pre-Lisbon interpretation of secondary acts with respect to the Union's international obligations is based on a specific hierarchy of norms within the EU legal order.[13] International agreements concluded by the Union, once in force, represent an integral part of the EU legal order, placing themselves above secondary legislation but below primary law, and are binding upon the Union's institutions. Consequently, it can be argued that secondary acts have to be interpreted in conformity with international obligations, a duty that has its foundation not in international law itself, but in the rank of international agreements within the EU's normative hierarchy. This approach, established in pre-Lisbon case law, continues to be affirmed by post-Lisbon case law, where the primacy of international law over secondary legislation is still crucial.[14] In this context, Art. 3(5) TEU, as Kassoti and Wessel (2023) observe, provides a clear basis for the EU's obligation to comply with international law, as also established by the Court in the Air Transport Association of America case,[15] arguing that Art. 3(5) TEU implies that the Union, when adopting an act, is bound to observe international law in its entirety, including customary international law.[16] Although from a legal point of view, the Union is obliged to achieve the objectives set out in Art. 3 TEU,[17] the normative power of this provision has been deeply debated in academic literature. On this matter, Kassoti and Wessel (2023) have argued that, despite the lack of explicit references to the mechanisms by which the EU intends to pursue those aims, Art. 3(5) TEU should be read as a binding principle that lays the groundwork for interpreting the legal framework of EU external action,[18] since it set out those values and principles that the Union shall respect. As a matter of fact, Art. 3(5) TEU is frequently linked to Art. 21 TEU, since both provisions clearly aim to connect the Union's internal and external interests with its fundamental values set out in Art. 2 TEU and in the Charter of Fundamental Rights of the European Union, like human dignity, freedom, democracy, the rule of law, equality and respect for human rights. Consequently, this normative connection, that all of these provisions share, also establishes the link between what the European Union stands for and how it is required to act on the international sphere.

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[13]Casolari, F. (2012) 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in Cannizzaro, E., Palchetti, P. and Wessel, R.A. (eds) International Law as Law of the European Union. Leiden: Martinus Nijhoff Publishers, pp. 395–415, p. 395.

[14]Kassoti, E. and Wessel, R.A. (2023) 'The Normative Effect of Article 3.5 TEU: Observance and Development of International Law by the European Union' in García Andrade, P. (ed.) *Interacciones entre el derecho de la Unión Europea y el derecho internacional público*. Valencia: Tirant lo Blanch, pp. 21–25.

[15]Ibid., p. 15.

[16]Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864, para. 101.

[17]Ziller, J. (2023) Advanced Introduction to European Union Law. Cheltenham: Edward Elgar Publishing, p. 157.

[18]Kassoti, E. and Wessel, R.A. (2023), p. 7.

However, Art. 3(5) TEU and Art. 21 TEU are not identical: Art. 3(5) TEU uses the phrase "*strict observance of international law*"[19] while Art. 21 TEU refers to "*respect for its principles"*,[20] which highlights a textual difference that may carry interpretative significance in the assessment of the Union's obligations under international law. Moreover, it should be noted that, notwithstanding its legal importance, the Court of Justice of the European Union (CJEU) has consistently treated Art. 3 TEU as a provision of a programmatic nature,[21] since it does not directly confer rights on individuals before courts. Nonetheless, Art. 3 TEU can be seen as an interpretative tool for the CJEU when reviewing the legal basis of a secondary act. As a matter of fact, the Court needs to verify the consistency of the act with the objectives set out in the Treaties, and where this is not the case, it requires its amendment or annulment.[22] For instance, in the Rosneft case, the Court on the grounds of the Union's commitment to international law, interpreted the EU-Russia Agreement in view of the UN Charter. According to the ruling of the Court, the restrictive measures adopted in response to Russia's actions in Ukraine were lawful and "*necessary for the protection of its national interests, particularly in time of war or serious international tension constituting a threat to war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security"* (Case C-72/15, Rosneft, para. 111).[23] Ultimately, Art. 3(5) TEU reinforced the broader interpretation of the agreement, allowing threats to international peace to fall within its scope.[24] For the purposes of this thesis, Art. 3(5) TEU is of particular relevance because it explicitly links the Union's objectives of free and fair trade with its commitment to human rights and international law within a single normative provision. This structural linkage creates a normative expectation that the Union's commercial policy will be conducted in a manner consistent with those values. As it will be demonstrated in Chapter 4, this expectation was placed under significant strain during the negotiation and ultimate suspension of the CAI with China. Finally, these objectives set out in Art. 3(5) TEU are operationalised through a set of concrete principles and specific goals that govern the Union's action in the international framework, as stated in Art. 21 TEU. That provision translates the broad aims introduced by Art. 3(5) TEU into an actionable normative framework, specifying both the principles that shall guide EU external action and the objectives that the Union shall actively pursue in all relevant policy areas.

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[19]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 3(5) TEU.

[20]Ibid., Art. 21(1) TEU.

[21]Kassoti, E. and Wessel, R.A. (2023), p. 9; Case C-149/96 Portuguese Republic v Council of the European Union. - Commercial policy - Access to the market in textile products - Products originating in India and Pakistan EU:C:1999:574 Judgment of the Court, 23 November 1999, para 86.

[22]Ziller, J. (2023), p. 15.

[23]Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* EU:C:2017:236, para. 111

[24]Kassoti, E. and Wessel, R.A. (2023), pp. 22–23.

### 1.2 Article 21 TEU: Principles Governing EU External Action

Article 21 TEU establishes the normative framework upon which the principles governing EU external action are based. Firstly, the provision clearly states that the Union's external action: "*shall be guided by the principles which have inspired its own creation, development, and enlargement and which it seeks to advance in the wider world: democracy, the rule of law, the universality, and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law"* (Art. 21(1) TEU).[25] However, before examining the article as a whole, an explanation of the term is required, since within the EU legal order various types of principles coexist, reflecting the complex nature of the Union's judicial system itself. The notion of principles, famously difficult to define among legal scholars, includes at least three distinct categories; starting from the general principles of EU law, such as proportionality, legal certainty, and the protection of legitimate expectations, which were developed mainly by the Court to review the legality of secondary legislation and actions of Member States.[26] Moving on, the structural principles such as conferral, subsidiarity, and sincere cooperation[27] organise the distribution of competences between the Union and its Member States, and among the EU institutions; and finally, the foundational principle,[28] expressed in Art. 2 TEU such as democracy, the rule of law, the universality of human rights and fundamental freedoms, human dignity, equality and solidarity, constitute the basic expression of the EU's identity.[29] For the specific purpose of this thesis, Cremona's definition of structural principles as "*principles which have been drawn from the Treaties and elaborated by the Court to establish (the) institutional space within which policy may be formed, in which the different actors understand and work within their respective roles"* (Cremona, 2018),[30] represents the most useful definition for explaining the specific relationship between Art. 21 TEU and the Union's external action objectives, since it captures both the normative content of those principles and their function as organisational devices governing the conduct of EU external relations.

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[25]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 21(1) TEU.

[26]Ziller, J. (2023), p. 113.

[27]Ziegler, K.S., Neuvonen, P.J. and Moreno-Lax, V. (eds) (2022) Research Handbook on General Principles in EU Law. Cheltenham: Edward Elgar Publishing, p. 577.

[28]Ibid., p. 99.

[29]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 2 TEU.

[30]Cremona, M. (2018) 'Structural Principles and their Role in EU External Relations Law' in Cremona, M. (ed.) Structural Principles in EU External Relations Law. Oxford: Hart Publishing, pp. 3–30, p. 5.

According to Cremona (2018), some examples of structural principles include the principles of conferral, institutional balance and subsidiarity, characterised by their involvement in the relationship between actors in the process of policymaking.[31] Now that the notion of principles has been clarified, the analysis can move to the second paragraph of the article, where a detailed list of objectives is set out, ranging from the "*safeguard its values, fundamental interests, security, independence and integrity"* (Art. 21(2)(a) TEU);[32] "*consolidate of democracy and the rule of law"* (Art. 21(2)(b) TEU)[33] to the "*promotion of an international system based on multilateral cooperation and good global governance" (*Art. 21(2)(h) TEU).[34] Taken together, all of these objectives represent what the Union shall pursue in defining and implementing its external policies. Of particular relevance for the purposes of this thesis is Art. 21(2)(e) TEU,*[35]* which encourages the abolition of restrictions on international trade to promote the integration of all countries into the world economy: an objective that has been identified by Spiliopoulos and Gkoni (2023) as one of the key normative foundations of the Common Commercial Policy (CCP).[36] However, the part of the provision that represents a fundamental basis for EU external action is paragraph 3 of Art. 21 TEU, which establishes the principle of consistency providing that the Union shall respect and pursue the principles and objectives set out in paragraphs 1 and 2 in the development and implementation of its external action and other policies.[37] Basically, the principle of consistency ensures the alignment between the Union's external actions and other policies, while the Council and the Commission, assisted by the High Representative, are entrusted with ensuring consistency and cooperation.[38] This principle is also useful to explain the relationship between the Common Commercial Policy (CCP) set out in Art. 207 TFEU and the Common Foreign and Security Policy (CFSP) under Art. 24 TEU, since both policies must be pursued in conformity with the same set of objectives, priorities and principles,[39] such as the one of consistency described in Art. 21 TEU.

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[31]Ziegler, K.S., Neuvonen, P.J. and Moreno-Lax, V. (2022), pp. 608–609.

[32]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 21(2)(a) TEU.

[33]Ibid., Art 21(2)(b) TEU.

[34]Ibid., Art. 21(2)(h) TEU.

[35]Ibid., Art. 21(2)(e) TEU.

[36]Spiliopoulos, S. and Gkoni, P. (2023) 'The Common Commercial Policy as a Legal Instrument of Confirmation of the European Union International Identity' Journal of Finance and Investment Analysis 12/1, p. 33.

[37]Kassoti, E. and Wessel, R.A. (2023), p. 14.

[38]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 21(3) TEU.

[39]European Parliament (2015) Implementation of the Lisbon Treaty: Improving Functioning of the EU. Directorate-General for Internal Policies, Policy Department C, PE 536.475, p. 6.

To sum up, as already clarified, the principles listed in Art. 21 TEU do not operate in the abstract; on the contrary they find their concrete expression through specific policies that structure the Union's relationship with the wider world. Particularly relevant among these, the CFSP constitutes the political and security dimension of EU external action. The CFSP represents the primary instrument through which the Union pursues the objectives of peace, security, and the consolidation of democracy and the rule of law listed in Art. 21 TEU.

### 1.3 Article 24 TEU: The Common Foreign and Security Policy (CFSP)

The Common Foreign and Security Policy (CFSP) represents one of the most distinctive and institutionally complex dimensions of EU external action. Formally established as the second pillar among those governing the powers conferred to the Union at the time of the Maastricht Treaty, and then subsequently reformed by the Lisbon Treaty, which strengthened Europe's role as an international actor (as also noted in Art. 3(5) TEU),[40] it is now mainly governed by Art. 24 TEU. The article establishes that the Union's competence in matters of CFSP shall "*cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy"* (Art. 24(1) TEU).[41] Crucially, the same provision specifies that the CFSP "*is subject to specific rules and procedures"* (Art. 24(1) TEU), and that the adoption of legislative acts in this area is expressly excluded.[42] This specific part of the provision raised serious concerns related to the legal nature of the CFSP, which was widely debated by legal scholars and legal scientists, given that the traditional belief was that CFSP was mainly driven by political interests rather than legal rules.[43] A legislative act, such as regulations, directives or decision, is a form of legal act that needs to be adopted through a legislative procedure: the general decision-making procedure used for EU policy. The exclusion of this type of procedure, the requirement of unanimity for decisions to be taken by the European Council and the Council rather than qualified majority voting, the limited role of the European Parliament and of the Commission, and the fact that the Court does not have jurisdiction (as all stated in Art. 24 (1) TEU), may be perceived as crucial limits associated to the legal nature of CFSP acts.[44]

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[40]Orzeszyna, K. (2017) 'Common Foreign and Security Policy of the European Union' Teka Komisji Prawniczej OL PAN, 137–146, pp. 138–139.

[41]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 24(1) TEU.

[42]Wessel, R.A. (2021) 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' in Kilpatrick, C. and Scott, J. (eds) Contemporary Challenges to EU Legality. Oxford: Oxford University Press, pp. 71–99, p. 75.

[43]Ibid., p. 74.

[44]Ibid., p. 75.

At the same time, the Treaties confirm the binding nature of CFSP acts, meaning that they are not only part of the Union's legal order, but also that they limit the freedom of the Member States in their individual actions, and that Member States cannot act oppositely to the decision taken.[45] It is therefore fair to say that, the jurisdictional position of the Court with respect to CFSP is governed by the combined reading of Art. 24(1) TEU, establishing that the Court of Justice shall have no jurisdiction with respect to CFSP provisions, and Art. 275 TFEU, which further clarifies this exclusion by providing two exceptions.[46] Firstly, the Court maintains jurisdiction to monitor compliance with Art. 40 TEU, which establishes the mutual non-affectation clause between CFSP and non-CFSP competences;[47] and secondly to rule on the legality of Council decisions providing for restrictive measures against natural or legal persons. Beyond these exceptions, the Court has broadened its oversight through its case law over CFSP-related matters; without, however, formally departing from the exclusion rule. As a matter of fact, in the Mauritius and Tanzania judgments,[48] the Court ruled that CFSP international agreements are concluded under the legal basis of Art. 218 TFEU, allowing the Court to revise those decisions and ensure compliance.[49] This approach, described by Wessel (2021) as an progressive strategy of normalising CFSP within the broader framework of EU legal order,[50] allows the Court to exercise a form of procedural control over CFSP external agreements, without claiming jurisdiction over their content. This development shows that the Court considers the CFSP as part of the Union's institutional framework, while recognising the limits on its capacity to review the legality of CFSP acts.[51] Moving forward with the institutional structure of the CFSP, drawing on the text of Art. 24(2) TEU, the Lisbon Treaty brought numerous institutional innovations, and among others, it introduced a new actor inside the CFSP framework: the High Representative of the Union for Foreign Affairs and Security Policy. According to Art. 18 TEU, he or she simultaneously serves as Vice-President of the Commission and as the Chair of the Foreign Affairs Council. This double role is carefully designed to bridge the institutional divide between the CFSP and other areas of EU external action.

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[45]Ibid., p. 76

[46]Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art 275 TFEU.

[47]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 40 TEU.

[48]Case C-658/11 *European Parliament v Council (Mauritius)* EU:C:2014:2025; Case C-263/14 *European Parliament v Council (Tanzania)* EU:C:2016:435.

[49]Wessel,, R.A. (2021), pp. 79–80.

[50]Ibid., p. 71.

[51]Ibid., p. 80.

As Orzeszyna (2017) observes, the High Representative chairs the Foreign Affairs Council and is responsible for the coordination of civil and military aspects of CFSP missions under Art. 43(2) TEU.[52] It is also important to state that the CFSP encompasses the Common Security and Defence Policy (CSDP) under Art. 42 TEU, which provides the Union with operational capabilities for peacekeeping, conflict prevention, and international security missions conducted outside the EU's territory. The CSDP constitutes an integral part of the CFSP, underscoring the intergovernmental nature of this policy.[53] Of particular relevance for the purposes of this thesis is the relationship between the CFSP and the other areas of EU external action, most notably the CCP and other matters related to free and fair trade. This relationship is regulated by Art. 40 TEU, which establishes that: "*the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union"* (Art. 40 TEU),[54] mainly referring to objectives such as the abolition of restrictions on international trade or free and fair trade. In practice, however, the boundary between CFSP and non-CFSP competences has proven difficult to delineate, as also widely proven by extensive litigation before the Court on the choice of legal basis for international agreements with both CFSP and non-CFSP components. Yet alongside the CFSP, the Union pursues its external objectives through another policy: the Common Commercial Policy. Whereas the CFSP is intergovernmental in nature, requiring unanimity and affording limited supranational oversight, the CCP is an area of exclusive competence of the Union, subjected to qualified majority voting and the full institutional participation of the European Parliament. This structural asymmetry between the two frameworks is not merely a matter of institutional design; it reflects a deeper structural choice about the respective roles of the Member States and the Union's supranational institutions in shaping relations with third countries. That choice becomes even more visible in the context of economic relations with an influential trading partner such as China, where commercial relations coexist with profound disagreements on human rights, governance, and geopolitical orientation. All of these aspects will be analysed later with the EU-China CAI: an agreement designed to facilitate investments and trade relations between both Parties, but that was eventually stalemated by foreign policy concerns.

[52]Orzeszyna, K. (2017), p. 140.

[53]Ibid., p. 145.

[54]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 40 TEU.

### 1.4 Article 207 TFEU: The Common Commercial Policy (CCP)

The Common Commercial Policy (CCP) constitutes the primary legal instrument and key component through which the EU engages in economic relations with third states and exercises its role as a global trade actor. One of the main objectives pursued by the Union has always been the liberalisation of international trade through the implementation of a common commercial policy, as clearly stated in both the TEU and the TFEU (Dimopoulos, 2010).[55] As Spiliopoulos and Gkoni (2023) observe, through the CCP, the EU confirms its international identity by playing an important role in the management of international economic relations.[56] The CCP falls within the exclusive competence of the Union by virtue of Art. 3(1)(e) TFEU, which means that only the EU, and not its Member States, has the power to adopt legally binding acts in matters covered by this policy.[57] The fundamental provision governing the exercise of the CCP is Art. 207 TFEU, which establishes that the common commercial policy shall cover changes in tariff rates, the conclusion of tariff and commercial agreements regarding exchanges of goods or services, the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy, and trade defence measures.[58] Drawing from the text of Art. 207 TFEU, the Commission is empowered to make recommendations to the Council, which authorises the opening of negotiations. Moreover, the Commission conducts negotiations in consultation with a special committee appointed by the Council, which is entrusted to assist the Commission in its task. The Council mostly act by qualified majority apart from "*the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment" (*Art. 207(4) TFEU) where decisions must be taken unanimously.[59] At the same time, in particular matters, such as trade in cultural, social, educational or health services, the Council is also required to act unanimously since such agreements usually include provisions for which unanimity is necessary for the adoption of internal rules. Finally, thought this provision, it is possible to point out the common thread between the CCP and the framework established by Arts. 3(5) and 21 TEU, including the Union's commitment to human rights and the rule of law.

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[55]Dimopoulos, A. (2010) 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' European Foreign Affairs Review 15/2: 153–170, pp. 156-158.

[56]Spiliopoulos, S. and Gkoni, P. (2023), p. 32.

[57]Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art 3 TFEU.

[58]Ibid., Art 207(1) TFEU.

[59]Ibid., Art 207(4) TFEU.

It is in fact stated in the Preamble of the TFEU that each Member State shall "*contribute, by exercising a common commercial policy, to the progressive abolition of restrictions on international trade"* (Preamble, TFEU, 2016).[60] Moreover, Art. 3(5) TEU provides that the EU shall "*contribute to peace, security, sustainable development of the planet, solidarity and mutual respect between peoples, free and fair trade"* (Art. 3(5) TEU) in the field of international relations.[61] Finally, through Art. 21(2) TEU, stating that one of the Union's aim is "*promoting the integration of all countries into the world economy, between others and through the progressive abolition of restrictions on international trade"* (Art. 21(2) TEU), the Treaties clearly connect the role of the Union as a global trade actor with its purpose of creating a common commercial policy based on the liberalisation of the market and international trade.[62] Additionally, it is important to note the close link between the CCP and the customs union, which involves not only removing tariffs internally between Member States, but also establishing a common approach to goods coming from non-EU countries.[63] Therefore, drawing on the text of Art. 206 TFEU, the CCP together with the customs union contributes significantly to the regulation of EU external trade with "*the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers"* (Art. 206 TFEU).[64] However, it has been noted that the provision stated in Art. 21(2) TEU does not refer to a complete removal of barriers in the EU's commercial transactions with third countries; on the contrary, international trade must be conducted in accordance with the common objectives listed in Art 3(5) TEU.[65] Furthermore, having addressed international trade, the Lisbon Treaty significantly expanded the scope of the CCP by including foreign direct investments (FDI) within its direct scope.[66] This transfer of competences does not just represent a meaningful development of crucial importance for the legal characterisation of the EU-China Comprehensive Agreement on Investments (CAI), but also significantly changed the Union's institutional framework governing the conclusion of investment agreement in the international sphere.

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[60]Ibid., Preamble TFEU.

[61]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 3(5) TEU.

[62]Ibid., Art 21(2)(e) TEU.

[63]Spiliopoulos, S. and Gkoni, P. (2023), p. 33.

[64]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 206 TFEU.

[65]Spiliopoulos, S. and Gkoni, P. (2023), p. 34.

[66]Ibid., p. 35.

Regarding the Union's exclusive competence, the Court expressly delineated and clarified the areas covered by the CCP through its Opinion 2/15 on the Free Trade Agreement with Singapore, in which the Court established a fundamental criterion for determining whether an agreement falls within the EU's exclusive competence. Essentially, with Opinion 2/15 the Court established that when a provision included in an international agreement with a third country shares a "*direct and immediate link with international trade"* (Opinion 2/15, EU–Singapore FTA),[67] then that provision shall fall within the scope of the CCP under Art. 207(1) TFEU, and therefore under the exclusive competence of the EU.[68] Finally, the scope and normative framework of the CCP would, however, remain incomplete without the procedural dimension through which it is given concrete legal expression. How the Union concludes international agreements, how it negotiates them and whose institution must give its consent under Art. 218 TFEU constitutes the framework within which institutional balance between the CCP, the CFSP, and the broader objectives of EU external action is directly tested.

### 1.5 The Procedure for the Conclusion of International Agreements under Article 218 TFEU

Art. 218 TFEU establishes the general procedure for the negotiation, signature, and conclusion of international agreements by the European Union. Since its provisions regulate the procedural pathway through which the Union's external relations are formalised and given legal effect, its role within the normative framework of EU external action is of fundamental importance. The procedure provided for in Art. 218 TFEU includes the following principal stages: a recommendation by the Commission (or by the High Representative of the Union for Foreign Affairs and Security Policy in CFSP matters) to the Council, which shall authorise the opening of negotiations; the appointment of a special committee and a negotiator; the conduct of the negotiations by the Commission; the signature and the conclusion of the agreement by the Council.[69] Under Art. 218(8) TFEU, the Council shall act by qualified majority throughout the procedure, except for those agreements that cover a field for which unanimity is required such as, association agreements or the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[70] As for the role of the European Parliament, it varies depending on the nature and content of the agreement: under Art. 218(6)(a) TFEU, Parliament's consent is required for agreements covering fields to which either the ordinary or the special legislative procedure applies, as well as for agreements of particular importance such

[67]Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376.

[68]Spiliopoulos, S. and Gkoni, P. (2023), p. 35.

[69]Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art. 218 TFEU.

[70]Ibid., Art 218 TFEU.

as association agreements and the Union's accession to the ECHR.[71] By contrast, in CFSP agreements, the Parliament's role is significantly reduced, and this discrepancy in powers constitutes a structural and institutional tension which remains widely debated in the literature and also legally reviewed by the CJEU, as illustrated by the Parliament v Council (Tanzania) litigation.[72] In this case, the Parliament brought an action for annulment under Art. 263 TFEU against Decision 2014/198/CFSP, which concerned an agreement on the transfer of suspected pirates and seized property from the EU naval mission to Tanzania.[73] The action was brought shortly after Advocate General Bot's Opinion in a similar case involving Mauritius (called the Mauritius case),[74] to signal the Parliament's disagreement with that Opinion rejecting its restrictive interpretation of its institutional rights. In the Mauritius case, the Council based the decision solely on Art. 37 TEU, which provides that the Union shall conclude international agreements with third states only in those areas covered by the CFSP. Consequently, since the agreement was treated as falling entirely within the CFSP, as a result the Parliament's prior consent and consultation under Art. 218(6) TFEU were not required.[75] The Court acknowledged the limited powers given to the Parliament in CFSP matters, but also noted that the Parliament is not completely deprived of procedural rights. In the Parliament v Council (Tanzania), the Court ruled that the duty to inform the Parliament at all stages of the negotiations, formal decisions but also to intermediate results or any major difficulties, is an expression of the principle of consistency set out in Art. 21(3) TEU, contributing to the achievement of a coherent and consistent EU external action.[76] Therefore, it can be concluded that the procedure examined in this section, starting from the negotiations, the voting rules in the Council, the consent and information rights of the European Parliament, and the judicial oversight exercised by the CJEU, reveal a fundamental principle that underpins the entire architecture of EU external action: the principle of institutional balance.

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[71]Ibid., Art.218(6)(a) TFEU.

[72]Case C-263/14 *European Parliament v Council (Tanzania)* EU:C:2016:435.

[73]Council Decision 2014/198/CFSP of 10 March 2014 on the Signing and Conclusion of the Agreement between the European Union and the United Republic of Tanzania on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the United Republic of Tanzania, [2014] OJ L108/1.

[74]Opinion of AG Bot in Case C-658/11 *European Parliament v Council (Mauritius)* EU:C:2014:41.

[75]Sánchez-Tabernero, S.R. (2017) 'The Choice of Legal Basis and the Principle of Consistency in the Procedure for Conclusion of International Agreements in CFSP Contexts: Parliament v Council (Pirate-Transfer Agreement with Tanzania)' Common Market Law Review 54: 899–920, p. 900.

[76]Ibid., p. 904.

### 1.6 Institutional Balance in EU External Action

The normative and institutional framework examined in the previous sections reflects a deliberate attempt to balance two competing imperatives characteristic of EU external action: managing the relationships with third states or international organisations, and preserving institutional and democratic accountability within the EU legal order. The Lisbon Treaty sought to address both imperatives through a series of institutional reforms, but the tensions between them have not been fully resolved. The principle of institutional balance, understood as the requirement that each institution shall act within the limits of the powers conferred upon it by the Treaties, captures the basic meaning of the principle of conferral.[77] However, the principle of institutional balance is also linked to how institutions execute their obligations and how they rule upon the consistency of their actions since "*each of the institutions must exercise its powers with due regard for the powers of the other institutions"* (Case C-70/88, Parliament v Council, para. 22; Case C-133/06, Parliament v Council, para. 57).[78] From this point of view, as argued by Koutrakos (2019), the principle of institutional balance lies at the core of the European Union's institutional order.[79] This principle is clearly articulated in the provision of Art. 13(2) TEU which provides that "*each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation"* (Art. 13(2) TEU).[80] From one hand this provision clearly outlines the powers and limits conferred on institutions, but also expressly obliges EU bodies to cooperate. Given this dual dimension, Art. 13(2) TEU suggests that the principle of institutional balance and the duty of cooperation between institutions must coexist, as both essentially represent the guide of conduct of the Union's legal order.[81] In the context of international agreement-making, this dualist structure manifests itself in the procedural allocation of roles between the Council, the Commission, the European Parliament, the High Representative and in the judicial oversight exercised by the CJEU on the choice of legal bases. As previously stated, the Tanzania judgment represents a significant step in the Court's approach to the normalisation of CFSP within the EU legal order, as argued by Sánchez-Tabernero (2017). While acknowledging that the role of Parliament in the CFSP was limited, by linking the duty to inform Parliament during the negotiations to conclude an international agreements under Art. 218(10) TFEU to the principle of

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[77]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 5(1)(2) TEU.

[78]Case C-70/88 *Parliament v Council* EU:C:1990:217, para. 22; Case C-133/06 *Parliament v Council* EU:C:2008:257, para. 57.

[79]Koutrakos, P. (2019) 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' International and Comparative Law Quarterly 68/1: 1–33, p. 5.

[80]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art.13(2) TEU.

[81]Koutrakos, P. (2019), p. 6.

consistency under Art. 21(3) TEU, the Court recognised the Parliament's role as a guarantor of consistency even in the context of CFSP: a policy domain where its formal decision-making powers are limited.[82] Nonetheless, while the Court recognised the Parliament's role to ensure consistency, Art. 21(3) TEU refers to the Council and the Commission, assisted by the High Representative, as the institutions that "*shall ensure that consistency and shall cooperate to that effect"* (Art. 21(3) TEU).[83] However, considering that the Union as a whole is entrusted with ensuring consistency, even institutions not specifically mentioned in Art. 21(3) TEU, such as the Parliament, are obliged to cooperate with the Council, the Commission and the High Representative to ensure consistency in EU external action.[84]

To conclude, the normative framework described in this chapter constitutes the normative environment within which the subsequent analysis of this thesis will proceed. Firstly, the objectives set out in Arts. 3(5) and 21 TEU establish a normatively integrated framework that links the Union's trade objectives to its human rights commitments and its obligation to observe international law. Secondly, even if the CCP and the CFSP are characterised by different decision-making procedures and different levels of parliamentary oversight, they are subject to the same overarching objectives and the same requirement of consistency. Thirdly, the procedure established by Art. 218 TFEU and the case law of the CJEU on the choice of legal bases, reveal the practical difficulties of managing the interaction between these two policy domains. While this structure does not resolve the tensions between foreign policy and economic interests and the EU's commitment to human rights, it provides the rules within which these three dimensions of EU external action are negotiated. These conclusions set the stage for the subsequent chapters of this thesis, which will examine in greater detail the specific interaction between the CCP, the CFSP, and the human rights framework in the context of EU external action, before turning to the case of the EU-China CAI.

[82]Sánchez-Tabernero, S.R. (2017), p. 915.

[83]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 21(3) TEU.

[84]Sánchez-Tabernero, S.R. (2017), p. 915.

# Chapter 2: EU Investment Policy and External Economic Agreements after the Lisbon Treaty

# Chapter 2: EU Investment Policy and External Economic Agreements after the Lisbon Treaty

As a result of the Lisbon Treaty of 2007, the legal framework governing the Union's economic relations with the world fundamentally changed. By integrating foreign direct investment (FDI)[85] into the Common Commercial Policy (CCP) under Art. 207 TFEU, the European Union now exercises an exclusive competence that had previously remained with the Member States. This evolution, described by Meunier as an act of "*integration by stealth"* (Meunier 2017), has profoundly shaped the EU's capacity to act as a unified investment actor in the international sphere.[86] The aim of this chapter is to trace the background of this transfer of competence over FDI prior to the Lisbon Treaty. It then analyses the scope and implications of Art. 207 TFEU as the new institutional and legal basis for EU investment policy. Finally, it will explore three key decisions of the Court of Justice of the European Union (CJEU) that defined the limits and institutional scope of the exclusive competence conferred to the EU, namely: Opinion 2/15 on the EU-Singapore FTA, Opinion 1/17 concerning the CETA between the EU and Canada, and Achmea. Taken together these decision shares some insights on the structural tensions between economic interests, investor protection provisions and the autonomy of EU law. Overall, the expansion of EU competences after the Lisbon Treaty did not produce a coherent policy framework, on the contrary it rather challenged its scope, laying down the basis to later discuss the EU-China Comprehensive Agreement on Investment (CAI).

## 2.1 Foreign Direct Investment and the Evolution of EU Competences

The Lisbon Treaty of 2007 transferred FDI competence at EU level potentially giving the EU the possibility to assume responsibility for negotiations of international investment treaties on behalf of the Member States. Through this new competence the EU is now able to regulate and negotiate various issues concerning the liberalisation of foreign markets, the protection of European investments abroad, settling investment issues, coordinating rules governing foreign investments inside Europe and negotiating Bilateral Investment Treaties (BITs) with its major trading partners

[85]*Foreign Direct Investment (FDI)* is classified as a cross-border investment made by an investor based in one economy, (namely the direct investor), that successfully acquires both a lasting interest and a significant influence over an enterprise located abroad. In economic terms, when a direct investor shares the 10% of voting power of the direct investment enterprise, this represents its lasting interests (OECD, 2025). At the same time, through the lens of EU law, the CJEU clearly defined FDI as any kind of investments concluded by natural or legal persons to develop or maintain direct links between the persons providing the capital and the enterprises that manage the available capital to carry out an economic activity (Opinion 2/15, 2017 paras 80). See OECD, *OECD Benchmark Definition of Foreign Direct Investment* (5th edn, OECD Publishing 2025); Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376, para. 80.

[86]Meunier, S. (2017) 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' Journal of Common Market Studies (JCMS) 55/3: 593–610, p. 593.

such as Canada and Japan.[87] However, prior to the Lisbon Treaty, under the European Economic Community (EEC) established by the Treaty of Rome of 1957, foreign direct investment (FDI) were not governed at the supranational level, leaving Member States free to retain their competence over investment treaties.[88] As a result, this context created a fragmented and decentralised framework without specific rules for its governance that later developed into a legitimacy problem.[89] Garcia et al. described this framework as "*failing to respond to pressing social needs"* (Garcia et al., 2015),[90] lacking a proper institutional process which was criticised for "*failing basic rule of law criteria such as coherence, predictability, neutrality, and accountability"*(Garcia et al., 2015).[91] In other words, prior to Lisbon, each Member State was entitled to negotiate, conclude and apply of its own BITs with third countries. As a result the number of BITs experienced an outstanding increase, almost quintupling their number between the 1980s and 1990s.[92] To prove this rapid proliferation of bilateral agreements, Sophie Meunier explains that, at the time of the Lisbon Treaty, "*Member States had about 1,200 extra-EU BITs with 148 countries, accounting for almost half of investment agreements in the world"* (Meunier, 2017).[93] However, this fragmented and decentralised framework also experienced significant normative and strategic consequences. From a normative perspective, the main issue was expressed by the substantial differences between the provisions contained in each BIT concluded by individual Member State, which differ in their national treatment clauses and compensation, their investor-State dispute settlement (ISDS) mechanisms, their inclusion of labour rights, environmental protection, and transparency. For instance, Comerma observes that in pre-Lisbon BITs concluded with China, no good governance provision was included, revealing a structural disconnection between the pre-Lisbon investment framework and the normative objectives of EU external action listed in Arts. 3(5) and 21 TEU.[94] On the contrary, from a strategic perspective, the consequences of this fragmented investment policy meant that the EU was unable to speak with a single voice during investment negotiations.

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[87]Ibid., p. 593-594.

[88]Ibid., p. 595.

[89]Comerma, L. (2025) 'European Foreign Investment Policy towards China: Is There an EU Net Contribution?' Asia Pacific Law Review 33/1: 102–124, p. 102.

[90]Garcia, F.J. et al. (2015) 'Reforming the International Investment Regime: Lessons from International Trade Law' Journal of International Economic Law 18: 861–892, p.861

[91]Ibid., pp. 861-862.

[92]Comerma, L. (2025), p. 103.

[93]Meunier, S. (2017), p. 595.

[94]Comerma, L. (2025), p. 107.

As Meunier has argued, the process was "*an example of historical institutionalism in action"* (Meunier, 2017) in which institutional actors and Member States found it in their interests to govern specific investment-related issues at EU level.[95] However, it is important to clarify that the European system is a union of 27 states that willingly cooperate and work together, while conferring some competences at EU level. In this regard, Member States were indeed reluctant to transfer their sovereignty and competences to the EU in the context of foreign direct investment, considering this area to be closely linked to their national economic policy.[96] This contrasts with the approach that Member States decided to adopt in the context of the Common Commercial Policy, which is falls within the exclusive competences of the Union and that defines the broader framework of EU external relations. Therefore, considering the initial objection of Member States to the transfer of competence over foreign direct investment to the EU, it is now fair to argue that this evolution was not the result of a clearly planned political project, but rather of a gradual institutional shift. Initially, FDI received limited attention within the broader debate on the Union's external action, to such an extent that several amendments sought to remove this reference to FDI from the list of EU's exclusive competences, arguing in favour of the national and shared nature of investment policies.[97] A crucial change occurred during the Praesidium meeting in April 2003, when Michel Barnier, the European Commissioner for Regional Policy at the time, proposed the inclusion of the concept of foreign direct investment among the areas covered by the CCP.[98] As a result, the reference remained in the Constitutional Treaty of 2004, and was later carried unchanged into the Lisbon Treaty. The inclusion of FDI in Art. 207 TFEU did not just alter the governance of EU's investment policy, but also became part of the CCP, transforming it into an exclusive EU competence with the Commission playing the crucial role as mediator in the negotiations of investment agreements and shaping external investment policy on behalf of the Union.[99] However, how was it possible to achieve this if the outcome was opposed to the preferences of Member States, considering that they are the ones sharing the ability to confer part of their competences at EU level? An inspiring point of reflection was given by Meunier, who wrote: "*the competence shift resulted from a combination of historical serendipity, Commission entrepreneurship and procedural constraints"* (Meunier, 2017).[100]

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[95]Meunier, S. (2017), p. 593.

[96]Ibid., p. 599.

[97]Ibid., pp. 602-603.

[98]Ibid., pp. 601-602.

[99]Ibid., p. 603.

[100]Ibid.

Finally, the gradual and unplanned nature of the competence shift described above makes the legal significance of Art. 207 TFEU even more remarkable. What began as a simple addition of the words "*foreign direct investment*" into a draft treaty provision during a Praesidium meeting in April 2003, ultimately produced a fundamental reallocation of competence over investment policy, shifting FDI from a fragmented framework of BITs concluded by each Member State, into an area of exclusive competence of the Union. Yet the process through which this transfer of competence took place left several of its legal implications unresolved, such as its precise scope or its relationship with the pre-existing BITs. The following section, focused on Art. 207 TFEU will examine these uncertainties.

### 2.2 The Scope of EU Exclusive Competence over FDI under Article 207 TFEU

The inclusion of foreign direct investment in the scope of the CCP by Art. 207(1) TFEU represents a turning point in the development of the institutional framework of EU external economic relations. Art. 207(1) TFEU is indeed quite explicit in this regard, providing that "*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 liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies"* (Art. 207(1) TFEU).[101] As previously stated, through to this competence shift, the Union acquired the exclusive competence to negotiate, conclude, and apply investment agreements with third countries in the area of FDI, defined as "*one of the principal ways that economies integrate into the global economy. FDI is not only an important channel for exchanging capital across countries but also for exchanging goods, services and knowledge, and serves to link and organise production across countries"* (OECD, 2025).[102] As noted by the European Parliament's Policy Department in its document identifying the key policy objectives after the Lisbon Treaty, the transfer of competence over FDI to EU level included several objectives namely, the protection of EU investors abroad, greater legal certainty and the overcoming of the fragmented framework created by the BITs. In other words, this transfer of competence was intended to provide for the same level of investment protection for all EU investors and strengthen the EU's negotiating power in investment negotiations vis-à-vis third countries.[103]

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[101]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207(1) TFEU.

[102]OECD (2025) OECD Benchmark Definition of Foreign Direct Investment. 5th ed. Paris: OECD Publishing. Available at: https://doi.org/10.1787/7f05c0a3-en , (accessed 15 May 2026).

[103]European Parliament (2010) The EU Approach to International Investment Policy after the Lisbon Treaty. Brussels: European Parliament, PE 433.854–855–856.

Apart from Art. 207 TFEU, which states "*the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action"* (Art. 207(1) TFEU),[104] the legal basis for EU investment policy post-Lisbon is mainly constituted by the general provisions on EU external action in Arts. 3(5) and 21 TEU, requiring the Union to uphold and promote its values and interests in its international relations. In this respect, Arts. 3(5) and 21 TEU provide a normative dimension to the Union's investment policy, reinforcing the EU's role as a value-based actor within the global sphere of economic governance. To expand on this notion, the Commission's 2021 Trade Policy Review "*An Open, Sustainable and Assertive Trade Policy*" proposed a strategy for the conduct of EU trade and investment policy based on openness and strategic autonomy as policy choices, recalling the Union's commitment to free and fair trade. This strategy includes resilience and competitiveness to strengthen the EU's economy; to promote sustainability and rules-based cooperation in EU international relations, but also to foster readiness to combat unfair practices by third countries.[105] This framework is significant since it illustrates both the approach and the mindset adopted by the Union and its policy-makers towards investment policy after Lisbon: not as a purely commercial instrument, but as a vehicle for projecting EU values in its external relations. This strong connection will be among the most contested issues in the CAI negotiations with China, where European efforts to secure enforceable commitments on labour rights and sustainable development collided with China's aim of maintaining full sovereignty over domestic regulation. However, returning to the transfer of competence under Art. 207 TFEU, this accomplishment was definitely not straightforward, leaving three main contentious issues unresolved during the implementation phase. First, the fate of the pre-existing BITs concluded by each Member States with third countries raised difficult questions as to which institution has the necessary competences to negotiate and conclude new treaties.[106] Directly linked to this first issue, another point of friction and debate concerned the compatibility of EU law with existing intra-EU BITs, which resulted in a series of infringement proceedings against some Member States (European Commission, 2015).[107] As for the last contentious point, questions were raised concerning the actual meaning of the words "*foreign direct investment*" which the Lisbon Treaty did

[104]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207(1) TFEU.

[105]European Commission (2021) Trade Policy Review – An Open, Sustainable and Assertive Trade Policy. COM (2021) 66 final, Brussels, 18 February 2021, pp. 4–5.

[106]Meunier, S. (2017), p. 605.

[107]European Commission (2015) 'Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties', IP/15/5198, 18 June; see also Meunier, S. (2017), p. 605.

not clarify (Bischoff, 2011; Chaisse, 2012).[108] Essentially, after the entry into force of Lisbon Treaty in 2009, the development of FDI policy resulted in a much greater political debate on its implementation. Both the Commission and Parliament sought to define the new direction to take in the context of the new investment policy with documents (European Commission, 2010; European Union, 2012, 2014), hearings and written reports by the Committee on International Trade (INTA). At the same time, Member States contested the position of the Parliament and the Commission, stating in favour of their shared competence and sovereignty over investment matters and FDI.[109] Clarification of this important debate on the question of whose institution was required to ratify the international agreements negotiated by the EU, became particularly relevant in the context of the EU-Singapore Free Trade Agreement, as in October 2014 the Commission requested an Opinion to the European Court of Justice (CJEU). The following section therefore examines Opinion 2/15, which provided a landmark interpretation of Art. 207 TFEU and defined the limits and scope of the EU's exclusive competence in the field of international investment.

### 2.3 Opinion 2/15 (EU-Singapore FTA) and the Limits of EU Competence

Opinion 2/15, delivered by the CJEU on 16 May 2017, represents the most authoritative judicial statement on the scope of EU exclusive competence in trade and investment in the post-Lisbon institutional framework. The opinion was requested by the Commission under Art. 218(11) TFEU, which allows Member States, the Parliament, the Council or the Commission to ask for an opinion from the Court on whether an agreement is compatible with the Treaties, in order to clarify whether the Union had exclusive competence to conclude the Free Trade Agreement with Singapore (EUSFTA) or whether that agreement fell within the shared competence of the Member States.[110] Art. 218(11) TFEU also specifies that: "*where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised"* (Art. 218(11) TFEU), confirming its binding effect.[111] The negotiations of the EU-Singapore agreement date back a long way, when the Council granted the authorisation to open negotiations in 2006. After the entry into force of Lisbon Treaty in 2009, the Council proposed the cessation of all BITs with individual

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[108]Meunier, S. (2017), p. 605, see also Bischoff, J. (2011) 'Just a Little BIT of "Mixity"? The EU's Role in the Field of International Investment Protection Law' Common Market Law Review 48: 1527–1570; Chaisse, J. (2012) 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' Journal of International Economic Law 15/1: 51–84.

[109]Meunier, S. (2017), p. 604.

[110]Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376, para. 1.

[111]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 218(11) TFEU; see also Cremona, M. (2018) 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' European Constitutional Law Review 14/1: 231–259, p. 231.

ASEAN countries,[112] and gave the green light to the Commission to start negotiations directly with Singapore. Negotiations conducted by the Commission concluded in 2015 with a text that precisely clarifies that the EU-Singapore FTA will be settled by the EU alone, rather than together with its Member States. However, both Member States and the Council believed that the agreement contained some elements of shared competence with the Union, and some issues falling within the competence of Member States, and therefore proposing a mixed agreement.[113] In this context, the Court's response was nuanced: it confirmed the exclusive competence of the EU over most of the provisions of the EU-Singapore FTA, but identified some exceptions that required participation and ratification of all Member States, thereby determining the legal and procedural architecture for a new generation of EU trade and investment agreements. Opinion 2/15 of the Court, thus, has implications both for the Singapore Agreement itself, but also for other comprehensive trade agreements, like the ones that the EU sought to conclude with other countries, such as Canada, USA and China[114]. Essentially, with its Opinion 2/15 the Court also tried to answer one of those contentious issues that arose after the Lisbon Treaty and the transfer of competence of FDI at EU level under Art. 207 TFEU, namely which actors are required to ratify the international trade agreements negotiated by the EU. Firstly, the Court confirmed that all aspects of the EU-Singapore FTA falling within the scope of the CCP, including trade in goods and services, FDI and intellectual property, directly fell within the exclusive competence of the Union as set out in Art. 207(1) TFEU. Consequently, the Court held that a provision belong to the scope of the CCP "*if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the goods or services concerned"* and that the CCP must be conducted in the context of the principles and objectives of EU external action.[115] In doing so, provisions whose connection to trade was only indirect were considered to be outside the Union's exclusive competence over FDI. However, the significance of Opinion 2/15 does not lie merely in the confirmation of the EU's exclusive competence over FDI in international trade agreements, but mostly lies in the limits that the Court placed upon it. While Opinion 2/15 clarified the scope of Art. 207 TFEU, it also identified areas that remained outside the Union's exclusive competence, most notably non-direct investment (also referred to as portfolio investments) and Investor–State dispute settlement (ISDS) mechanisms .

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[112]ASEAN Association of South East Asian Nations, which includes many countries namely: Brunei Darussalam, Myanmar/Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam.

[113]Cremona, M. (2018) 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' European Constitutional Law Review 14/1: 231–259, pp. 231–232.

[114]Ibid., p. 232.

[115]Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376, paras. 34–36.

By doing so, the Court demonstrated that the post-Lisbon transfer of competences in the field of FDI was not unlimited and that Member States still shared an important role in certain aspects of international investment policy. Indeed, Opinion 2/15 clearly distinguishes between foreign direct investment (FDI) and non-direct investment (portfolio investments), which takes place in the form of "*the acquisition of company securities with the intention of making a financial investment"* without influencing the management of the enterprise.[116] As previously stated, the Court held that provisions governing the liberalisation of FDI fell within the CCP, and thus, within the exclusive competence of the Union set out in Art. 207(1) TFEU. However, the Court ruled that provisions relating to portfolio investment did not fall within the exclusive competence of the EU over the CCP, and therefore required shared competence between the Union and the Member States. In this regards, the Treaties generally classify as shared competences between the Union and its Member States those that are not classified as exclusive competences under Art. 3 TFEU or supporting competences under Art. 6 TFEU, as provided in Art. 4(1) TFEU.[117] In the context of the EU-Singapore FTA, the distinction between FDI and non-direct investment is also closely linked to EU-China CAI, since it represents an agreement covering both investment liberalisation and governance, which will be discussed in Chapters 4 and 5. A further finding of considerable importance concerned the Investor-State dispute settlement (ISDS) mechanism included the EU-Singapore FTA, which establishes a settlement regime in case of a dispute concerning an alleged breach of investment protection provisions that caused loss or damage to the claimant or its locally established company.[118] The Court held that such a mechanism fell outside the scope of the exclusive competence of the Union, and instead fell within a competence shared between the European Union and the Member States.[119] To support its decision, the Court based its reasoning on several considerations. Both the EU and its Member States can be parties to such disputes and the Court has responsibility for determining the allocation of competences needed to establish competences in relation to such disputes. Moreover, the Court also considered the fact that the claimant investor may decide to submit the dispute to arbitration, leaving Member States without the possibility of opposing that choice. Ultimately, considering that the choice of arbitration would potentially remove the dispute from the jurisdiction of Member States' national courts, the CJEU concluded that the Investor-State dispute settlement (ISDS) mechanism fell within a shared competence between the EU and its Member States.

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[116]Ibid., para. 227.

[117]Ibid., para. 242.

[118]Ibid., para. 285.

[119]Ibid., paras. 286-293.

On this matter, Cremona identifies a further ambiguity concerning the legal basis of ISDS provisions, explaining that while the Court concluded that competence over ISDS is shared between the Union and the Member States, it did not clearly specify the legal basis supporting such competence. In EU law, competences can be conferred only after the identification of an appropriate legal basis, making this omission noteworthy. According to Cremona, although the legal basis for ISDS could be traced back to the investment provisions to which it directly relates, namely Art. 207 TFEU for direct investment and Art. 63 TFEU for non-direct investment, the Court's omission leaves an unresolved legal and institutional question.[120] To sum up, Opinion 2/15 of the Court represents a landmark in the interpretation of the post-Lisbon framework governing EU external economic relations. As noted by Cremona, its significance extends beyond the enlarged scope of the CCP, and contributing more broadly to the understanding of the allocation of external competences under the Treaties and the relationship between exclusive and shared powers.[121] However, by excluding portfolio investment and Investor–State dispute settlement (ISDS) mechanisms from the scope of the Union's exclusive competence, and by leaving unresolved questions on the legal basis for ISDS, the Court highlighted the limits that continue to shape EU investment policy. After the delivery of Opinion 2/15, on 18 April 2018, the Commission presented to the Council the outcome of the EU-Singapore FTA, dividing the original agreement into two: the EU-Singapore Trade Agreement and the EU-Singapore Investment Protection Agreement (IPA).[122] This so-called split approach was also supported by the European Parliament, which, in its resolution for trade negotiations with Australia and New Zealand states: "*on the Commission and the Council to put forward a proposal as soon as possible about the general future architecture of trade agreements taking into account CJEU Opinion 2/15 on the EU-Singapore FTA, and to clearly distinguish between a trade and liberalisation of foreign direct investment (FDI) agreement, containing only issues that fall within the EU's exclusive competence, and a potential second agreement which covers subjects whose competences are shared with Member States*".[123] These developments demonstrate that, the conclusion of comprehensive investment agreements remains conditioned by important legal and institutional limitations that continue to require a significant role for EU Member States.

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[120]Cremona, M. (2018), p. 256.

[121]Ibid., p. 235.

[122]Svoboda, O. (2019) 'The Common Commercial Policy after Opinion 2/15: No Simple Way to Make Life Easier for Free Trade Agreements in the EU' Croatian Yearbook of European Law and Policy 15: 189–214, p. 205.

[123]European Parliament, 'Resolution of 26 October 2017 Containing the Parliament's Recommendation to the Council on the Proposed Negotiating Mandate for Trade Negotiations with Australia' (2017), para. 10; see also Svoboda, O. (2019), p. 206.

The next section examines whether Opinion 1/17 on the Comprehensive Economic and Trade Agreement (CETA) between EU and Canada can address some of these unresolved questions, particularly with regard to the EU's new Investment Court System (ICS).

### 2.4 Opinion 1/17 (CETA) and the EU Investment Court System

If Opinion 2/15 defined the outer limits of the exclusive competence of the EU in matters of foreign investment, Opinion 1/17, delivered by the CJEU on 30 April 2019, addressed a related but distinct issue: whether the Investment Court System (ICS), first introduced to solve investment disputes between investors and States under the EU and Canada CETA and the EU-Vietnam FTA, was compatible with EU law, including the requirement of fundamental rights protection.[124] Requested by the Kingdom of Belgium pursuant to Art. 218(11) TFEU asking clarifications on three main issues concerning the compatibility of the ICS with EU law, Opinion 1/17 is of critical importance for this thesis since the ICS represented the EU's preferred mechanism for resolving investment disputes. As a result, its compatibility with EU law was a precondition for its broader adoption in future investment agreements, including the EU-China CAI which will be discussed in the following sections of this thesis. As Dietz et al. argues, the legitimacy gap of investor-State arbitration, described as "*the incongruence between the purpose, procedure and performance of an institution with generalised standards of appropriateness"* (Dietz et al; 2019), was characterised by some issues, namely the lack of transparency, independence and impartiality in arbitral proceedings, inconsistency and a privileged legal position of international investors.[125] In the light of the growing debate on the legitimacy gap, the Commission opened a public consultation on ISDS, which led to almost 150,000 responses from European citizens who rejected the proposed dispute resolution via arbitration tribunals. As a result, in autumn 2015, the Commission presented a new dispute settlement model: the so-called ICS.[126] Essentially, the ICS was an attempt to address the legitimacy gap and to overcome the legitimacy crisis by taking decisions involving investment disputes, not by arbitration tribunals, but rather by bilateral investment courts made of public judges with a fixed term and appointed by each State.[127] However, the compatibility of the ICS with EU law remained unsolved, and with Opinion 1/17, the Court tried to address three key issues. Firstly, it examined whether the system could be compatible with the autonomy of EU law. Secondly, it analysed whether the system complied with the principles of equal treatment and effectiveness, and finally, it

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[124]Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)* EU:C:2019:341, para. 1.

[125]Dietz, T., Dotzauer, M. and Cohen, E.S. (2019) 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' *Review of International Political Economy* 26/4: 749–772, pp. 750, 756–758.

[126]Ibid., pp. 760-761.

[127]Ibid., p. 750, p. 761.

questioned whether the proposed dispute settlement mechanism guaranteed the right of investors to access to an independent and impartial tribunal.[128] The CJEU, in Opinion 1/17, held that the CETA Investment Court System was compatible with EU law explaining how the designation of a court responsible for the interpretation of the provisions of an international agreement, whose decisions are binding on the European Union, is indeed part of the competences of the Union with regard to the conclusion of international agreements.[129] Second, it held that the system did not compromise the autonomy of the EU law since CETA tribunals are required to apply the provisions of the envisaged agreement and not EU law as such, and could not be called upon to interpret EU law as binding manner. As a result "*the power of interpretation and application conferred on that Tribunal is confined to the provisions of the CETA and that such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the Parties"* as clearly stated in paragraph 122 of the Opinion.[130] Regarding the principle of equal treatment, the Court rejected the argument that the ICS would discriminate against EU investors, arguing that Canadian investors operating as foreign entrepreneurs within the EU, "*are to have a specific legal remedy against EU measures"* under CETA. By contrast, EU investors already benefit from the judicial protection provided by the courts of the Member States and the CJEU.[131] The Court also found that the ICS does not undermine the effectiveness of EU law, including EU competition law. According to the Court, the tribunals established under CETA are not entitled to interpret EU law, nor do they have the power to require Member States to amend their laws. Therefore, the role of the ICS is limited to specific circumstances where an EU measure violates the investment protection standards defined by CETA, without undermining the effectiveness of EU legal order[132]. Consequently, the Court concluded that this kind of dispute settlement mechanism is compatible with both the principle of equal treatment and the requirement of effectiveness within the EU legal order. Finally, concerning the right of access to an independent tribunal, the Court ruled that the envisaged system provided sufficient guarantees of accessibility, independence, and impartiality to comply with the requirements of EU law. The Court based its position on the compatibility of the ICS with Art. 47 of the Charter of Fundamental Rights, which binds the Union when entering into a international agreement "*that encompasses the establishment of bodies that are primarily judicial in nature and that are called on to resolve disputes between, in particular, private*

[128]Opinion 1/17 *CETA* EU:C:2019:341, paras. 70–104.

[129]Ibid., para. 106.

[130]Ibid., para. 122.

[131]Ibid., para. 181.

[132]Ibid., paras. 187-188.

*investors and States"* (Opinion 1/17; 190; 2019).[133] Opinion 1/17 therefore represents a significant development for the evolution of EU investment policy. By confirming the compatibility of the ICS with EU law, the Court supported the EU's attempt to replace the traditional arbitration system with a more institutionalised Investor-State dispute settlement (ISDS) mechanism. As the same time, the Court reaffirmed the Union's commitment to promoting a rules-based framework for the resolution of investment disputes. To sum up, Opinion 1/17 addressed the relationship between international investment and the autonomy of EU law from the perspective of external dispute settlement mechanisms. The next section therefore turns to Achmea, a landmark judgment that further developed the principle of autonomy of EU law and profoundly influenced the future of investment protection within the European Union.

### 2.5 Achmea and the Autonomy of EU Law in Investment Protection

The CJEU's judgment in Case C-284/16 Achmea, delivered on 6 March 2018, represents another landmark in the post-Lisbon institutional framework of EU investment policy, addressing the question of the compatibility between intra-EU bilateral investment treaties (BITs) and the autonomy of EU law.[134] As for a concise historical background, in 1992 a BIT between the Netherlands and the Czech and Slovak Federative Republic entered into force, allowing investors from one of those two countries to bring proceeding against the other in the event of an investment dispute. This was indeed the case, since Achmea, a Dutch health insurance company, initiated arbitration proceedings to settle a dispute with Slovakia, due to the fact that in 2006 the Slovak Republic reversed the liberalisation of the private sickness insurance market ending the distribution of profits.[135] Consequently, the arbitral tribunal found that Slovakia had breached the BIT between the two parties and awarded Achmea damages of approximately 22.1 million Euros, resulting in Slovakia subsequently challenged the arbitral award of the tribunal stating that the dispute settlement mechanism chosen was incompatible with EU law. Finally, the dispute was brought before the CJEU by the Federal Court of Justice of Germany under the provisions of Art. 267 TFEU, asking whether the investor-State arbitration clause contained in the BIT as preferred investor-State dispute settlement mechanism, was compatible with Arts. 18, 267 and 344 TFEU.[136]

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[133]Ibid., para. 190.

[134]Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158.

[135]Ibid., para. 8; see also Ankersmit, L. (2018) 'Achmea: The Beginning of the End for ISDS in and with Europe?' Investment Treaty News, 24 April. Available at: https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/ (accessed 4 June 2026).

[136]Ankersmit, L. (2018).

After having established that investment tribunals could potentially interpret EU law since the disputes that they intend to solve are liable to relate to the interpretation or application of EU law,[137] the Court moved to another issue: whether those tribunals are indeed part of the EU's judicial system. Consequently, the Court ruled that an arbitral tribunal could be called upon to apply and, if necessary, interpret EU law, but was not empowered to make a reference for a preliminary ruling to the CJEU and was not part of the EU's judicial system.[138] On the basis of this finding, the third and final consideration of the Court was whether the awards formulated by such tribunals were indeed subject to judicial review by another Member State's court. This reasoning, led to the deliberation that questions of EU law can be submitted to the Court by means of a reference for a preliminary ruling, clarifying that the Court retain full control over questions about the interpretation and applicability of EU law.[139] To clarify, the Court identified three features of investment arbitration tribunals that were incompatible with the autonomy of EU law. Firstly, investment tribunals can indeed interpret EU law. Secondly, the Court concluded that such tribunals operate outside the EU judicial system and thirdly, the awards of such tribunals by national courts have limited means of judicial review. These three considerations led the Court to finally conclude that, in the conclusion of a BIT, the Parties shall establish a "*mechanism for settling disputes between an investor and a [EU] member state which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law"*.[140] Put differently, with regard to the circumstances addressed by Achmea, the Court held that Member States cannot establish a dispute settlement mechanism capable of diverting disputes involving EU law from the EU judicial system. Essentially, Achmea confirmed that the principle of autonomy of EU law operates as a constraint in the establishment of investment dispute settlement mechanisms involving investment agreements. This fundamental principle of autonomy of the EU law was developed through a series of judgments starting from Van Gend en Loos to Opinion 2/13, and now occupies a key position in the case law of the CJEU.[141]

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[137]Case C-284/16 *Achmea* EU:C:2018:158, para. 39.

[138]Ibid., para. 45.

[139]Ibid., para. 50; Ankersmit, L. (2018).

[140]Ibid., para. 56; Ankersmit, L. (2018).

[141]Van Gend en Loos, is known for stressing the idea of European integration, establishing that national courts are obliged to protect and enforce those individual rights created by EU law. This is opposed to the traditional international law system, where treaties bind only to the signatory states. Whereas, Opinion 2/13, with respect to the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, established the principle of autonomy of EU law, emphasising the need to preserve the integrity of the EU judicial system. See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* EU:C:1963:1; Opinion 2/13 *Accession of the European Union to the ECHR*EU:C:2014:2454.

Essentially, the autonomy of EU law refers to the concept that EU law is autonomous from both national and international law, constituting an independent legal system with its own institutions, procedures, and mechanisms for judicial review. This autonomy is protected through a judicial framework carefully designed to ensure a unified interpretation and application of EU law across all Member States under Art. 267 TFEU, which allows national courts of Member States to request preliminary rulings to the Court asking questions about the interpretation or validity of EU law. Against this background, Achmea confirmed that intra-EU BITs arbitral tribunals that apply or interpret EU law, without being integrated into the EU judicial system, are incompatible with the autonomy of the EU law. Furthermore, the conclusions of the Court established that provisions about arbitration in such agreements cannot be considered immune from legal review: tribunals designed under these treaties may indeed transfer the resolution of disputes with issues involving EU law away from the jurisdiction of national courts, potentially undermining the EU judicial system and its mechanisms for ensuring a unified interpretation of EU law.[142]

To conclude, three main points emerge throughout this chapter. First, the expansion of EU competences in the field of investment has not resulted in a fully coherent investment policy. The distinction between foreign direct investment (FDI) and portfolio investment, the large number of Member State BITs still present in the current international arena and the unresolved debate over investment dispute settlement mechanisms, have created a complex legal framework in which EU and Member States' competences continue to overlap. Second, the case law of the CJEU shows that EU investment policy cannot be viewed solely as an economic or commercial instrument, considering that the EU is strictly required to pursue its investment interests in conformity with international law and the objectives set out in Arts. 3(5) and 21 TEU. Lastly, the institutional and legal developments examined in this chapter such as, the transfer of FDI competence under Art. 207 TFEU, the judicial clarifications provided by Opinions 2/15 and 1/17, and the legal and institutional constraints imposed by the Achmea judgment, define the normative and institutional framework within which the EU's investment policy operates after the Lisbon Treaty. Thanks to these developments, EU Member States must now ensure that investment dispute settlement mechanisms such as arbitral tribunals, do not undermine the integrity of the EU judicial system. Balancing these requirements with the continuing need to engage in international investment relations remains one of the key challenges of EU investment policy. These conclusions set the analytical context for Chapter 3, which examines in greater detail the relationship between the CCP, the CFSP, and the Union's human rights obligations: a three-dimensional field within which the CAI (discussed in Chapter 4 and 5), was negotiated and ultimately suspended.

[142]Ankersmit, L. (2018).

# Chapter 3: Human Rights Protection in EU External Action

# Chapter 3: Human Rights Protection in EU External Action

The evolution of the European Union's competence in the field of investment after the Lisbon Treaty has demonstrated that EU investment policy cannot be solely explained through the lens of market integration and economic liberalisation. On the contrary, EU external action is strongly shaped by the values and objectives set out in the Treaties. This chapter focuses on one of those significant objectives: the protection and promotion of human rights in EU external action. As already stated in the previous chapters, Arts. 3(5) and 21 TEU, apart from requiring the Union to pursue its economic and political interests, also expressly oblige the EU and its institutions to protect human rights, but also promote democracy and the rule of law, while respecting international law. Therefore, it comes as no surprise that EU's external economic policies, including those specific related to trade and investments, tend to mirror these normative commitments expressed in the Treaties. Against this background, Chapter 3 focuses on the relationship between human rights protection, restrictive measures, and EU external economic relations. It begins by analysing the legal significance of Art. 21 TEU, which explains those values and human rights commitments that shall guide the Union's external action. It then analyses the legal basis, structure, and procedures governing EU restrictive measures, before turning to the Rosneft judgment and its implications for judicial review in the field of CFSP. The chapter subsequently investigates the structural interaction between the CCP and the CFSP, concluding with some considerations on how human rights commitments have become even more integrated into EU external economic relations.

## 3.1 From Principle to Policy: Human Rights Commitments in the Post-Lisbon Framework of EU External Action

The proposed accession of the EU to the European Convention on Human Rights (ECHR) progressively became even more concrete after the entry into force of the Lisbon Treaty, under Art. 6(2) TEU, which expressly requires the Union to accede to the ECHR. Between 2010 and 2013, negotiations between the European Union and the Council of Europe took place, culminating in the adoption of a Draft Accession Agreement on 5 April 2013.[143] Nonetheless, despite the EU's commitment to human rights protection, the aforementioned accession agreement was interrupted by the Court's Opinion 2/13, stating that the agreement was incompatible with EU primary law and the autonomy of the EU legal order.[144]

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[143]Callewaert, J. (2014) The Accession of the European Union to the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, p. 7.

[144]Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:2014:2454.

Although negotiations were later resumed, as for today the Union is still not an official party of the ECHR. However, the proposed accession remained of considerable importance, since it would strengthen the coherence of the system of fundamental rights protection of the Union, as also restated in the Preamble to the EU Charter of Fundamental Rights, declaring that the Union's universal values include the protection human dignity, freedom, equality and the respect for the principles of democracy and the rule of law.[145] As a matter of fact, acceding to the ECHR, would indeed subject EU institutions and their acts, falling within the scope of the Convention, to external review by the European Court of Human Rights (ECtHR). As a consequence, acceding to the ECHR would eventually close the gap whereby Member States, but not the Union itself, are parties of the Convention, described by Callewaert as a "*missing link*" (Callewaert, 2014).[146] This objective reflects the broader post-Lisbon framework which aims at placing the promotion of human rights as a cross-cutting objective of EU external and internal action: a development that is particularly relevant for understanding the evolution of EU external economic policy, which will be discussed in the following sections of this chapter. In the pre-Lisbon context, human rights were less systematically integrated across EU external policies and mainly confined to the field of CFSP and development policy, complicating the integration of human rights norms into the framework of EU's external policies. This dynamic eventually resulted in a fragmented and inefficient framework based on a overly narrow concept of human rights protection.[147] As a result, the Union's approach was frequently criticised for lacking coherence, treating human rights as a merely political and not as issues of international security or stability concerns, limiting the significance of human rights implications compared to other domains of EU external policies.[148] Among those fields, the policy area that incorporated, to a limited extent, human rights considerations was the CCP in matters of policy coherence, or when such considerations were considered necessary to support trade-related aims.[149] As for today, human rights considerations in matters of trade-related measures and investment agreements frequently include treaty clauses related to sustainable development, labour standards, health and safety at work and environmental protection, and generally adopt policy instruments, such as general human rights guidelines, impact assessments and evaluation

[145]Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Preamble.

[146]Callewaert, J. (2014), pp. 7-8.

[147]Kube, V. (2016) The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU? EUI Working Paper LAW 2016/10. Florence: European University Institute, p. 4.

[148]Ibid., p. 9.

[149]Ibid., p. 6; see also European Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' COM(2001) 252 final; M Gołąbek, '"Weaving a Silver Thread": Human Rights Coherence in EU Foreign Affairs and Counter-Terrorism' (European University Institute 2013) 307.

procedures to safeguard the respect of human rights in EU external and economic action.[150] As a matter of fact, Art. 207 TFEU clearly provides that the CCP must be conducted in respect of the principles and objectives of the Union's external action, thereby formally subjecting the CCP, even if it is an exclusive competence of the EU under Art. 3(1)(e) TFEU, to principle and objectives of human rights set out in Art. 21 TEU.[151] However, looking back to the limited influence of human rights in the pre-Lisbon context, this compartmentalised structure contributed to the development of a human rights framework that was often criticised for being politically driven and insufficiently integrated across the other domains of EU external action. Against this background, the entry into force of the Lisbon Treaty constituted a milestone entitled to have extended the relevance of human rights across all areas of the Union's external policy, including trade and investment relations, placing human rights as ultimate goals of the Union's external action.[152] This shift is mostly shown both in Arts. 3(5) and 21 TEU, where human rights are pictured not just as values, as stated in Art. 3(5) together with Art. 2 TEU, but also as guiding principles in Art.21(1) TEU, and policy objectives of the Union's external action under Art. 21(2)(b) TEU.[153] These three normative functions are reinforced by the principle of coherence under Art. 21(3) TEU, which ensures that all areas of the Union's external action policies and other internal commitments of the Union are consistent with one another.[154] As already widely stated in Chapter 1, Art. 3(5) TEU requires the Union to uphold and promote its values in its relations with the wider world,[155] while Art. 21 TEU provides that its external action shall be guided by those principles that have inspired its own creation, namely human rights, democracy, the rule of law, and the respect for international law.[156] This concept is also described by Art. 21(2)(b) TEU, which states that the Union must pursue its external policies in order to "*consolidate and support human rights*".[157] However, rather than revisiting the general principles already discussed in Chapter 1, this section focuses on the practical implications of Arts. 3(5) and 21 TEU for the promotion of human rights commitments in EU external action.

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[150]Kube, V. (2016), p. 6; see also European Commission, 'Trade, Growth and Development' SEC(2012) 87 final; Council of the European Union, *EU Strategic Framework on Human Rights and Democracy* (2012); *EU Action Plan on Human Rights and Democracy* 2015–2020; Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2014* 34.

[151]Kube, V. (2016), p. 3; see also Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art. 207 TFEU.

[152]Kube, V. (2016), pp. 1-4.

[153]Ibid., pp. 3-4.

[154]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 21(3) TEU.

[155]Ibid., Art 3(5) TEU.

[156]Ibid., Art. 21(1) TEU.

[157]Ibid., Art. 21(2)(b) TEU.

As a matter of fact, the combination of these two provisions places human rights as an overarching normative position within the scope of foreign policy objectives, creating a unique normative groundwork applicable to all dimensions of EU external action.[158] In other words, by requiring human rights protection norms to be integrated across different policy areas, the Lisbon Treaty overcame the understanding of human rights as objectives limited to CFSP or development policies, and strengthened their integration across different areas of external action. The legal significance of this normative groundwork has been deeply examined by Kube, who examined what human rights objectives brought to the external action of the Union in the post-Lisbon framework.[159] This interpretation is also supported by some CJEU case law, such as the Philippines Agreement set out in Case C-377/12, where the Court confirmed that EU external policy shall pursue those objectives written in Art. 21(2) TEU, and not only the sector-specific goals relevant to the agreement.[160] However, for the purpose of this thesis, what stands out in Kube's analysis is the fact that the real innovation brought by the Lisbon Treaty does not lie in the recognition of human rights as values, guiding principles and objectives of EU external action, but rather in the in-depth transformation of the institutional structure within which external policies operate.[161] Indeed, in the context of the pre-Lisbon framework, to incorporate human rights considerations into areas such as trade or investment, a specific legal justification was required, since those considerations were not effectively recognised as actual objectives of EU external policies. Consequently, such considerations were treated as ancillary, with the specific aim to not interfere with other economic objectives of the CCP.[162] On the contrary, the Lisbon Treaty elevated human rights objectives, labelling them as overarching objectives not essentially limited to CFSP and development policies, bur rather extending their relevance across different foreign policy fields. The Court also ruled that the pre-Lisbon case law could not simply be transported to the post-Lisbon framework, which significantly transformed the institutional structure governing EU external action. This finding is also supported by the Courts reasoning in Daiichi Sankyo where it is stated that: "*in view of that significant development of primary law, the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force"*.[163]

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[158]Kube, V. (2016), p. 4; see also Velluti, S. (2016) The Promotion and Integration of Human Rights in EU External Trade Relations. Version 2. Brighton: University of Sussex, p. 46.

[159]Kube, V. (2016), p. 1.

[160]Case C-377/12 *Commission v Council (Philippines Agreement)* EU:C:2014:1903, para. 37; European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* COM (2015) 497 final (14 October 2015) 22.

[161]Kube, V. (2016), pp. 10–11.

[162]Ibid.

[163]Ibid., p. 11; see also Case C-414/11 *Daiichi Sankyo* EU:C:2013:520, para. 48.

To sum up, what changed after the Lisbon Treaty is the fact that human rights started to be considered as a balancing requirement and as an overarching objective that must be taken into account across all fields of external action under Arts. 3(5) and 21 TEU.[164] Consequently, policies falling within the scope of the CCP, including trade and investment agreements, can no longer be decided solely on the grounds of their economic objectives and interests. On the contrary, they must be evaluated in light of their contribution to the promotion and protection of human rights as provided by the Treaties.[165] As a result, in the post-Lisbon framework, human rights are used as an evaluation tool to assess whether the Union's external policies are consistent with its human rights commitments.[166] In this context, the post-Lisbon framework enhanced the development of some legal instruments capable of translating these normative commitments into practice. Among such tools, conditionality mechanisms and restrictive measures, including sanctions, have been used by the Union to respond to human rights violations. Therefore, the following section will focus on the legal basis, structure, and practice of EU restrictive measures.

### 3.2 The Regime of EU Restrictive Measures: Legal Basis and Application

In 2012, the EU adopted the Strategic Framework for Human Rights and Democracy, which set out the objectives, priorities and principles aimed at improving the effectiveness and coherence of EU policies in the context of human rights protection.[167] Over the years, to implement this framework the EU also adopted three Action Plans (2012-2014,[168] 2015-2019[169] and 2020-2024),[170] containing all the measures that the EU and its Member State intend to develop and follow in those specific periods.

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[164]Kube, V. (2016), p. 11; see also Velluti, S. (2016), p. 46.

[165]Kube, V. (2016), pp. 3–4; see also Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207 TFEU.

[166]Kube, V. (2016), p. 13.

[167]Council of the European Union, *Human Rights and Democracy: EU Strategic Framework and EU Action Plan*, 11855/12 (25 June 2012); see also Torres Pérez, M. (2022) 'The European Union Protection of Human Rights through its Global Policy: The Implementation of the Regime of Restrictive Measures against Serious Violations and Abuses of Human Rights' The Age of Human Rights Journal 19: 255–269, p. 255.

[168]Council of the European Union, *Human Rights and Democracy: EU Strategic Framework and EU Action Plan* 11855/12 (25 June 2012), Annex III.

[169]European Commission and High Representative, *Action Plan on Human Rights and Democracy (2015–2019): Keeping Human Rights at the Heart of the EU Agenda* JOIN (2015) 16 final (28 April 2015).

[170]European Commission and High Representative, *EU Action Plan on Human Rights and Democracy 2020–2024* JOIN (2020) 5 final (25 March 2020).

On 18 November 2020, the new EU Action Plan on Human Rights and Democracy 2020-2024[171] was implemented, focusing on the Commission's long-term priorities,[172] reaffirming the EU's commitment to the promotion of fundamental values as provided by the Treaties under Arts. 3(5) and 21 TEU, such as respect for human dignity, human rights, freedom, democracy, equality and the rule of law in its external action. However, an effective and efficient implementation of this new EU Action Plan inevitably requires a common and coordinated EU approach with its Member States, and the implementation of a series of enforcement mechanisms.[173] EU restrictive measures, more often called sanctions, represent one of the most frequently used enforcement mechanism through which the Union safeguards its external action commitments, mainly in the context of human rights protection and foreign policy. These measures enable the response of the EU to human rights violations or situations that threaten the promotion of international peace, democratic values and those objectives set out in Arts. 3(5) and 21 TEU. The legal basis behind the sanctions reflects the structural duality of EU external action: their implementation requires the adoption of measures under the TFEU, whereas their political foundation remains rooted in the intergovernmental framework of the CFSP. In other words, while the political assessment of the restrictive measures is governed by the CFSP, its economic implementation is possible through Art. 215(1) TFEU, which authorises the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, to adopt the necessary measures to cease or reduce economic and financial relations with third countries.[174] At the same time Art. 215(2) TFEU set out the norms to adopt restrictive measures against natural or legal persons, groups and non-State entities.[175] The adoption of the comprehensive EU Global Human Rights Sanction Regime by the Council in December 2020 marked a significant evolution in this framework. This new comprehensive regime, established by Council Decision (CFSP) 2020/1999[176] and Council Regulation (EU) 2020/1998,[177] was not designed to replace the regime of geographical

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[171]Ibid.

[172]The *EU Action Plan on Human Rights and Democracy 2020-2024* listed five areas of priority: 1) protecting and empowering people; 2) building resilient, inclusive and democratic societies; 3) promoting a global system for Human Rights and Democracy; 4) new technologies: harnessing opportunities and addressing challenges; and 5) delivering by working together, European Commission and High Representative (n 160).

[173]Torres Pérez, M. (2022), p. 257.

[174]Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art. 215(1) TFEU.

[175]Consolidated Version of the Treaty on the Functioning of the European Union, 2016 OJ C202/47, Art. 215(2) TFEU.

[176]Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/13.

[177]Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/1.

sanctions already in place, which already targeted some serious violations of human rights, such as those concerning the case of Venezuela,[178] Syria,[179] or the ongoing conflict in Ukraine;[180] but rather to impose restrictive measures on those "*responsible for, involved in or associated with serious Human Rights violations and abuses"* (Torres Pérez; 2022). This different approach intends to cover a wide range of serious human rights violations based on the objectives of the common foreign and security policy set out in Art. 21 TEU and the gravity or impact of the abuses, ranging from genocide and crimes against humanity to torture and violations of the freedoms of expression, assembly, and religion.[181] In this matter, Art. 1(3) of the Council Decision (CFSP) 2020/1999 clearly provides that: "*for the purposes of this Decision, natural or legal persons, entities or bodies may include: a) State agents; b) other agents exercising effective control or authority over a territory; c) Other non-State agents"*.[182] According to Decision (CFSP) 2020/1999, the restrictive measures that would be applicable in cases of serious and continuous violations of the previously listed human rights norms, consists of a travel ban restricting entry into or transit through Member States territories (for natural persons) and asset freezing (for both natural and legal persons), together with a prohibition on making funds available to listed individuals and entities (Torres Pérez; 2022).[183] However, it is important to note that the funds freezing and the prohibition of making them available to listed persons is only included in Regulation (EU) 2020/1998. Whereas, the travel ban is exclusively provided in Council Decision (CFSP) 2020/1999, and is implemented by Member States through their national authorities, reflecting the aforementioned intergovernmental character of the sanctions regime and ultimately limiting the uniformity of the framework.[184] As for the listing procedure, decision are directly adopted by the Council after meeting both the unanimity and confidentiality requirements, considering that restrictive measures are labelled as highly political and as key elements of the Decision (CFSP) 2020/1999 as set out in Art. 1(4): "*the objectives of the common foreign and security policy as set out in Article 21 TEU, and (b) the seriousness or impact of the abuses"*.[185]

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[178]Council Implementing Regulation (EU) 2021/275 of 22 February 2021 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela [2021] OJ L60I/1.

[179]Council Implementing Regulation (EU) 2021/848 of 27 May 2021 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria [2021] OJ L188/18.

[180]Council Regulation (EU) 2022/428 of 15 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L87I/13.

[181]Torres Pérez, M. (2022), pp. 259–260; see also Council Decision (CFSP) 2020/1999 (n 165), Art. 1(1).

[182]Council Decision (CFSP) 2020/1999 (n 165), Art. 1(3).

[183]Torres Pérez, M. (2022), p. 262; see also Council Decision (CFSP) 2020/1999 (n 165), Arts. 2–4.

[184]Torres Pérez, M. (2022), p. 262; see also Council Regulation (EU) 2020/1998 (n 166), Arts. 3–5.

[185]Torres Pérez, M. (2022), p. 263; see also Council Decision (CFSP) 2020/1999 (n 165), Art. 5.

To record, the unanimity requirement was strongly criticised by the European Parliament Resolution of 8 July 2021 on the EU Magnitski Act (2021/2563(RSP)),[186] which asked the Commission and the Council to expand the regime of EU sanctions to target both perpetrators of serious human rights abuses and acts of corruption.[187] Nonetheless, even if there was an significant increase in the development and promotion of human rights norms, EU restrictive measures remain subject to notable criticism both with respect to their effectiveness and to their legal design. While the regime enables the Union to react to serious human rights violations in situations where a coordinated international action from the United Nations Security Council may be unavailable or ineffective, its practical capacity to influence and repress the conduct of individuals and entities responsible for such breaches, remains uncertain.[188] The reason behind this statement is the fact that to improve the effectiveness of sanctions within their domestic legal systems, Member States have adopted different approaches limiting the development of a fully harmonised European enforcement framework, as partially set out in the principle of conferral under Art. 5 TEU.[189] These criticisms reveal fundamental tension within the EU sanctions regime. On the one hand, restrictive measures are designed to give effect to the EU's external commitments to human rights and the rule of law. However, their implementation must be in accordance with the fundamental rights and procedural guidelines listed in the Treaties, with particular reference to the rights of defence and the rights to effective judicial protection, set out in Arts. 47 and 48 of the Charter of Fundamental Rights.[190] In this respect, Art. 275(2) TFEU plays a crucial role since it allows for judicial review of restrictive measures against natural or legal persons adopted within the framework of CFSP, ensuring that external objectives are subject to the rule of law.[191] A key example on this matter is the General Court's judgment in Case T-258/20 Klymenko (applicant) v. Council of the European Union of 3 February 2021, concerning the annulment of his inclusion in the list of persons to be subjected to asset freezes in response to the situation in Ukraine.[192] The applicant claimed an infringement of both the aforementioned rights of defence and effective judicial protection, and in examining this claim, the General Court reaffirmed that, in principle, EU Courts must conduct a full review of the legality of restrictive measures with respect to the fundamental rights protected by the Treaties,

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[186]European Parliament, 'Resolution of 8 July 2021 on the EU Global Human Rights Sanctions Regime (EU Magnitsky Act)' (2021/2563(RSP)); see also Torres Pérez, M. (2022), p. 263.

[187]European Parliament, 'Resolution of 8 July 2021 on the EU Global Human Rights Sanctions Regime (EU Magnitsky Act)' (2021/2563(RSP)).

[188]Torres Pérez, M. (2022), p. 267.

[189]Ibid.

[190]Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Arts. 47-48.

[191]Consolidated Version of the Treaty on the Functioning of the European Union, [2016] OJ C202/47, Art. 275(2) TFEU.

[192]Case T-258/20 *Oleksandr Viktorovych Klymenko v Council* EU:T:2020:287; see also Torres Pérez, M. (2022), p. 264.

settled case law, and by Arts. 47 and 48 of the Charter of Fundamental Rights, which safeguards individuals when subjected to EU sanctions.[193] It is now fair to conclude that, the legitimacy of EU restrictive measures depends not only on their ability to pursue the Union's objectives within the CFSP, or its commitment to promote and foster the protection of human rights in its territory and abroad, but also on the existence of effective mechanisms that are capable of ensuring an effective implementation of the sanctions and their subjection to judicial review by the CJEU. It is precisely this issue that will emerge in the Rosneft judgment, discussed in the following section, which clarified the role of the Court in reviewing restrictive measures adopted within the framework of the CFSP.

### 3.3 Judicial Review of CFSP Measures: The Rosneft Case

The CJEU Grand Chamber's preliminary ruling in the Rosneft case of 28 March 2017[194] is considered to be one of the most significant developments in the sphere of EU external action following the entry into force of the Lisbon Treaty. Historically, bilateral relations between the Union and Russia have been characterised by periods of both cooperation and growing tension, as illustrated by the annexation of Crimea in 2014 and the Russian military activities in Eastern Ukraine, which culminated in the full-scale invasion of Ukraine by Russian government in 2022. The Rosneft case arose directly from this highly tense relationship between the EU and Russia, as the Union strongly condemned Russia's aggressive external actions and adopted, in 2014, strict economic sanctions as restrictive measures aimed at weakening the Russian economy and bring peace to Ukraine.[195] However, what characterises the Rosneft case is the fact that the CJEU was asked, for the first time ever, whether it had jurisdiction to review the validity of CFSP restrictive measures, considering that the legality of targeted sanctions had already been highly examined through annulment actions. In other words, in this case the Court was provided with the means to assess the validity of CFSP restrictive measures through the preliminary ruling procedure under Art. 267 TFEU,[196] clarifying the scope of the jurisdiction of the Court with respect to acts adopted in the EU's CFSP framework, and the application of the EU judicial protection system in relation to

[193]Case T-258/20 *Klymenko* EU:T:2020:287, para. 59; see also Torres Pérez, M. (2022), p. 264.

[194]Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* EU:C:2017:236.

[195]Lonardo, L. (2018) 'Law and Foreign Policy Before the Court: Some Hidden Perils of Rosneft' European Papers 3/2: 547–561, p. 548.

[196]Ibid., p. 548. Previously, the CJEU had judged on restrictive measures during preliminary ruling procedures, but never on CFSP acts; see Case C-158/14, *A and Others v Minister van Buitenlandse Zaken* ECLI:EU:C:2017:202, judgment of 14 March 2017; Case C-340/08, *The Queen, on the application of M and Others v Her Majesty's Treasury* ECLI:EU:C:2010:232, judgment of 29 April 2010.

restrictive measures against natural and legal persons (also called targeted sanctions).[197] Nonetheless, to properly understand the legal significance of the case, it is necessary to examine its historical background. As previously stated, in 2014 the EU imposed some sanctions against some Russian companies (mainly Rosneft, the leading state-owned oil company), consisting of travel bans,[198] asset freezes and targeted measures against individuals directly linked to threats to Ukraine's territorial integrity, and the prohibition for EU natural or legal persons to engage in any kind of economic or contractual relationships with these Russian companies.[199] In response, the state-owned company Rosneft challenged the validity of Council Decision (CFSP) 2014/512[200] and Council Regulation (EU) No 833/2014,[201] concerning the restrictive measures adopted against Russia's actions which destabilised the situation in Ukraine, before the United Kingdom High Court of Justice.[202] The UK Court, to resolve the dispute, asked some questions to the CJEU to review the validity of the provisions contained in the Regulation and the Decision. Firstly, the UK Court asked whether the CJEU had the proper jurisdiction to review on the validity of an act inside the field of the CFSP, as in the case of Decision 2014/512.[203] In this matter, under Art. 24 TEU and Art. 275 TFEU, the Court issued a preliminary ruling on the validity of some provisions stated in the Decision 2014/512 and in the Regulation No 833/2014 with respect to Art. 40 TEU, confirming that restrictive measures adopted by the Council against Russia, including oil state-owned company Rosneft, are valid.[204] Furthermore, the UK Court asked whether the principle of legal certainty could preclude a Member State from imposing criminal penalties in case of infringement of the provision listed in the Regulation 833/2014, for which the CJEU answers in the negative.[205] Among the issues addressed to the Court, the first is of particular significance since it illustrates the divergent relationship between politics and law inside the European legal order.[206]

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[197]Van Elsuwege, P. (2017) 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case' Verfassungsblog, 6 April. Available at: https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/ p. 1.

[198]Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol [2014] OJ L183/70.

[199]Lonardo, L. (2018), p. 550.

[200]Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, such as prohibiting the provision of financial services to Russian entities [2014] OJ L229/13.

[201]Regulation (EU) No 833/2014 of the Council of 31 July 2014 also concerning the restrictive measures regime imposed against Russia and its actions destabilising the situation in Ukraine, such as the prohibition to supply services related to oil exploration and production in Russia, and the obligation for Member States to establish the rules on penalties [2014] OJ L229/1.

[202]Lonardo, L. (2018), p. 550.

[203]Case C-72/15 *Rosneft* EU:C:2017:236, paras. 46–81.

[204]Ibid., paras. 81-151.

[205]Ibid., paras. 159-170.

[206]Lonardo, L. (2018), p. 556.

As a matter of fact, "*law and politics pulsate with different rhythms"* (Leonardo, 2018), yet in the Rosneft case, they ultimately appear before the Court, resulting in a judgment both shaped by political and legal considerations.[207] Therefore these questions, were not merely of practical significance for the parties involved, but also of structural importance for the entire framework of EU external action, since it ultimately clarified the CJEU's jurisdiction in reviewing the legality of restrictive measures adopted in the area of CFSP, also strengthening the protection of human rights within the framework of EU's external action. Indeed, under Art. 24(1) TEU and Art. 275 TFEU, the Treaties limit the CJEU's jurisdiction in reviewing the validity of acts taken in the domain of CFSP, as also described in the Advocate General Wathelet's Opinion as "*carve-out*", as also mentioned in Art. 19 TEU which confers the jurisdiction on the Court to ensure a uniform interpretation and application of the Treaties.[208] At the same time, however, both Art. 24(1) TEU and Art. 275 TFEU include an exception to the exception, in the sense that the Court has jurisdiction to ensure the compliance with Art. 40 TEU, reviewing the legality of Council's decisions regarding restrictive measures against natural or legal persons within the scope of CFSP.[209] In the aforementioned Wathelet's Opinion, the Advocate General pictured this provision as a "*claw-back*", implying that the Lisbon Treaty restored limited judicial powers in matters of CFSP to the CJEU, while simultaneously integrating CFSP into the EU legal order.[210] The central question that stands out in the Rosneft case was whether this claw-back also extends to preliminary rulings on the validity of CFSP act, with a particular focus on the restrictive measures against Russia under Decision 2014/512, later implemented in the EU legal system with Regulation 833/2014. The Court reasoned that, under Art. 19 TEU, EU's judicial protection system is based on two complementary pillars including the direct actions before the Court and those before national courts, since both can refer questions to the CJEU for a preliminary ruling to review the validity of an act and to ensure a uniform interpretation of EU law. Therefore, according to the Rosneft case, the adoption of targeted sanction against natural or legal persons can be judicially reviewed by the Court as long as "*the coherence of the EU system of judicial protection is preserved"* (Peter van Elsuwege, 2017).[211] In spite of that, the Treaties do not specify the relevant procedure to monitor the compliance of CFSP decisions with Art. 40 TEU, therefore, the Court noted that the "*monitoring falls within the scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the*

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[207]Ibid., pp. 547-548; see also Alter, K. (1998) 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' International Organization 52/1: 121–147.

[208]Van Elsuwege, P. (2017), p. 1; see also Opinion of AG Wathelet in Case C-72/15 *Rosneft* EU:C:2016:381, Section V(A)(2)(b), paras 39-50.

[209]Van Elsuwege, P. (2017), p. 1.

[210]Ibid.; see also Opinion of AG Wathelet in Case C-72/15 *Rosneft* EU:C:2016:381, paras. 51–93.

[211]Van Elsuwege, P. (2017), p. 2.

*interpretation and application of the Treaties the law is observed"*, thereby confirming the Court's jurisdiction to review the compliance of Decision 2014/512 under Art. 40 TEU.[212] With respect to the ratione materiae, essentially which CFSP acts are indeed reviewable, the Court distinguished between measures of general application and decisions including restrictive measures against natural or legal persons.[213] Since the provisions of Decision 2014/512 established a general authorisation regime for oil exports and "*do not target identified natural or legal persons"*, the Court held that it lacked jurisdiction to review the provisions of Decision 2014/512 under Art. 275(2) TFEU.[214] However, it confirmed jurisdiction over the provisions stated in the Decision and Annex III, where Rosneft and other entities subject to measures are listed by name, and so "*are defined by reference to specific entities"*.[215] Finally, on the substance of the case, the judgment confirmed that the sanctions were compatible with the Union's aim to ensure the territorial integrity of Ukraine and promoting the fundamental values of the Union's external action under Arts. 21 and 23 TEU, which set out the specific CFSP provisions and expressly provides that the Union's action "*shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions on the Union's external action"*, precluding the interpretation of CFSP provisions outside the logic of the Treaties.[216] This concept is also relevant to the reasons behind the implications of the Rosneft case, with respect to the European commitment to fundamental and human rights protection. As a matter of fact, the Court explicitly refers to Art. 47 of the EU Charter of Fundamental Rights regarding the right to judicial protection, confirming the role of the Rosneft case as a trend-setter in the CJEU case law concerning the application of law and protection of individuals fundamental rights in EU external action.[217] In confirming the validity of legal review in matters of CFSP and the application of the Charter of Fundamental Rights to restrictive measures, the Court ultimately ensured that human rights were not invoked as a justification for restrictive measures towards targeted entities under Arts. 1, 4, 5, 17, 47 and 48 of the Charter.[218] Essentially, the Court concluded that both human rights and CFSP objectives cannot exempt restrictive measures from complying to fundamental rights.

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[212]Case C-72/15 *Rosneft* EU:C:2017:236, paras. 62–63.

[213]Ibid., para. 97.

[214]Ibid., paras. 96-99.

[215]Ibid., paras. 100.

[216]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 23 TEU; see also Van Elsuwege, P. (2017), p. 2; Lonardo, L. (2018), p. 557.

[217]Van Elsuwege, P. (2017), p. 2.

[218]Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Arts. 1, 4, 5, 17, 47 and 48. Respectively on dignity, prohibition of torture, prohibition of slavery and forced labour, right to property, effective remedy and presumption of innocence.

This was also confirmed with the Kadi cases,[219] where the CJEU held that EU institutions are not entitled to implement UN resolutions without ensuring that, in doing so, fundamental rights are respected, proclaiming that the Union is lawfully entitled to review those measures that implement UN Security Council resolutions, to protect and promote human rights, as established in the Treaties and in the Charter.

To conclude, the Rosneft case can undoubtedly be considered as a significant step forward in strengthening the rule of law within the CFSP, however, at the same time, the judgment exposes some hidden consequences. Although the Court recognised that the Council owns a certain margin of discretion in CFSP issues, Leonardo argues that the Rosneft case contains some unseen hazards. If, in a future case, the Court should conclude that the Council's political choices to target a particular State or category of individuals are inappropriate or incompatible with the Treaties, the Court may indeed "*decide whether or not to confirm what the Council does"* (Leonardo, 2017), blurring the traditional boundary between judicial review and political objectives in foreign policy.[220] The significance of the Rosneft case is therefore not limited to judicial review of CFSP restrictive measures alone. The judgment also illustrates how the Union's foreign policy objectives cannot be read separately from the principles governing EU external action. This continuing interaction between politics and law sets the stage for the following section, which examines the structural relationship between the CCP and the CFSP, and how these separate dimensions increasingly influence each other, even if they are traditionally two distinct areas of EU external action.

### 3.4 Structural Interaction between the CCP and the CFSP in EU External Action

The separation between the CCP and the CFSP has been a long standing characteristic of the Union's external relations framework since the early stages of European integration. Traditionally, CCP foundations were already established in the 1957 Treaty of Rome,[221] while foreign policy cooperation started to emerge only during the 70s, as an intergovernmental cooperation among few Member States, in the form of European Political Cooperation (EPC),[222] and in contrast to the exclusive competence conferred to the Union in trade issues. During those years foreign policy considerations failed to produce any kind of legal effects on Member States' policies, as the EPC was considered a form of informal discussion between national governments

[219]Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission EU:C:2008:461; Case C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi EU:C:2013:518.

[220]Lonardo, L. (2018), p. 561.

[221]Cremona, M. (2018) 'Structural Principles and their Role in EU External Relations Law' in Cremona, M. (ed.) Structural Principles in EU External Relations Law. Oxford: Hart Publishing, pp. 3–30, pp. 5–6.

[222]Nuttall, S. (1992) European Political Co-operation. Oxford: Oxford University Press.

outside the Community legal framework, that continued unchanged until the 90s.[223] This strict separation between the two policy areas is also evident in the literature regarding the relationship between the CFSP and the CCP, where CFSP-related works tend to focus on the new boundaries of CJEU's jurisdiction, as illustrated in the Rosnfet case,[224] while CCP-related articles usually highlight the Union's exclusive competences in the field of trade agreements.[225] The crucial shift can be traced back to the entry into force of the Lisbon Treaty, which expressly subjected the CCP within the broader scope of EU external action under Art. 207(1) TFEU, assuming that it must be conducted in compliance with the principles and the objectives set out in Art. 21 TEU. Nonetheless, the CFSP "*has only complemented, but not substituted for the national foreign policies of the EU member states"* (Klein, Reiners and Kunstein, 2010) and requires a continuous collaboration between Member States and EU institutions to function efficiently, even considering that decisions must be generally taken unanimously and with the possibility for Member States to veto any position of the Union in matters of CFSP.[226] Trade policy, by contrast, has always been characterised by a better equipped supranational structure compared to the foreign policy.[227] However, whereas in international relations, developments in commercial policy cooperation started to be perceived as an integral part of foreign policy, the EU began to recognise this shift more clearly only in the past few years. Recent examples, like the US extraterritorial sanctions against European companies to force them to close their business ties with certain countries,[228] or the Chinese full embargo against Lithuania for allowing Taiwan to open a de facto embassy,[229] show how great powers in the international sphere are already using a mixed policy made of both trade and foreign policy measures to coerce other countries.[230]

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[223]Szép, V. (2024) 'The Geopoliticization of EU Trade Policy: Exploring the Growing Links Between the Common Foreign and Security Policy and the Common Commercial Policy' European Foreign Affairs Review 29/4: 1–20, p. 5.

[224]Van Elsuwege, P. (2017), see also Poli, S. (2022) 'The Right to Effective Judicial Protection With Respect to Acts Imposing Restrictive Measures and Its Transformative Force for the Common Foreign and Security Policy' Common Market Law Review 59; Verellen, T. (2021) 'In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)' European Papers 6: 17; Carrozzini, A. and Lonardo, L. (2021) 'Non-contractual Liability for EU Sanctions: Towards the Normalization of CFSP' European Foreign Affairs Review 26.

[225]Szép, V. (2024), pp. 1–2; see also Kaddous, C. (2022) 'The EU Competence to Conclude the New Generation of Free Trade Agreements: Opinion 2/15 (EU-Singapore FTA)' in Wessel, R.A. and Butler, G. (eds) EU External Relations Law: The Cases in Context. Oxford: Hart Publishing, pp. 891–906.

[226]Klein, N., Reiners, W. and Kunstein, T. (2010) Assessing EU Multilateral Action: Trade and Foreign and Security Policy Within a Legal and Living Framework. MERCURY E-paper No. 6, p. 27.

[227]Ibid., p. 27.

[228]Szép, V. (2024), p. 3; see also Ruys, T. and Ryngaert, C. (2020) 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions' British Yearbook of International Law 89: 1–116; Ruys, T. and Rodríguez Silvestre, F. (2024) 'Secondary Sanctions after Russia's Invasion of Ukraine: A Whole New World?' in Ruys, T., Ryngaert, C. and Rodríguez Silvestre, F. (eds) The Cambridge Handbook of Secondary Sanctions and International Law. Cambridge: Cambridge University Press, pp. 463–500.

[229]Szép, V. (2024), p. 3; see also Blockmans, S. (2021) 'Lithuania, China and EU Lawfare to Counter Economic Coercion'. CEPS, 16 December. Available at: https://www.ceps.eu/ceps-publications/lithuania-china-and-eu-lawfare-to-counter-economic-coercion/.

[230]Szép, V. (2024), p. 3.

It is now fair to conclude that, considerations and objectives of foreign and security policy may be pursued through measures and instruments outside the domain of the CFSP framework, mirroring a broader understanding of EU external action, in which trade and investment instruments are no longer used exclusively to achieve economic objectives but also in CFSP goals.[231] Therefore, recent trade instruments such as the Anti-Coercion Instrument (ACI) or the Foreign Direct Investment (FDI) regulation, reflect the increasingly blurred boundaries between CFSP and non-CFSP policies.[232] Traditionally, those boundaries were reviewed by the Court under Art. 40 TEU as a mutual non-affectation clause, and now they are even-more difficult to delineate, expressly when the EU is internally or externally pressured to combine its foreign and trade policies for the sake of the Union's objectives in its external action.[233] This concept is perfectly described by Szép, who argues that: "*the special rules and procedures under Article 24(1) TEU have gradually become an anomaly in CFSP matters because of the increasingly blurred boundaries between CFSP and non-CFSP issues and the fact that the Union's external objectives under Article 21 TEU do not differentiate between CFSP and non-CFSP domains"* (Szép, 2024).[234] A major driver behind these developments has been the concept of a "*geopolitical Commission"* proposed by Ursula von der Leyen with the intent to strengthen the European Union's capacity to respond to the current challenges of the international environment, by integrating geopolitical considerations into EU policies. In doing so, the Union recognises that the "*EU faces a more hostile world"* (Blockmans, 2020)[235] that requires a greater strategic use of the Union's external policy instruments. Contrary to the years in which the European Council deeply influenced the decisions in foreign policy issues, through the creation of the geopolitical Commission, choices in CFSP are now taken considering this combination of economic and foreign policy's objectives.[236] Major examples might be the sanctions imposed on Russia in response to its aggression against Ukraine or the goal of reaching energy independence.[237] Another representative case that illustrates this intensification of interactions between CCP and CFSP objectives is the implementation of specific strategies, notably

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[231]Freudlsperger, C. and Meunier, S. (2024) 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument' Journal of Common Market Studies 62/4: 1063–1079, pp. 1063–1065.

[232]Szép, V. (2024), p. 3.

[233]Ibid., p. 4.

[234]Ibid.

[235]Blockmans, S. (2021) 'Lithuania, China and EU Lawfare to Counter Economic Coercion'. CEPS, 16 December. Available at: https://www.ceps.eu/ceps-publications/lithuania-china-and-eu-lawfare-to-counter-economic-coercion/ ; see also Szép, V. (2024), p. 9.

[236]Szép, V. (2024), p. 9.

[237]Raik, K., Blockmans, S., Osypchuk, A. and Suslov, A. (2024) 'EU Policy towards Ukraine: Entering Geopolitical Competition over European Order' The International Spectator 59/1: 39–58; see also; Szép, V. (2024), p. 9; Szép, V. (2020) 'New Intergovernmentalism Meets EU Sanctions Policy: The European Council Orchestrates the Restrictive Measures Imposed Against Russia' Journal of European Integration 42: 855–871.

the Commission's Strategic Plan (2020-2024), where the need to use trade to achieve non-trade objectives is underlined, and it is recognised that trade policy is operating in a particularly challenging international context, "*affected by several trends such as the rise of geo-strategic rivalries between the US and China, the increasing resort to unilateral measures and economic nationalism, and the crisis of the multilateral trading system and in particular of the World Trade Organisation (WTO)*".[238] Issuing this strategic plan, crystallised the role of the CCP in achieving broader EU external action objectives, such as sustainable development, combating climate change and ensuring security, as well as the EU's position in the world.[239] A further shift towards a more integrated use of trade and CFSP, is represented by the 2021 Trade Policy Review which, by putting together security and economic objectives, reaffirmed the goal of the CCP in responding to the current global geopolitical changes and challenges through an open, sustainable and assertive trade policy.[240] The document stresses that to build a stronger and more resilient Europe joining internal and external action across multiple policy areas is required, while using trade tools in support of EU interests and policy objectives in its external operations.[241] Finally, the Commission's latest Political Guidelines 2024-2029,[242] presented to the European Parliament on 18 July 2024 by Ursula von der Leyen on the occasion of her second mandate as President of the European Commission, apart from listing the various EU 2024-2029 priorities ranging from defence and security to sustainable prosperity and democracy, also includes a section specifically designed to fulfil the so-called economic foreign policy. The section states that in a world deeply shaped by global challenges, where geopolitics and geoeconomics tend to follow the same path, Europe's foreign and economic policy must do the same, by laying the groundwork for an approach that links trade and foreign policy.[243] To further develop this concept, it is now useful to list some of the practical ways in which the Union adopted CCP measures related in coordination with the CFSP. Most notably, the Anti-Coercion Instrument (ACI),[244] adopted by the Council and Parliament in October 2023 on the legal basis of Art. 207(2) TFEU, provides the Union with the possibility, as a last resort, to retaliate

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[238]European Commission, *Strategic Plan 2020–2024: Directorate-General for Trade*, p.3, Available at: https://commission.europa.eu/system/files/2020-10/trade_sp_2020_2024_en.pdf.

[239]Ibid., p. 4.

[240]European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* COM (2021) 66 final (18 February 2021). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0066.

[241]Ibid., p. 4-5.

[242]U von der Leyen, *Europe's Choice: Political Guidelines for the Next European Commission 2024–2029* (18 July 2024) Available at: https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

[243]Ibid., p. 26.

[244]Council of the European Union, 'Trade: Political Agreement on the Anti-Coercion Instrument' (28 March 2023). Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/03/28/trade-political-agreement-on-the-anti-coercion-instrument/

against third countries using economic restrictive measures, such as trade restrictions, financial bans and FDI limitations.[245] More specifically, the ACI was proposed as a deterrent to third countries from engaging in economic coercive activities aimed at forcing the hand of the EU or its Member States governments both directly or indirectly. Its primal objective is therefore, the protection of the Union from external interference upon their sovereignty and political choices.[246] In this sense, the instrument is mainly defensive in nature, however, the ACI combines the Union's exclusive competence in CCP under Art. 3 TFEU with traditional tools of the EU's CFSP, namely the adoption of economic sanctions under Art. 29 TEU. This structural development was described as "*foreign policy becoming trade policy"* (Freudlsperger, C. and Meunier, S; 2024).[247] While, the ACI has proven effective in creating a link between CCP and CFSP instruments, this nexus is also considered to be an unintended consequence of external pressures and EU's uneven structure of its internal competence between CCP and CFSP.[248] A further instance of a CCP instrument, pursuing objectives analogous to those of the CFSP and its sanctions regimes, is the proposed Regulation against forced labour.[249] Art. 3 of the aforementioned Regulation, clearly states that economic operators are obliged not to sell, make available or export on the Union market any good produced through modern slavery, creating a horizontal restrictive approach where certain products can be banned from the EU markets when certain activities are carried out in other regions.[250] Similarly, EU's Regulation 2019/125 of 2019,[251] concerning anti-torture regulation based on Art. 207(2) TFEU, regulates the export and import of goods that might be used for torture or for any other cruel, inhuman or degrading treatment or punishment, and can be included in this framework of CFSP's horizontal restrictive approach that can "c*lose a major gap in human rights-based trade controls"*.[252] Both instruments target specific practices rather than specific states or economic entities and are justified by referring to Art. 21 TEU's human rights objectives.

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[245]Freudlsperger, C. and Meunier, S. (2024), p. 1064.

[246]Ibid., p. 1065.

[247]Ibid.

[248]Ibid., p. 1075.

[249]Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM (2022) 453 final, 2022/0269(COD).

[250]Szép, V. (2024), p. 15, see also Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour (2022), Art. 3.

[251]Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L30/1.

[252]European Commission, Report on the Review of Regulation (EU) 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, COM(2020) 343 final, p. 1; Available at: https://fpi.ec.europa.eu/document/download/03485b22-b3f9-49f6-8df9-8e142a64e4df_en?filename=com2020_343_f1_report_from_commission_en_v2_p1_1089601.pdf ; see also Szép, V. (2024), p. 15.

To conclude, the structural significance of this convergence between objectives in CCP and CFSP, illustrates that the EU's institutional framework promotes and develops the pursuit of human rights objectives using both CFSP measures and CCP instruments, provided that the principles of mutual protection and institutional balance enshrined in Art. 40 TEU, as mutual non-affectation obligations, are both respected. This evolution also raises a broader question, as to whether the traditional distinction between trade and external action remains meaningful in the current framework of EU international relations, considering how both policy domains are equally governed by the common objectives set out in Art. 21 TEU and by the EU's commitment to the promotion and protection of human rights of the Charter of Fundamental Rights of the European Union.[253] Against this background, in the final section it will be examined the Union's external economic policy with a special focus on the integration of human rights considerations into trade and foreign policy.

### 3.5 Human Rights Considerations in the EU's External Economic Policy

Human rights considerations entered into EU external economic relations through a series of instruments prior to the Lisbon Treaty, but have evolved and developed significantly after it. Traditionally, human rights were promoted mainly within specific areas of EU external policy, namely the CCP and development cooperation. At the same time, the Court progressively recognised fundamental rights as general principles and founding values of EU law through settled CJEU case law.[254] It was later debated whether human rights, as general principles of EU Law, could constitute a sufficient legal basis in matters of the Union's external action, however in Opinion 2/94 on the accession to the ECHR, the Court rejected that argument, on the basis that considering human rights as general principles of EU Law, did not itself confer to the Community the competences required to accede to the ECHR.[255] In the aftermath of the decision, it was also confirmed that EU is nevertheless required to promote human rights with respect to the specific fields in which it has competence.[256] One of those fields is indeed the CCP; where economic sanctions have long been used against another State or individuals constituting a threat to international security, but not necessarily linked to human rights protection.[257]

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[253]Szép, V. (2024), pp. 17-19.

[254]Szép, V. (2024), pp. 17–19. See also Case 4/73 *Nold v Commission* EU:C:1974:51, para. 13; Case C-260/89 *ERT* EU:C:1991:254, para. 41; Opinion 2/94 *Accession by the Community to the ECHR* EU:C:1996:140, para. 33.

[255]Szép, V. (2024), p. 5; see also *Opinion 2/94 Accession by the Community to the ECHR* EU:C:1996:140.

[256]Szép, V. (2024), p. 5; see also Joseph Weiler and Philip Alston, 'An "Ever Closer Union" in Need of a Human Rights Policy' in Philip Alston (ed), The EU and human rights (Oxford University Press 1999) 3, p. 24.

[257]Szép, V. (2024), p. 5.

With the entry into force of the Lisbon Treaty, human rights considerations progressively archived an overarching role across all areas of EU's external action, translating human rights objectives into the feasible conduct of the EU's external economic policy, and influencing both the negotiation of international agreements and the adoption of trade and investment instruments.[258] Therefore, up-to-date trade-related measures have to include human rights considerations as preliminary impact assessments as well as retrospective evaluations concerning labour standards, health and safety at work, environmental protection, and the adoption of general human rights guidelines.[259] This collaboration between trade policy and human rights considerations was also stressed by the 2010 Communication of the Commission to the European Parliament on Trade, Growth and World Affairs, which stated that the aim of the EU is to encourage the promotion and respect for human rights, labour standards, the environment and good governance through trade.[260] However, critiques argue that, notwithstanding the post-Lisbon developments, human rights integration into the Union's framework of external action remains incomplete.[261] Whereas both Arts. 3(5) and 21 TEU establish that human rights must be considered as overarching objectives of EU external action, their practical implementation continues to appear clearer within the framework of CFSP, rather than within the field of external trade and investment.[262] Consequently, even if both the EU and its Member States are bound to respect human rights as set out in the Treaties, the Union has often been more inclined to promote these values externally through the use of trade instruments, conditionality clauses and restrictive measures to respond to violations of human rights standards in third countries, rather than to create a consistent integration of human rights in the broader framework of EU external policies.[263] Clear examples of this stronger and central role of the EU in its external action are the wide range of instruments such as human rights clauses in BITs, human rights guidelines or the Generalised System of Preferences (GSP),[264] that the EU uses to engage in the promotion of human rights externally.

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[258]Gammage, C. (2015) 'Social Norms and Labour Standards in EU FTAs: A Legal Perspective', GIFTA Workshop, London, 30 June–1 July; see also Velluti, S. (2016), p. 42.

[259]Velluti, S. (2016), p. 6; see also European Commission, 'Trade, Growth and Development' SEC(2012) 87 final; Council of the European Union, *EU Strategic Framework on Human Rights and Democracy* (2012); *EU Action Plan on Human Rights and Democracy 2015–2020*; Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2014* 34.

[260]European Commission, *Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy* COM(2010) 612 final (9 November 2010).

[261]De Búrca, G. (2011) 'The Road Not Taken: The EU as a Global Human Rights Actor' American Journal of International Law 105. Available at: https://ssrn.com/abstract=1705690; see also Velluti, S. (2016), p. 49.

[262]Velluti, S. (2016), pp. 49–50; see also Cannizzaro, E. (2014) 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' European Journal of International Law 25: 1093–1099.

[263]Velluti, S. (2016), pp. 49–50

[264]Egan, A. and Pech, L. (2015) 'Respect for Human Rights as a General Objective of the EU's External Action'. KU Leuven Working Paper No. 2015/161; see also Velluti, S. (2016), pp. 41–42.

First set up in 1971 and subject to periodical revisions, the GSP is an autonomous preferential trade scheme that the EU employs to provide preferential access to the market with reduced tariffs on their goods to developing countries. Not surprisingly, the main objective of the GSP is to enhance the growth of developing countries economies, but also their political and social conditions.[265] In 2005, the EU strengthened the structure of the GSP, creating the GSP+ incentive regime, by offering additional tariff preferences as benefits to particularly vulnerable countries, to support them in their ratification and implementation of international conventions. To be eligible for GSP+, countries must ratify and implement international standards with particular respect to human rights, core labour standards (CLS), sustainable development and good governance.[266] Consequently, this incentive mechanism rewards those countries that, on the contrary, would not be able to implement those international conventions including human rights protection, while providing the EU the ability to "*temporarily withdraw GSP preferences in case of serious and continued violations of these conventions"* (Velluti, 2016).[267] The EU exercised its power to withdraw preferences very rarely, however to provide some examples, in 1997 the GSP status was withdrawn from Myanmar for forced labour practices,[268] while in 2007 the Council suspended Belarus's access due to serious and persistent violations of the rights of freedom of association.[269] However, the practical implementation of the EU's GSP+ scheme has been subject to considerable criticism, since many countries that are remarkably known for breaching human rights norms and labour rights, still benefit from the scheme. Some argues that the reasons behind this fragmented implementation lies in the pursuit of CFSP objectives, rather than ensuring the protection of human rights in countries, such as Uzbekistan and Turkmenistan, which are widely criticised for violating labour rights, but continue to have the GSP status.[270] Hence, as the post-Lisbon framework transformed human rights in a must-have requirement across EU external policies, with Art. 21 TEU as the normative framework of both principles and objectives, EU's institutions are now supposed to follow this parameter also in the formulation, implementation and conclusion of international trade and investment agreements, with Arts. 207 and 218 TFEU as legal bases.[271]

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[265]Velluti, S. (2016), p. 50.

[266]Ibid.

[267]Ibid.

[268]Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to the generalized tariff preferences from Myanmar/Burma [1997] OJ L85/8; see also Velluti, S. (2016), p. 51.

[269]Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus [2006] OJ L405/35; see also Velluti, S. (2016), p. 51.

[270]Velluti, S. (2016), p. 51; see also Orbie, J. and De Ville, F. (2010) 'Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations' in Fenwick, C. and Novitz, T. (eds) Human Rights at Work: Perspectives on Law and Regulation. Oxford: Hart Publishing, p. 487.

[271]Kube, V. (2016), pp. 13–14.

Indeed, since the 1990s, clauses of human rights, democracy and the rule of law have increasingly been included as essential elements for the conclusion of international trade agreements with third countries, on which "*the reciprocal obligations of the parties are premised, so that human rights violations of a certain scale by one of them can amount to a material breach of the agreement and justify suspension or other counter-measures"* (Velluti, 2016).[272] According to the Commission, appropriate restrictive measures are generally perceived as responses that must be reserved only under the claim of serious and systematic violation of human rights norms. This concept is as also illustrated in Art. 8(3) of the 2012 EU–Colombia and Peru Trade Agreement, stating that "*any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement"*.[273] One of the clearest legal operationalisation of this inclusion of human rights as overacting objectives of EU external policies is represented by the conduction of human rights impact assessments (HRIA) prior to the conclusion of trade agreements. Firstly emphasised as a requirement by the EU Ombudsman in her 2016 recommendation on the EU-Vietnam Free Trade Agreement, referring to Art. 21 TEU and specifically stating that "*although [she] agrees with the Commission that there appears to be no express and specific legally binding requirement to carry out an human rights impact assessment (HRIA) concerning the FTA with Vietnam, she is of the view that it would be in the spirit of the legal provisions mentioned above to carry out an HRIA"*.[274] This obligation was subsequently given judicial expression by the General Court in the 2015 Frente Polisario v Council case, where the failure to conduct such assessment was found capable of invalidating the Council's decision.[275] Eventually, the General Court annulled the Council's decision concluding the trade agreement with Morocco on the ground that the Council had failed to properly assess whether the adoption of the agreement would adversely affect the fundamental rights of the inhabitants of Western Sahara,[276] also emphasising that whereas an EU trade agreement might indirectly encourage violations of fundamental rights, then the EU is required to carry out an adequate assessment and adopt preventive measures to protect human rights.[277]

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[272]Velluti, S. (2016), p. 53; see also Fierro, E. (2003) The EU's Approach to Human Rights Conditionality in Practice. Leiden: Martinus Nijhoff Publishers; Bartels, L. (2005) Human Rights Conditionality in the EU's International Agreements. Oxford: Oxford University Press; Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Art. 60.

[273]Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3, Title IX; see also Velluti, S. (2016), p. 54.

[274]European Ombudsman, Draft Recommendation in Complaint 1409/2014/JN against the European Commission, para. 24.

[275]Case T-512/12 *Frente Polisario v Council* EU:T:2015:953; see also Kube, V. (2016), p. 25.

[276]Case T-512/12 *Frente Polisario v Council [2015]*, see also Vidigal, G. (2015) 'Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in Frente Polisario v Council and the Protection of Fundamental Rights Abroad'. EJIL: Talk!. Available at: http://www.ejiltalk.org/13901-2/.

[277]Case T-512/12 *Frente Polisario v Council* EU:T:2015:953, para. 231.

Finally, following the reasoning of the General Court in 2015, it can be also established that the Council has a legally enforceable procedural duty to conduct an impact assessment before the conclusion of a trade agreement, making human rights justiciable and reviewable obligations.[278] To conclude, the integration of human rights norms into the Union's external economic policy has progressively evolved from normative concerns within specific areas of EU external policy into overarching Treaty objectives and crucial requirements in the conduct of EU external action. This shift can be seen both in the Treaties under Arts. 3(5), 21 TEU and Art. 207 TFEU, and in the increasing incorporation of human rights conditions into the Union's international trade agreements. The post-Lisbon Association Agreements concluded with Ukraine, Georgia and Moldova[279] and signed in 2014 on the basis of Art. 217 TFEU, illustrate this evolution particularly well. Together with their Deep and Comprehensive Free Trade Areas (DCFTAs), these agreements show how advanced political and economic integration can be offered by the EU to its partner, also incorporating human rights clauses as an integral component of the Union's external economic policy.[280] At the same time, the Union's credibility as a global promoter of human rights ultimately depends on the consistency between its external objectives and its internal legal framework, as represented by Charter of Fundamental Rights. As confirmed by the Court in the Rosneft case,[281] by giving the possibility to national courts to ask for preliminary rulings with respect to the validity of CFSP restrictive measures, the gap between the EU's proclaimed role as human rights promoter and the procedural shortcomings of its restrictive measures regime may be perceived as narrowing. Human rights considerations have therefore become an increasingly defining feature of the Union's external economic policy, shaping both the negotiation of international agreements and the use of trade instruments such as restrictive measures. Therefore, the post-Lisbon framework established the normative and legal basis required for the EU to conclude trade and investment agreements with third countries, always considering that they must be negotiated and concluded consistently with the Union's human rights commitments. These developments provide the necessary background for assessing the EU-China CAI, whose negotiation and subsequent suspension illustrate many of the legal and political tensions analysed throughout this chapter.

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[278]Ibid., para. 225.

[279]Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Moldova, of the other part [2014] OJ L260/4; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4.

[280]Velluti, S. (2016), p. 54.

[281]Case C-72/15 *Rosneft* EU:C:2017:236.

# Chapter 4: The EU-China Comprehensive Agreement on Investment (CAI)
# 中欧全面投资协定 (CAI)

# Chapter 4: The EU-China Comprehensive Agreement on Investment (CAI)

The previous chapters of this study reconstructed the institutional architecture that governs the European Union's external action, focusing on the structural relationship between the CCP, the CFSP, and the Union's commitment to human rights under Arts. 3(5) and 21 TEU. Having established the theoretical framework in the previous chapters, this section now turns to its application in practice through an explicative case involving the negotiation, signature, and subsequent freezing of the ratification process of the EU-China Comprehensive Agreement on Investment (CAI). The CAI precisely illustrates the intergovernmental framework of the Union's external action, as this agreement was negotiated and concluded to primarily pursue CCP objectives, yet its ultimate fate was shaped by considerations extending beyond trade policy, and regarding both CFSP dynamics and the human rights commitment set out in the Treaties. This following session, therefore, does not merely analyse the background of the CAI's diplomatic history. Firstly, it reconstructs the legal and political background within which the negotiations were conducted. It then analyses the legal nature, structure, and objectives of the agreement under Art. 207 TFEU, before turning to the reciprocal sanctions between EU and China in March 2021 and the ratification stalemate that followed.

## 4.1 Background of the EU-China Trade and Investment Relations

In this first section of this chapter, the analysis will shift its focus towards the broader evolution of both the international investment regime and the development of EU-China economic relations, which deeply characterised the subsequent negotiations of the EU-China Comprehensive Agreement on Investment (CAI), (中欧全面投资协定 *Zhōng-Ōu quánmiàn tóuzī xiédìng*). Since a comprehensive multilateral framework ruling upon international investment was developed only after the Second World War, states strongly relied on BITs as preferential trade instruments, resulting in their proliferation between the 1980s and 1990s, through which states regulated the protection and liberalisation of foreign investment.[282] As a matter of fact, the BITs framework not only enhanced the liberalisation of foreign investment, but also established the Investor-State Dispute Settlement (ISDS) mechanism to resolve disputes between foreign investors and States parties of the agreement.[283] Unsurprisingly, before the CAI, investment relations between China and the Union were governed by a fragmented network of BITs concluded by each Member States.

[282]Comerma, L. (2025) 'European Foreign Investment Policy towards China: Is There an EU Net Contribution?' Asia Pacific Law Review 33/1: 102–124, pp. 102–103.

[283]Ibid., p. 103; see also Meunier, S. (2017) 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' Journal of Common Market Studies 55/3: 593–610; Bubb, R.J. and Rose-Ackerman, S. (2007) 'BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment' International Review of Law and Economics 27: 290–311.

The reason behind this lies in the belief that BITs momentarily solved the legitimacy issues created by the lack of a broader multilateral agreement on investment that could govern the global investment regime in the international framework. In this context, between 1982 and 2009 twenty-five BITs were signed between EU's Member States and China, with the exception of Ireland, the earliest being the 1982 China-Sweden BIT and the most recent being the China-Malta BIT of 2009.[284] As a result, the pre-CAI framework can be described as a disconnected patchwork of bilateral arrangements, widely regarded by legal scholars as incapable of reflecting the recent developments in trade and investment relations between EU and China, nor the major shifts in international relations due to current geopolitical challenges.[285] Comerma (2024) observes that the pre-Lisbon BITs concluded with China typically include provisions on investment protection, but not in an homogeneous manner and without good governance provisions, revealing a system that is "*not in line with EU's foreign policy priorities, which, since the TFEU, must incorporate EU values"*(Comerma, 2025).[286] However, as already discussed in Chapter 2, this framework was significantly altered by the Lisbon Treaty by including FDI within the scope of CCP under Art. 207 TFEU. This transfer of competence, later clarified in the CJEU Opinion 2/15 of 2017, provided the Union with the means needed to act as a central investment actor in the international framework.[287] In the context of the EU-China bilateral relationship, this was particularly relevant since it allowed the Union to negotiate the CAI as an investment agreement at EU level, rather than leaving investment relations to the fragmented network of BITs concluded by individual Member States. Against this background, the negotiation of the EU-China CAI can be understood as an opportunity for the Union to move beyond the pre-existing framework of BITs concluded between its Member States and China, while replacing this fragmented network with a single EU-China investment agreement capable of addressing investment relations at EU level.[288] The need for a comprehensive agreement between both sides, was also linked to the lack of reciprocity in market

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[284] Comerma, L. (2025), p. 107; see also Zhang, A. (2024) 'A New Dish of "CAI" for State-to-State Dispute Settlement in the EU-China Comprehensive Agreement on Investment' in Svetlicinii, A. and Chen, I.-J. (eds) The EU-China Comprehensive Agreement on Investment. Cham: Springer, p. 234, fn. 4 for the list of BITs:
The China-Austria BIT (1985); The China-Belgium Luxembourg Economic Union BIT (2005); The China-Bulgaria BIT (1989); The China-Croatia BIT(1993); The China-Cyprus BIT (2001); The China-Czech Republic BIT (1991); The China-Demark BIT (1985); The China-Estonia BIT (1993); The China-Finland BIT (2004); The China-France BIT (2007); The China- Germany BIT (2003); The China-Greece BIT (1992); The China-Hungary BIT (1991); The China-Italy BIT (1985); The China-Latvia BIT (2004); The China-Lithuania BIT (1993); The China-Malta BIT (2009); The China-the Netherlands BIT (2001); The China-Poland BIT (1988); The China- Portugal BIT (2005); The China-Romania BIT (1994); The China-Slovakia BIT (1991); The China-Slovenia BIT (1993); The China-Spain BIT (2005); The China-Sweden BIT (1982). This is based on UNCTAD, "Investment Policy Hub Database' http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu

[285]Grieger, G. (2021) EU-China Comprehensive Agreement on Investment: Levelling the Playing Field with China. EPRS Briefing, PE 679.103, March 2021, p. 3.

[286]Comerma, L. (2025), p. 107.

[287]Grieger, G. (2021), p. 3; see also Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376.

[288]Comerma, L. (2025), pp. 102-103.

access and the absence of a level playing field for European investors (Grieger, 2021), characterising the EU-China investment relations in the years preceding the CAI negotiations. With respect to this issue, the Union's approach to FDI has been traditionally characterised by the openness of its markets as a driver of growth, development and innovation, whereas the Chinese FDI framework has been described by the Organisation for Economic Cooperation and Development (OECD) as one of the most restrictive ones, gifting China with a certain leeway to restrict the access to its market in matters of FDI.[289] To provide an example, the 1985 EU-China Agreement on Trade and Economic Cooperation, concluded before China's accession to the World Trade Organisation (WTO) in 2001, lacked any market access provision for investment, meaning that it was impossible to use it as an instrument aiming at correcting this asymmetry between this openness of the European market and the more restricted Chinese one.[290] Nonetheless, whereas China had introduced some selective liberalisation measures, including the removal of ownership limits in the financial sector[291], the adoption of the new Foreign Investment Law in 2019,[292] the reduction of the prohibited and restricted sectors in foreign investment set out in the Market Access Negative List for private investors of December 2020,[293] European investors continued to face an uneven regulatory environment in China, shaped by distinctions between foreign companies, domestic private firms and state-owned enterprises.[294] In this context Grieger (2021) argues that: "*the lack of a level playing field for EU companies in China as compared to Chinese firms in the EU, where the latter benefit from the non-discrimination principle enshrined in EU law, has become a major bone of contention in EU-China relations"*.[295] Against this background, the CAI was considered as a crucial tool needed to improve market access and rebalance EU-China investment relations. Additionally, to fully explain the background of the negotiations of the CAI, a further analysis of the broader trade relationship between the EU and China is needed.

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[289]Grieger, G. (2021), p. 1.

[290]Ibid., p. 3.

[291]In 2019, the China Securities Regulatory Commission (SCRC) announced the extension of the removal of foreign ownership limits in foreign-invested securities companies, fund management firms and futures companies until 2020. See China Securities Regulatory Commission, 'Q&A on Removal of Foreign Ownership Limits in Foreign-Invested Securities Companies, Fund Management Firms, and Futures Companies in 2020' (23 July 2019) Available at: http://www.csrc.gov.cn/csrc_en/c102035/c1371503/content.shtml.

[292]National Development and Reform Commission, 'Foreign Investment Law of the People's Republic of China' (24 February 2021) Available at: https://en.ndrc.gov.cn/policies/202105/t20210527_1281403.html.

[293]On 16 December 2020, the National Development and Reform Commission and the Ministry of Commerce of China announced the Market Access Negative List (2020), which contrary to the 2019 version, comprehends 123 items in different sectors, such as oil and gas, resource management, and trading and financial services. See UNCTAD, 'Releasing 2020 Negative List for Market Access' (Investment Policy Monitor, 16 December 2020) Available at: https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3634/china-releasing-2020-negative-list-for-market-access.

[294]Grieger, G. (2021), p. 1.

[295]Ibid., p. 1.

Since China's accession to the World Trade Organisation in 2001, there was a massive increase in bilateral trade, making the Union China's largest trading partner, while China the EU's second-largest economic partner after the United States.[296] However, studies on EU-China trade and investment relations show that, even if China, as a WTO member, highly benefited from the reduced tariffs to its importers and reduced the uncertainty of trade by applying the WTO's protecting rules from unfair competition, resulting in an increase of FDI in the Chinese market, the Union continued to face a significant barriers connected to the restrictive system that characterises China's state-driven model for market access.[297] More precisely, since the joining of the WTO in 2001, China manifested a mixed compliance with the organisations norm: first of all, it is true that China lowered its tariffs, but they still remained too high considering the average for other WTO members.[298] Another example of the lack of adherence by the Chinese government is illustrated by the granting of subsidies considered to be inconsistent with WTO rules, which resulted in a widespread criticism by the US, Japan and even the EU. Finally, China currently has not lived up to the promises made in the moment of accession to the WTO, and so is still not widely recognised as a market economy in the geopolitical sphere.[299] It is in the EU's best interest to enhance cooperation and positive relationships with China advancing bilateral trade and addressing those aforementioned structural barriers in the Chinese market, however the Union shall always keep in mind that China's economic system is driven by a state-governed economic system that complicates and develops tensions in trade and investment relationships.[300] This concept is also relevant with respect to the context in which the CAI negotiations took place, considering that such agreement was not negotiated in a neutral economic environment, but rather in a concurring setting with persistent concerns over reciprocity, market access and competitive neutrality. This broader background can be illustrated by some major developments in China's economic policy, which deeply characterised both the relations with the Union and the subsequent negotiation of the CAI. First of all, the Belt and Road Initiative (BRI) (一带一路 *yī dài yī lù*), more often called as the One Belt One Road, launched by China's President Xi Jinping during state visits to Kazakhstan and Indonesia in 2013.[301] The initiative anticipated potential benefits with respect to the EU-China trade

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[296]García-Herrero, A. et al. (2020) EU-China Trade and Investment Relations in Challenging Times. Brussels: European Parliament, Directorate-General for External Policies, Policy Department, PE 603.492, pp. 6–9.

[297]Ibid., p. 7.

[298]Płóciennik, S. et al. (2021) EU-China Comprehensive Agreement on Investment: Political and Economic Implications for the European Union. Wnukowski, D. and Wąsiński, M. (eds). Warsaw: Polish Institute of International Affairs, p. 12.

[299]Ibid., p. 13.

[300]Ibid., p. 11.

[301]García-Herrero, A. et al. (2020), p. 40; see also the Belt and Road Official Portal https://eng.yidaiyilu.gov.cn/.

and investment relations, promising reduced transport costs and better-developed physical connectivity between China and the Union, thanks to large-scale infrastructure projects like the Silk Road Economic Belt and the Maritime Silk Road.[302] Therefore, the initiative was presented as means of enhancing international prosperity, while reaffirming the Chinese position to "*promote multi-level cooperation with the BRI countries, covering political, technical, economic and social aspects"* (García-Herrero et al, 2020). However, EU-China cooperation in central and Eastern Europe also raised some concerns within the Union itself, since the growing influence of China within these territories could eventually affect the EU's ability to act and act in a unified way in matters linked to EU-China trade relations.[303] Secondly, another element is represented by the so-called Made in China 2025 strategy (中国制造 2025 *Zhōngguó zhìzào èrlíng'èrwǔ*), formulated in 2015, as a milestone for the development of China's manufacturing sector and which significantly contributed to the evolution of the EU-China economic relations.[304] The strategy reflected China's ambition to improve its economy, moving away from the traditional labour-intensive production and low value-added activities, both unsuitable for a sustainable economic growth, towards an economy that is capable of enhancing high-technology and high value-added production.[305] Its focus on competitive sectors such as next-generation information technology, aerospace and aviation equipment, advanced rail equipment or energy-saving vehicles, showed China's intention to equally compete with the US and EU in those sectors that were traditionally associated with the technological and industrial advantages possessed by industrialised economies. Therefore, Made in China 2025 can be also understood as a strategy capable of intensifying the EU-China economic competition in strategic sectors.[306] Taken together, the BRI and the Made in China 2025 strategy, help explain the broader competitive environment in which both the European and Chinese firms operate. Against this background, negotiations for what would become the CAI were authorised by the Council on 18 October 2013 under a mandate enabling the Commission to negotiate an investment agreement with China on behalf of the Union.[307]

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[302]National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce, (2015) *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road.*

[303]García-Herrero, A. et al. (2020), p. 41.

[304]State Council of the People's Republic of China, 'Notice of the State Council on the Publication of "Made in China 2025" / 国务院关于印发《中国制造2025》的通知' (8 May 2015, published 19 May 2015); available at: http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm; see also State Council of the People's Republic of China, Made in China 2025 / 《中国制造2025》 (7 July 2015), available at: https://www.cscc.it/upload/doc/Made-in-China-2025.pdf.

[305]García-Herrero, A. et al. (2020), p. 65.

[306]Ibid.

[307]Council of the European Union, '3266th Council Meeting: Foreign Affairs – Trade Items' (Press Release, Presse 419 PR CO 52, 18 October 2013); see also Comerma, L. (2025), p. 108.

The opening of the discussions relating to the CAI was announced on the occasion of the 16th EU-China Summit, which adopted the EU-China 2020 Strategic Agenda for Cooperation[308] aimed at consolidating and further developing their strategic partnership, based on the principles of respect, equality and trust.[309] However, it is also important to highlight that, during the negotiations of the CAI, China was undergoing significant changes in its domestic and foreign policy framework. As a matter of fact, after Xi Jinping consolidated his leadership in 2012 as Secretary-General of the Chinese Communist Party (CCP) and President of the National People's Congress in 2013, China went through a progressive centralisation of political authority and a stronger role of the Party inside state institutions and businesses.[310] At the same time, several internal security instruments were adopted, namely the National Security Law[311] and the Counterterrorism Law of 2015,[312] the Cybersecurity Law[313] and the National Intelligence Law of 2017,[314] creating a broader regulatory environment for both foreign and domestic entities operating in China.[315] Moreover, due to their complexity, the negotiations of the CAI continued for seven years with more than thirty talks between representatives of both Parties, finally reaching an Agreement in Principle only on 30 December 2020. At that stage, the CAI still had to undergo through the formal EU procedures required for the conclusion of an agreement under Art. 218 TFEU, namely legal scrubbing, translation into the EU languages, approval by the Council and consent by the European Parliament, to be subsequently signed and eventually ratified. Its main objectives were to enhance "*investment links between the EU and China"* (Comerma, 2025) and to establish a more coherent legal framework for EU-China relations, characterised by more transparent and non-discriminatory investment conditions, reciprocity and open access to trade.[316]

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[308]European Union and People's Republic of China, *EU-China 2020 Strategic Agenda for Cooperation* (23 November 2013), Available at: https://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf

[309]European Union and People's Republic of China, *EU-China 2020 Strategic Agenda for Cooperation* (23 November 2013); see also Grieger, G. (2021), pp. 8–9.

[310]Płóciennik, S. et al. (2021), p. 8.

[311]National Security Law of the People's Republic of China / 中华人民共和国国家安全法 (adopted and effective 1 July 2015 by the Standing Committee of the National People's Congress). Available at: https://www.chinalawtranslate.com/en/2015nsl/

[312]Xinhua (2015) 'China Adopts First Counter-Terrorism Law', 27 December. Available at: https://www.xinhuanet.com/mil/2015-12/28/c_128574674.htm

[313]Creemers, R., Webster, G. and Triolo, P. (2018) 'Translation: Cybersecurity Law of the People's Republic of China (Effective June 1, 2017)'. DigiChina, 29 June. Available at: https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/

[314]National Intelligence Law of the People's Republic of China / 中华人民共和国国家情报法 (adopted 27 June 2017, effective 28 June 2017; amended 27 April 2018 by the Ministry of State Security). Available at: https://www.chinalawtranslate.com/en/national-intelligence-law-of-the-p-r-c-2017/

[315]Płóciennik, S. et al. (2021), pp. 8-9.

[316]Comerma, L. (2025), pp. 108–109; see also Berger, A. (2019) 'The China-EU Investment Agreement Negotiations: Rationale, Motivation, and Contentious Issues' in Li, Y., Qi, T. and Bian, C. (eds) China, the EU and International Investment Law. London: Routledge.

To sum up, understanding this background is essential to proper analyse the CAI both as a legal and institutional instrument. The agreement in question, originated from the fragmented pre-existing BITs framework between China and EU's Member States and the post-Lisbon transfer of competences at EU level over FDI, tried to respond to the long-standing problems of reciprocity, market access and China's restrictive economic system with respect to the EU-China investment and trade relations. Having reconstructed the historical and institutional background that influenced the development of the CAI negotiations, the following section will focus on its legal nature and main features, illustrating its revolutionary character, despite the fact that it was neither ratified nor entered into force.

### 4.2 EU-China CAI: Legal Nature and Key Features

The EU-China CAI represents a distinctive legal instrument within the broader framework of EU external economic agreements, since it was conceived as a "*stand-alone investment agreement that does not include trade issues"* (Grieger, 2026) but rather focuses on investment liberalisation, market access, regulatory disciplines and sustainable development.[317] Although it was described as a crucial milestone in the evolution of the EU-China investment and trade relations, the CAI cannot be recognised either as a conventional free trade agreement (FTA) or as a traditional BIT between China and the Union. The reason behind this distinction is explained by the fact that the CAI does not address tariffs or trade as its main objectives, as typically occurs with FTAs, and does not include an investment protection chapter or the traditional Investor-State dispute settlement (ISDS) mechanism, both considered as features commonly found in BITs.[318] This distinctive legal setup can be considered a result of the post-Lisbon framework of EU investment policy, which as already explained, included FDI within the scope of the CCP under Art. 207(1) TFEU, thereby transferring them within the exclusive competences of the Union under Art. 3(1)(e) TFEU.[319] As a result, the EU obtained the go-ahead to negotiate and conclude investment agreements with third countries in a sector largely governed by BITs individually concluded by each Member State. The scope of the Union's exclusive competence in investments, however, was not entirely self-explicatory, considering that investment agreements do not only cover FDI, but also portfolio investment, investment protection and ISDS. In Opinion 2/15 in the context of the EU-Singapore Free Trade Agreement, the CJEU better clarified this issue, stating that FDI falls within the exclusive

[317]Grieger, G. (2026) 'EU-China Comprehensive Agreement on Investment (EU-China CAI)'. European Parliament Legislative Train 01.2026: A Global Europe: Leveraging Our Power and Partnerships – Bilateral Investment Agreements, p. 1.

[318]Zhang, A. (2024) 'A New Dish of "CAI" for State-to-State Dispute Settlement in the EU-China Comprehensive Agreement on Investment' in Svetlicinii, A. and Chen, I.-J. (eds) The EU-China Comprehensive Agreement on Investment. Cham: Springer, p. 234.

[319]Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Arts. 207(1), 3(1)(e) TFEU.

competence of the Union, while non-direct investment and ISDS require the participation of the Member States during the decision-making process.[320] This distinction was crucial for the CAI, since the agreement was focused on market access, non-discrimination, level playing field obligations and transparency, whereas leaving investment protection and ISDS outside its immediate scope, made the CAI an agreement mostly based on the exclusive competence of the Union in the field of the CCP, rather than a mixed agreement requiring ratification by all Member States.[321] Therefore, at the beginning of the negotiations, the CAI was described as a comprehensive agreement, in the sense that it aimed at regulating several dimensions of EU-China investment relations, including market access,[322] prohibition of forced technology transfers,[323] non-discrimination by state-owned enterprises and regulatory bodies[324] and transparency in economic governance.[325] However, the agreement only contained a section concerning the State to State dispute settlement (SSDS) involving a step-by-step mechanism to solve disputes between the parties, but refrained from speaking about investment protection, or ISDS, making what was originally supposed to be a comprehensive agreement only a partial one (Grieger, 2026).[326] The parties were supposed to reopen the negotiations with respect to this issue, but eventually the Commission voted for the freezing of the agreement on 4 May 2021. Moving forward with the scope of the agreement, the CAI is composed of a preamble and six sections, namely: objectives and general definitions; investment liberalisation; regulatory framework; investment and sustainable development; dispute settlement, and finally institutional and final provisions.[327] Moreover, as for the territorial coverage, the agreement would apply in the territories of both Parties. With regard to the Union, its territorial scope concerns the territories in which both the TEU and the TFEU apply, whereas China's territorial coverage is defined as its entire customs territory, therefore excluding Hong Kong and Macao as Special Administrative Regions, as well as Taiwan, Penghu, Kinmen and Matsu, considered separate customs territories within the WTO framework.[328]

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[320]Opinion 2/15, *Free Trade Agreement with Singapore*, EU:C:2017:376, para. 227.

[321]Cotula, L. (2021) 'EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section' Business and Human Rights Journal 6: 360–367, p. 361; see also Zhang, A. (2024), p. 234.

[322]European Commission, EU-China Comprehensive Agreement on Investment (CAI), 22 January 2021, Section II, art. 2 and Schedules of Commitments. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

[323]European Commission (2021), CAI, Section II, Arts. 3(1)(f), 3(2)(f) and 3(3).

[324]Ibid., Section II, Art. 3bis-3ter.

[325]Ibid., Section III, Sub-Section 2.

[326]Zhang, A. (2024), p. 234; see also Grieger, G. (2026), p. 2.

[327]European Commission (2021), CAI; see also Płóciennik, S. et al. (2021), p. 17.

[328]Płóciennik, S. et al. (2021), p.18.

At the same time, the CAI does not include any specific provision excluding special economic zones, open coastal cities or other investment areas located within the customs territory of China, proving on the one hand a great advantage for EU investors, but on the other hand, the absence of an investment protection chapter and an ISDS mechanism limited the scope of the legal protection available for EU investors in China.[329] With this illustration of both the material and territorial scope concerning the application of the agreement, it is now possible to switch to the objectives pursued by the Union through the CAI. These objectives are also useful to better explain why the CAI was described as a stand-alone investment agreement and how it tried to solve the shortcomings brought by the pre-existing EU-China BITs framework. Undoubtedly, one of EU's main objective during the negotiations of the CAI was indeed to replace the fragmented network of BITs concluded between China and almost all EU Member States, with a single EU-China investment agreement to provide for a more coherent legal basis for future bilateral investment relations. However, since the CAI did not provide for any regulation on trade in goods or tariffs, but only focused on investment-related issues, the agreement was crafted as a stand-alone investment agreement rather than a broader trade agreement.[330] More in depth, the EU's main objectives were to improve market access conditions for both EU and Chinese investors, address key regulatory challenges, such as transparency, licensing and authorisation procedures and establishing guarantees concerning the treatment of investors of both Parties, including protection against unfair and inequitable treatment or unlawful discrimination. Following the Commission's 2015 Trade for All Strategy,[331] the CAI also aimed at ensuring a more level playing field based on the principle of non-discrimination, while encouraging responsible investment based on sustainable development, environmental protection, labour standards and commitment to a common dispute settlement mechanism between the contracting Parties.[332] More precisely, the first major feature of the CAI concerned market access and investment liberalisation, as a matter of fact, the agreement provided for some strict obligations relating to market access, national treatment and most-favoured-nation treatment.[333]

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[329]Ibid., p. 18.

[330]Grieger, G. (2026), p. 1.

[331]European Parliament Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment (2015/2105(INI)); see also European Commission, Directorate-General for Trade and Economic Security (2014) Trade for All – Towards a More Responsible Trade and Investment Policy. Luxembourg: Publications Office of the European Union. Available at: https://data.europa.eu/doi/10.2781/1753.

[332]Grieger, G. (2026), p. 6.

[333]European Commission (2022) EU-China Comprehensive Agreement on Investment – The Agreement in Principle: Factsheet CIRCABC, p. 2. Available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/6b4e0ec7-5ff0-4872-a4cf-54717b881d90/details.

With respect to market access commitments, both sides agreed not to impose quantitative restrictions upon each other, such as limiting the number of licenses, enterprises and transactions or imposing investment bans and monopoly rights.[334] Whereas, national treatment's obligations require that each Party must treat investors and enterprises of the other Party, just as advantageously as its own investors and enterprises in comparable situations. The most-favoured-nation treatment, on the other hand, implies that each Party shall grant a treatment to the investors of the other Party that has to be equally beneficial to that granted to investors of any third country.[335] At the same time, these obligations are complemented by the prohibition of certain requirements such as performance requirements, including local content requirements and technology transfer requirements, which the Parties must not to impose on each other's investors.[336] In general terms, from the Union point of view, its market was already open and largely committed to free and equal market access under the provisions of the General Agreement on Trade in Service (GATS) of the WTO, which entered into force in 1995. On the other hand, China has shown willingness to rebalance the asymmetry in market access conditions, making some crucial GATS commitments in financial services, environmental services, air transport and international maritime transport services and the opening of special market areas like the one of private healthcare.[337] In the context of EU-China investment relations, particular attention must be paid to the role of Chinese state-owned enterprises, over which the state exercises ownership and significant influence, either directly or indirectly. As a matter of fact, what characterises their role in the Chinese economic system is the fact that they do not merely consist of public enterprises operating in sectors linked to public services. Chinese SOEs are deeply linked to the state-driven structure of the Chinese economy and often function as tools of industrial policy, economic planning and strategic development.[338] Therefore, the Union's concern was not associated with the existence of SOEs as such, but rather with the possibility that they could benefit from preferential treatment, financial support, and privileged access to markets or regulatory advantages, resulting in the distortion of competition between the two Parties and the undermining of level playing field between European companies operating in China and Chinese companies operating in the EU.[339] European concerns on the role of SOEs in China, are therefore closely linked to the second key feature of the CAI which concerns the level playing field for enterprises.

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[334]Ibid., pp. 2-3.

[335]García-Herrero, A. et al. (2020), p.40; see also Grieger, G. (2021), pp. 5-9; European Commission (2022), pp. 2-3.

[336]European Commission (2022), pp. 2-3.

[337]Ibid.

[338]García-Herrero, A. et al. (2020), p. 55.

[339]Ibid., pp. 55-56.

This aim was considered as one of the main European objectives during the negotiation phase, due to the long-standing concerns of European investors regarding the lack of reciprocity, the restrictive nature of China's investment framework, discriminatory treatment, insufficient transparency and the role of SOEs.[340] The CAI tried to address these issues through specific provisions involving SOEs, forced technology transfer and subsidies' transparency. In particular, SOEs are required to act in compliance with the market's interests and not to discriminate in their purchases and sales of goods or services. The agreement also included specific transparency rules which oblige the Parties to provide informations, if requested, on a specific entity or group, to be used for a compliance assessment with respect to the agreed obligations on the behavioural rules of SOEs.[341] Moving on with the agreement, another key feature is represented by the CAI's sustainable development section. In fact, in its Preamble, the CAI refers to the protection of human rights, sustainable development, climate change, responsible business conduct, and high levels of environmental and labour rights protection, linking investments to the objective of sustainable development and responsible practices, such as those that inspired the Guiding Principles on Business and Human Rights.[342] Moreover, the agreement reaffirms that the Parties have the "*right to regulate"*[343] and adopt laws that provide for a high level of environmental and labour protection,[344] recognising how "*inappropriate"* it is to promote investment by reducing environmental or labour rights protection.[345] The CAI also obliges its Parties to comply with the environmental and labour commitments relating to the International Labour Organisation (ILO) conventions and climate agreements, under the ILO Declaration on Fundamental Principles and Rights at Work,[346] while making continued and sustained efforts to ratify ILO Conventions No. 29 and 105 on forced labour.[347] Finally, with the Working Group on Sustainable Development, the CAI aimed at monitoring of the application of the agreement's sustainable development commitments. With regard to disputes concerning sustainable development, they are not dealt with the ordinary SSDS arbitration mechanism, but through an independent panel of experts in the absence of an

[340]Grieger, G. (2026), pp. 1-3.

[341]European Commission (2022) EU-China Comprehensive Agreement on Investment – The Agreement in Principle: Factsheet CIRCABC, p. 3.

[342]European Commission (2021), CAI, Section IV, Arts. 1–2, see also Lorenzo Cotula, 'EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section' (2021) in Business and Human Rights Journal, 6 (2021), pp. 360–367, p. 363.

[343]Ibid., Section IV, Sub-Section 2, Art. 1, and Sub-Section 3, Art.1.

[344]Ibid., Section IV, Sub-Section 2, Art. 2(1), and Sub-Section 3, Art. 2(1).

[345]Ibid., Section IV, Sub-Section 2, Art. 2(2), and Sub-Section 3, Art. 2(2).

[346]Ibid., Section IV, Sub-Section 2, Art. 4 and 6, and Sub-Section 3, Art. 4.

[347]Ibid., Section IV, Sub-Section 3, Art. 4(2).

amicable solution.[348] Nonetheless, the legal effects of this procedure are considered weaker than those of the traditional SSDS arbitration, since arbitration may bring a binding decision and countermeasures in case of non-compliance, whereas the panels of sustainable development experts can only issue not legally binding reports and recommendations, which are not joined by a sanction mechanism.[349] Finally, the last feature involves the dispute settlement system. As already widely stated, unlike any other traditional BIT providing for ISDS, the CAI does not have one. Instead, Section V of the CAI provides for a State-to-State dispute settlement (SSDS) mechanism helpful to solve disputes on the interpretation and application of the agreement, aiming at establishing an "*efficient mechanism for the Parties to reach a mutual agreement on dispute resolution"* (Zhang, 2024). Under this SSDS mechanism, both Parties may resort to three types of DSM, starting from compulsory consultations, then moving on to the possibility of mediation and, finally leading to arbitration in the absence of a mutually agreed solution.[350] In case both Parties reach a mutual agreement, they shall comply with the decision and take all the necessary measures, needed to implement the solution within the agreed period of time.[351] In this context, as a guiding principle behind all types of implementing measures and resolutions, transparency shall always be granted and hearing shall be open to the public.[352] In conclusion, the CAI's DSM confirms the agreement's revolutionary character and distinctive institutional design. The SSDS mechanism is designed primarily to enhance the dialogue between EU and China, and to facilitate mutually agreed solutions in case of disputes. Moreover, its promotion of consultations, mediation, arbitration and institutional oversight also with the establishment of the Investment Committee, illustrates how the negotiated text preferred a controlled and diplomatic model of dispute resolution system.[353] Nevertheless, the lack of an ISDS mechanism remains one of the main shortcomings of the agreement. Although, further negotiations on the inclusion of investment protection and ISDS were put on the calendar, the role of such a mechanism was left undefined. Some studies suggest that ISDS would likely have operated as a supplementary mechanism, resolving disputes alongside SSDS.[354] Therefore, the Agreement in Principle of the CAI relied on intergovernmental enforcement and mutual cooperation, while leaving investors without a proper DSM and investment protection clauses outside the agreement.

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[348]Cotula, L. (2021), p. 365.

[349]Ibid.

[350]Zhang, A. (2024), p. 236.

[351]European Commission (2021), CAI, Section V, Art. 5.4.

[352]Ibid., arts. 19.1, 19.2; Annex I Rules of Procedure for State-to-State Dispute Settlement, art. X, see also Zhang, A. (2024), p. 236.

[353]Zhang, A. (2024), p. 248.

[354]Ibid.

To sum up, the CAI can be described as a post-Lisbon EU investment agreement, with the objective of moving beyond the fragmented BITs framework between China and EU Member States. Core aims of the agreement were to improve market access and investment liberalisation, address regulatory barriers, strengthen transparency and promote a level playing field in investment conditions between both Parties. However, the agreement's main limitation is expressed by the absence of a chapter on investment protection and the exclusion of an Investor-State dispute settlement (ISDS) mechanism, confirming the partial nature of the agreement compared to the traditional BITs. A separate issue concerns the institutional trajectory of the CAI, since the Agreement in Principle reached in December 2020 never reached its ratification stage and consequently its entry into force. The last section of this chapter will therefore analyse the stalemate of the ratification process of the agreement.

### 4.3 The Stalemate of the CAI Ratification Process

The stalemate of the CAI ratification process was not caused by the legal content of the agreement itself, but rather by the broader political context that emerged after the exchange of sanctions between the EU and China in March 2021. Contrary to what one might think, the reason behind the suspension of the agreement was not directly linked to trade or investment issues, but to the gradual deterioration of the political conditions needed for its ratification, linked to human rights violations in the context of the Xinjiang and Hong Kong's State repressions.[355] As a matter of fact, even if the suspension of CAI endangered its main goals of improving the volume of investments and promoting a level playing field between the Parties, statistics showed that in 2022 China consistently remained EU's largest partner for imports and its third-largest trading partner in exports, signifying that trade persistently grew even after the suspension of the agreement.[356] To better explain the reason behind the aforementioned stalemate, a focus on the historical background of the European sanctions and the resulting Chinese counter-sanctions is needed. On 22 March 2021, the Council adopted sanctions against four Chinese officials and one entity, the Xinjiang Production and Construction Corps Public Security Bureau, to respond to the human rights violations connected to the mass detention and persecution of the Uyghur ethnic minority in the Xinjiang Uyghur Autonomous Region, including forced labour.[357]

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[355]Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L99I/1, see also Cotula, L. (2021), p.263.

[356]Grünberg, N. and Brussee, V. (2021) 'China's 14th Five-Year Plan: Strengthening the Domestic Base to Become a Superpower'. MERICS. Available at: https://merics.org/en/short-analysis/chinas-14th-five-year-plan-strengthening-domestic-base-become-superpower; see also Mendes, C.A. (2023) 'Perspectives on the Suspension of the EU-China Comprehensive Agreement on Investment' Janus.net: E-Journal of International Relations 14/1, Thematic Dossier 'European Union-China Relations', p. 73.

[357]Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L99I/1.

The measures included asset freezes, travel bans to the Union's territory and a prohibition to make EU funds available to those listed. These restrictive measures were adopted under the EU Global Human Rights Sanctions Regime, established earlier in December 2020 with the Council Decision (CFSP) 2020/1999 and the corresponding Council Regulation (EU) 2020/1998, respectively based on Art. 29 TEU, setting the legal basis for the Council's decisions in CFSP matters, and on Art. 215 TFEU which allows the Council, upon a joint proposal from the High Representative and the Commission, to adopt by qualified majority restrictive measures in the context of CFSP.[358] Additional and equivalent sanctions were adopted by the UK, the US and Canada and they were the first restrictive measures adopted by the Union against China since the arms embargo, adopted by the Council in response to the 1989 Tiananmen Square repressions against university students.[359] Beijing's response was immediate, resulting in the announcement in March of targeted sanctions against ten individuals and four entities[360] connected to the European Union, prohibiting them from entering the territory of China, Hong Kong, and Macau, also restricting listed individuals and companies from doing businesses with China.[361] Notably, sanctioned individuals included members of the European Parliament and academic researchers specialised in Chinese studies, while sanctioned entities consisted of the Council's Political and Security Committee and the European Parliament's Subcommittee on Human Rights.[362] From this point forward, on 20 May 2021 the European Parliament adopted a motion on the freezing of the CAI with 599 votes in favour, 30 against and 58 abstentions, in which it condemned the measures imposed by Beijing upon MEPs and other entities as baseless and arbitrary.[363] The motion consequently led to the stalemate of the CAI ratification process, eventually nullifying all the efforts made during the seven-years long negotiations between the two Parties (van der Made, 2021).[364]

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[358]Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/13; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/1, see also Parry, M. (2021) Chinese Counter-Sanctions on EU Targets. European Parliamentary Research Service, At a Glance, PE 690.617, May 2021.

[359]Parry, M. (2021) Chinese Counter-Sanctions on EU Targets. European Parliamentary Research Service, At a Glance, PE 690.617, May 2021.

[360]Targeted subjects by the Chinese counter-sanctions were: Parliament's Subcommittee on Human Rights; MEPs Reinhard Bütikofer (Greens/EFA, Germany), Michael Gahler (EPP, Germany), Raphaël Glucksmann (S&D, France), Ilhan Kyuchyuk (Renew, Bulgaria) and Miriam Lexmann (EPP, Slovakia); the Council's Political and Security Committee, and a number of EU Member State Members of Parliament, think-tanks and academics specialised in Chinese studies. See also See Parry, M. (2021).

[361]Parry, M. (2021); see also Ministry of Foreign Affairs of the People's Republic of China (2021) 'Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel', 22 March.

[362]Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel', 22 March 2021.

[363]European Parliament Resolution of 20 May 2021 on Chinese counter-sanctions on EU entities and MEPs and MPs (2021/2644(RSP)).

[364]van der Made, J. (2021) 'European Parliament Votes to Freeze EU-China Investment Deal'. RFI, 20 May. Available at: https://www.rfi.fr/en/business/20210520-european-parliament-votes-to-freeze-eu-china-investment-deal-cai-human-rights-sanctions-xinjiang-hong-kong.

Although, from the Commission's perspective, the CAI was still considered as an economically significant agreement capable of enhancing market access, reciprocity and level playing field for European investors in China, the Parliament increasingly presented the issue not only as a matter of trade and investment, but as one concerning human rights considerations and democratic legitimacy. For the Parliament, Beijing's sanctions were considered as a direct attack on the fundamental freedoms and on the institutional work of the Parliament itself, rather than a diplomatic reaction to the restrictive measures imposed by the Union with respect to the human rights violations in Xinjiang, urging China to lift the restrictive measures.[365] With its firm position, the Parliament marked a crucial political turning point for the CAI: by considering any further discussion on the agreement or its ratification as "*justifiably frozen"* as long as the Chinese sanctions remained in place, the Parliament effectively brought the ratification process to a stalemate with little prospect of renegotiation.[366] This was particularly significant because the CAI, despite being negotiated as an investment agreement under the CCP, still required the Parliament's consent as a prerequisite and primary condition for its conclusion. This suggests that the Parliament used its consent power under Art. 218 TFEU not merely as a procedural requirement, but rather as an influential tool for political leverage, linking the agreement based on the CCP to broader human rights and CFSP's concerns. From the Chinese standpoint, statements included in the People's Daily and the Global Times (two tabloids closely linked to the Chinese Communist Party's propaganda department), labelled the motion adopted by the Members of the Parliament (MEPs) to freeze the CAI as "*preposterous"*, stating that the EU used "*groundless claims concerning human rights as an excuse to block progress on a deal that bodes well for European businesses and consumers"* (Global Times, May 2021).[367] At the same time, the Chinese foreign ministry spokesperson Zhao Lijian, who believed that the responsibility behind the difficulties in the EU-China relations did non lie with China, but rather with the Union's unjustified sanctions, reaffirmed that from Beijing point of view the EU-China investment agreement is a "*balanced and win-win deal"*.[368] Clearly, there were also statements from the European side, and on March 23, Bütikofer, Chair of Parliament's Delegation for Relations with the People's Republic of China (PRC), co-signed a statement with the other targeted MEPs stressing their "*serious concerns"* for the critical situation in Xinjiang, denouncing

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[365]European Parliament, 'MEPs Refuse Any Agreement with China Whilst Sanctions Are in Place', Press Release, 20 May 2021.

[366]European Parliament Resolution of 20 May 2021 on Chinese counter-sanctions on EU entities and MEPs and MPs (2021/2644(RSP)), paras. 1–6; see also Mendes, Carmen Amado (2023). Perspectives on The Suspension of the Eu-China Comprehensive Agreement on Investment. *Janus.net, e-journal of international relations.* VOL14 N1, TD1 – Thematic dossier "*European Union-China relations*", September 2023, p. 68

[367]Global Times (2021) 'European Parliament Votes through Motion to Freeze China Investment Deal, Risking Bloc's Economy amid Political Self-Entertainment', May. Available at: https://www.globaltimes.cn/page/202105/1224083.shtml, see also Mendes, C.A. (2023) 'Perspectives on the Suspension of the EU-China Comprehensive Agreement on Investment' Janus.net: E-Journal of International Relations 14/1, Thematic Dossier 'European Union-China Relations', p. 68.

[368]Mendes, C.A. (2023), p. 68.

any violations of human rights and breach of international law, and the Union's commitment to "*keep the respect of human rights at the core of all its external policies"* (European Parliament, Press Release, 23 March 2021).[369] From their point of view, China's measures against the Subcommittee on Human Rights undermined its crucial work, which consists of evaluating the level of promotion, respect and protection of human rights around the world in relation to the founding values and objectives of the Union, namely the principle of universality of human rights.[370]

To sum up, this chapter reconstructed the background of the EU-China CAI, starting from the history of EU-China trade and investment relations, then moving to the legal nature of the agreement and finally to the subsequent stalemate of its ratification process. The analysis has shown that, although the CAI was negotiated under Art. 207 TFEU as an instrument of the CCP, aimed at investment liberalisation, level playing field commitments, sustainable development and SSDS mechanism, its final trajectory was ultimately shaped by issues that went beyond the practical scope of the agreement itself. The stalemate of the CAI ratification process, resulting from the exchange of sanctions between the EU and China in March 2021 and connected to the human rights violations in Xinjiang and Chinese counter-sanctions against European entities and MEPs, demonstrated that even though an agreement is formally based on the CCP, it cannot be concluded separately from CFSP considerations and the Union's commitment to promote human rights. Against this background, the last chapter of this study will examine how the CCP, the CFSP and the Union's human rights commitments interact within the broader framework of the Union's external action, using the CAI as an evidencing example of this interaction.

[369]European Parliament, 'MEPs Continue to Firmly Condemn Human Rights Abuses in China', Press Release, 23 March 2021. Statement co-signed by David McAllister, Maria Arena, Raphaël Glucksmann and Reinhard Bütikofer. Available at: https://www.europarl.europa.eu/news/en/press-room/20210323IPR00601/meps-continue-to-firmly-condemn-human-rights-abuses-in-china.

[370]Ibid.

# Chapter 5: The Interaction between the CCP, the CFSP and Human Rights in the Framework of EU External Action: Insights from the EU-China CAI

# Chapter 5: The Interaction between the CCP, the CFSP and Human Rights in the Framework of EU External Action: Insights from the EU-China CAI

In its final chapter, this thesis intends to answer the research question examining the interaction between the CCP, the CFSP and the Union's commitment to human rights within the EU legal framework, while drawing some insights from the developments surrounding the EU-China CAI. The argument advanced in this chapter focuses on the idea that the legal framework of EU external action structures the interaction between the CCP, the CFSP and human rights commitments by formally separating these policy fields in the Treaties with different legal bases, different voting rules and different institutional actors, while placing them under shared objectives within the broader framework of EU external action. Indeed, both policy areas are placed under the broader objectives listed in Arts. 3(5) and 21 TEU, including the protection of human rights and the requirement of consistency. However, the distinction established in the Treaties does not prevent these policy fields from influencing one another in practice, revealing the limits of this formal separation. The developments surrounding the EU-China CAI are used in this chapter to provide some insights on this matter. As a matter of fact, the CAI is not treated as a representative model for every external agreement concluded by the Union, but as a particularly useful example that illustrates how CCP interests, CFSP dynamics and human rights considerations may come together within a single institutional process and eventually influence the fate of the agreement.

## 5.1 The CAI within the scope of the CCP

With respect to the interaction between different policy areas within the scope of the Union's external action, this study first focuses on the dimension of the CCP following the entry into force of the Lisbon Treaty, which expressly incorporated FDI within the scope of the CCP under Art. 207 TFEU, thereby extending the Union's exclusive competence in the field of external economic relations. This reallocation of competences does not merely determine which institutional actors are entitled to negotiate and conclude international agreements, but also determines both the design and the procedural pathway required for the conclusion of an agreement. Therefore, any assessment of the role of the CAI within the framework of EU external action is deeply connected to its legal classification as an instrument of the CCP, widely regarded as a stand-alone investment agreement. The agreement was indeed negotiated on a single legal basis: Art. 207 TFEU, which includes foreign direct investment within the CCP.[371]

[371]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207(1) TFEU; see also Grieger, G. (2021), p. 4.

This shift is particularly relevant with respect to EU-China relations, considering that the CAI was specifically designed to overcome the fragmented framework of BITs individually concluded by each Member State with China, with a single EU level investment arrangement[372]. As already widely discussed in Chapter 4, this specific choice of legal basis was not accidental, but rather a conscious institutional choice that became particularly meaningful once it is understood against the Court's Opinion 2/15 which clarified the boundaries of the Union's exclusive competence over FDI.[373] As a matter of fact, the Court distinguished between direct investment, liberalisation of the market, non discrimination and level playing field commitments, which specifically fall within the scope of the Union's exclusive competence under Art. 207(1) TFEU, and portfolio investment together with ISDS, which were treated as matters governed by the framework of shared competences between the Union and its Member States.[374] Following the Court's reasoning, it is fair to argue that future agreements including the latter categories must be treated as a mixed agreement, requiring ratification by all Member States together with the Union institutions to be concluded.[375] On the contrary, by strictly confining the CAI's objectives to market access, level playing field considerations, transparency, and providing rules concerning SOEs' behaviour, while also disregarding an investment protection chapter and replacing the traditional ISDS with a SSDS, the CAI was structured in a way that fell within the scope of EU's exclusive competence under Art. 207 TFEU.[376] As a consequence of the failure to include an investment protection chapter during the negotiations, what was initially announced as a comprehensive agreement changed towards a more partial one, and came to be regarded only as an economic instrument for bilateral relations between the EU and China (Zhang, 2024).[377] More specifically, Comerma argues that the absence of an investment court in the Agreement in Principle of the CAI, based on the model of the Investment Court System (ICS) recognised as compatible with EU law in CJEU Opinion 1/17, can be considered as a missed opportunity (Comerma, 2025). Since the Court had already confirmed, with respect to CETA, that a bilateral investment court composed of appointed judges, rather than ad hoc arbitrators, was indeed compatible with the autonomy of EU law, its absence in the CAI represents one of its main limitations, considering that the CJEU did not prevent the Commission

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[372]Comerma, L. (2025), pp. 108–109; see also Cotula, L. (2021) p. 361; see also Zhang, A. (2024), p. 234.

[373]Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376, paras. 80–110, 227 and 292–293; see also Cremona, M. (2018), p. 235.

[374]Opinion 2/15, paras. 227, 242, and 285-293.

[375]Cremona, M. (2018), p.256.

[376]Zhang, A. (2024), p. 234.

[377]Ibid., pp. 234, 248.

from proposing that same mechanism for the CAI.[378] However, to put it in another way, the failure to include investment protection provisions and an ISDS mechanism was not merely accidental, but rather produced some clear institutional consequences: by leaving those elements outside the agreement, the CAI became an instrument strictly confined to the CCP ruled at EU level. With respect to the research question, this first characteristic of the CAI shows how EU external action is deeply characterised by institutional constraints, political preferences and economic interests. More importantly, the CAI can be taken as an example to show the distinction between the exclusive competence of the Union and its shared competence with each Member State. Considering that it was designed to be a stand-alone agreement within the limits of the Union's post-Lisbon shift in competences over FDI, and not merely an investment agreement with China, the CAI not only illustrates which competences each institution must have to negotiate an agreement, but also what kind of agreement can be realistically concluded at EU level within the framework of EU external action. At the same time, choosing the CCP as policy area and Art. 207 TFEU as legal basis for the agreement, constitutes another legitimate point of analysis both for the arguments developed in this thesis and for the institutional procedure applied in the negotiations of international trade agreements. As a matter of fact, by keeping the CAI within the Union's exclusive competence under Art. 207(1) TFEU, the Commission also kept the agreement's conclusion procedure within the CCP's institutional channels. Under Art. 218 TFEU, concerning the conclusion of international agreements, the Commission is responsible for conducting the negotiation on the basis of a Council mandate, leaving the authorisation to start the negotiations to the Council acting by qualified majority, and to the European Parliament using its consent power under Art. 218(6)(a)(v) TFEU[379]. However, compared with other types of agreements concluded within the scope of the CFSP, the CAI does not require unanimity or a formal role for the High Representative or the Political and Security Committee.[380] With this in mind, the CAI also provides some insights on how the allocation of competences governing the conclusion of international agreements, may shape both the design of the external economic agreement and the institutional pathway through which it is negotiated and concluded. Essentially, its confinement within the scope of the CCP preserved the agreement within the Union's exclusive competence, following the procedures under Arts. 207 and 218 TFEU.

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[378]Comerma, L. (2025), pp. 108–110.

[379]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 218 TFEU.

[380]Ibid, Art. 218(6)(a)(v) TFEU.

Overall, what can be drawn from this first section is the fact that the legal architecture of an agreement, together with the choice of the proper legal basis, can deeply influence and shape both the substantive scope and the institutional procedure through which the agreement is negotiated and concluded. With respect to the CAI, confining it to the Union's exclusive competence over the CCP facilitated the procedural pathway of the agreement by providing a comparatively efficient decision-making process; however, its legal classification did not sufficiently protect the agreement from developments arising in other areas of EU external action, such as CFSP dynamics and human rights considerations. The following section will examine this tension, which became particularly relevant once the mutual sanctions adopted by the EU and China ultimately led to the stalemate of the CAI ratification process.

### 5.2 CFSP Dynamics and the Freezing of the CAI Ratification Process

If the CAI's legal basis formally placed the negotiations of the agreement within the scope of the CCP, foreign policy dynamics deeply affected its ratification process, eventually leading to its diplomatic stalemate. In March 2019, the Commission and the High Representative's joint EU-China Strategic Outlook declaration labelled China as a *negotiating partner*, an *economic competitor* and a *systemic rival* that promotes an alternative model of governance within its territory.[381] With respect to the CAI, this multifaceted description was particularly significant since it revealed a more complex political relationship between the two Parties during the negotiations of the agreement. Considering that, from the EU side, the CAI continued to be negotiated through the institutional channels of the CCP on the legal basis of Art. 207 TFEU, an important point to stress is the fact that these provisions do not require investment negotiations and trade considerations to be formally aligned with the High Representative's strategic assessment of a third country. Moreover, the mutual non-affectation clause laid down in Art. 40 TEU, essentially protects the institutional boundaries between CFSP and non-CFSP competences, rather than ensuring substantive coherence between them.[382] These considerations resulted in a growing gap between the economic objectives characterising the CAI and the Union's approach towards human rights that influenced the Union's external action and foreign policy with China. As long as these two dimensions remained politically manageable, the institutional separation between the CCP and the CFSP did not prevent negotiations from proceeding. However with the emergence of serious human rights violations within China's territory, the political acceptability of the agreement was eventually affected.

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[381]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, EU-China – A Strategic Outlook, JOIN (2019) 5 final, 12 March 2019; see also Płóciennik, S. et al. (2021), pp. 8-10; Parry, M. (2021).

[382]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 40 TEU.

This was the case only after the conclusion of the Agreement in Principle, and main events included the European sanctions and Chinese counter-sanctions of March 2021. On 22 March 2021, the Council adopted restrictive measures against four Chinese officials and one entity in response to serious violations of human rights and abuses in the Xinjiang region, including the persecution of the Uyghur minority and allegations of forced labour.[383] These measures were adopted under the EU Global Human Rights Sanctions Regime, established by Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998.[384] This regime represented a significant CFSP instrument under Art. 29 TEU and was implemented through Art. 215 TFEU, therefore, their legal bases were distinct and procedurally independent from Art. 207 TFEU through which the CAI was negotiated. The legal structure of these restrictive measures can be taken as an example of the dual nature of EU sanctions, answering one of the main points of the research question on the interaction between the CCP and the CFSP.[385] As already explained, whereas the political basis of these restrictive measures lies in the CFSP, with particular reference to Art. 29 TEU, their economic implementation is carried out through Art. 215 TFEU. This eventually confirms how restrictive measures can be taken as a practical example of the interaction between the CFSP and other areas of EU law, as their adoption is rooted in the CFSP, but their implementation requires TFEU instruments that eventually produce economic consequences[386]. Moving forward, China's response was immediate, adopting counter-sanctions against ten European individuals and four entities, including several Members of the European Parliament, the Council's Political and Security Committee, the European Parliament's Subcommittee on Human Rights and academics and research institutions.[387] Since these counter-sanctions directly targeted the European Parliament, they directly challenged the continuation of the negotiations of the CAI, considering that the Parliament is the very institution whose consent is required for the conclusion of the agreement under Art. 218(6)(a)(v) TFEU. This is one of the main insights that can be drawn from the CAI. The Chinese counter-sanctions did not merely create a diplomatic dispute between the EU and China; on the contrary, they directly affected the institutional procedure required for the conclusion of the agreement. In other words, these counter-sanctions are the perfect example to illustrate how CFSP-related sanctions can potentially lead to a stalemate in the ratification of a CCP agreement.

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[383]Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L99I/1.

[384]Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/13; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410I/1.

[385]Ibid., see also Parry, M. (2021); Parry, M. (2021), pp. 1-5.

[386]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 29 TEU; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 215 TFEU.

[387]Parry, M. (2021).

Therefore, the freezing of the CAI was not merely accidental and political in nature, but rather it was a direct consequence of the way in which the Treaties preserve a different allocation of powers between institutions and procedures in relation to CFSP and non-CFSP matters, particularly through Art. 40 TEU. At the same time, this legal separation does not necessarily prevent developments arising in one policy field from producing consequences in another. At this point, on 20 May 2021, the Parliament responded with a firm resolution which it condemned the Chinese counter-sanctions as baseless and arbitrary, justifying as frozen any further consideration or discussion on the ratification of the CAI, as long as the Chinese sanctions remained in place[388]. Once again, this firm position of the Parliament eventually transformed its consent power into a decisive political lever. Although Art. 218(6)(a)(v) TFEU does not expressly grant the Parliament with veto powers with respect to foreign policy issues, the CAI shows how this institution can indeed use its consent power as a form of leverage to influence the conclusion of an international economic agreement in light of CFSP and human rights considerations.[389] Studies argue that the reasons behind the suspension were not directly linked to trade or investment matters, but rather to the human rights and sanctions dispute that dominated the relationship between the two Parties by mid-2021, resulting in a stalemate in the ratification process of the CAI; that remains, to this day, neither formally withdrawn nor concluded (Mendes, 2023).[390] To sum up, this series of events that ultimately resulted in the freezing of the agreement also illustrates a structural interaction between the CCP and the CFSP. Formally, the CAI remained an agreement based on the CCP; however, the sanctions were restrictive measures that fell within the scope of the CFSP. Yet their direct effect was to hinder the ratification process of the CCP agreement (the CAI), demonstrating that the separation between CCP and CFSP legal bases in the Treaties does not prevent one field from affecting the other in practice. On the contrary, insights from the CAI show how both policy fields within the framework of EU external action are not institutionally isolated even if the Treaties maintain the CCP and the CFSP legally separated, instead this separation between the two policy areas does not prevent one from producing significant effects on the other, especially where different institutions control different stages of the decision-making process. At the same time, the CAI should not be considered as an isolated episode. As a matter of fact, the increasing geopoliticisation of EU trade policy ultimately suggests how this interaction, as revealed by the CAI, can also be present within broader developments in the framework of the Union's external action.

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[388]European Parliament Resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)), paras 1–6; see also European Parliament, 'MEPs Refuse Any Agreement with China Whilst Sanctions Are in Place' (Press Release, 20 May 2021).

[389]Parry, M. (2021); see also Mendes, C.A. (2023), pp. 63-68.

[390]Mendes, C.A. (2023), p.63.

This concept is directly linked to the argument that the traditional boundaries between CFSP and non-CFSP matters in EU external action have become even more difficult to maintain in practice, since the Union began to face growing internal and external pressure to combine its foreign policy and trade instruments in pursuit of the broader objectives of EU external action.[391] Szép observes that this evolution within EU external action eventually changed the practical significance of the traditional procedural separation between the CFSP and CCP, and argues that boundaries between CFSP and non-CFSP matters started to become increasingly blurred considering that the objectives set out in Art. 21 TEU, related to EU external action, are now applied to both policy fields.[392] Eventually, this concept became particularly relevant with the emergence of the "*geopolitical Commission*" under Ursula von der Leyen, based on the integration of geopolitics and foreign policy considerations into policy areas traditionally associated with economic integration, with the specific aim of strengthening the Union's capacity to respond to an increasingly challenging international environment. In the context of the broader external action framework in which economic and geopolitical objectives overlap, trade and investment instruments are no longer used only to pursue economic interests, and foreign policy objectives are no longer pursued solely through traditional CFSP instruments. This eventually reveals a certain degree of institutional permeability, as previously illustrated by the developments surrounding the freezing of the CAI.[393] Although the agreement remained legally grounded in the CCP, its conclusion became dependent on a broader geopolitical dispute involving human rights violations and sanctions, perfectly showing how the formal separation in the Treaties does not prevent foreign policy considerations from influencing both the political and institutional conditions required for the negotiations. Ultimately, this conclusion also points out the significant role of the Union's commitments to human rights protection, which constitute a further dimension within the framework of EU external action that cuts across both policy fields: the CCP and the CFSP. The following section will therefore examine this exact interaction between the CCP, the CFSP and the role as cross-cutting constraint of human rights commitments within the framework of EU external action, with respect to observations related to the EU-China CAI.

[391]Szép, V. (2024), p. 4; see also Blockmans, S. (2020).

[392]Ibid.

[393]Ibid., p. 9.

### 5.3 Human Rights as a Cross-Cutting Constraint for EU External Economic Action

As the previous two sections touched on the CAI's legal basis, its connection to the CCP and the subsequent CFSP developments that eventually led to its freezing, the third dimension analysed in this section concerns the role of human rights. This part of the analysis directly links the CCP and the CFSP to the Union's external action and its commitments to human rights. As a matter of fact, Arts. 3(5) and 21 TEU bind the Union to promote and protect human rights in its relations with the wider world, establishing the applicability of human rights across all areas of EU external action, while Art. 207(1) TFEU expressly requires the Union to conduct the CCP in accordance with to those principles and objectives.[394] As a result, it can be stated that human rights commitments cannot be perceived as matters outside the scope of the CCP; on the contrary, they form part of the institutional context within which EU external economic policy must be carried out. In this regard, the CAI contains some human rights provisions both in its Preamble and within its sustainable development chapter focused on environmental protection and labour rights. More specifically, in Section IV of the CAI, dedicated to investment and sustainable development, both parties must commit to implement the Paris Agreement as a legally binding international climate change treaty, and are responsible for the promotion of corporate social responsibility. Finally, the aforementioned section of the agreement also requires China to make continued and sustainable efforts towards the ratification of the two outstanding fundamental ILO conventions on forced labour. Accordingly, these provisions are politically significant considering that the stalemate of the CAI was caused by serious concerns regarding forced labour and human rights violations in Xinjiang.[395] However, the CAI also illustrates what can be considered as the limits of human rights enforceability within the framework of EU external action. Whereas both human rights and labour rights were included in the CAI, their enforcement mechanism was considerably weaker than the dispute settlement mechanism chosen to resolve disputes related to trade or investment protection. Sustainable development disputes were not subject to the SSDS arbitration mechanism in the same way as other disputes, but they must be referred to a separate and markedly weaker system: an independent panel of experts that can be established only once consultations have failed, with no possibility of issuing legally binding acts, or authorised countermeasures, only recommendations.[396]

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[394]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5) and 21 TEU; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art. 207(1) TFEU.

[395]Cotula, L. (2021), p. 365; see also Grieger, G. (2026), p.10; European Commission, EU-China Comprehensive Agreement on Investment (CAI), 22 January 2021, Section IV.

[396]Zhang, A. (2024), pp. 235-236, 247-248.

This specific dispute settlement mechanism is markedly different from the general SSDS that is applied to CCP disputes, such as those related to market access, level playing field commitments or investment protection, which allows for binding reports and the possibility of imposing countermeasures in the event of non-compliance, following the model provided by the WTO dispute settlement system.[397] In relation to the human rights violations in Xinjiang, including a binding human rights clause within the agreement was regarded as the main condition for its entry into force, however, the legal structure agreed in the Agreement in Principle of the CAI followed a different path. While commercial provision were subject to enforceable dispute settlement mechanisms, labour and human rights considerations were placed within a softer framework lacking proper binding force.[398] The CAI eventually reveals how human rights might act as cross-cutting objectives in the conclusion of an international agreement; however, it also reveals the weakness of the institutional mechanisms through which those objectives are given practical effect. In other words, the CAI can be taken as an example to show how human rights considerations are unevenly enforced in external economic agreements. Whereas, human rights overarching personality has already been established through the applicability of the principles and objectives listed in Art. 21 TEU, their enforcement differs depending on the policy field. With respect to the CFSP, human rights concerns may be pursued through restrictive measures and diplomatic action, while with respect to the external economic policy, they tend to appear through sustainable development chapters, labour clauses, human rights clauses, impact assessments or preferential trade arrangements. More precisely, the Treaties establish that under Art. 207(1) TFEU, the CCP must be conducted in accordance with the Union's external action objectives and human rights commitments under Art. 21 TEU,[399] yet Art. 207 TFEU does not itself provide for those institutional tools that are typically used to pursue such objectives within the CFSP, such as the adoption of restrictive measures under Art. 29 TEU, political conditionality, or diplomatic action.[400] Observation from Section IV of the CAI show that the legal framework of the Union allows for the incorporation of human rights objectives into the Union’s external economic action. However, as the CCP framework does not automatically provide those commitments with the same institutional and enforcement mechanisms applicable for the trade policy, human rights commitments are enforced through different methods compared to those applied within the CCP.

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[397]ivi, p.236.

[398]Grieger, G. (2026), p.10; see also Cotula, L. (2021), pp. 363-365; CAI, Section IV, Arts. 6–8 and Section V, Arts. 5.4 and 19.

[399]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art. 21(3) TEU, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207(6) TFEU.

[400]Ibid, Art. 29 TEU; Art. 215 TFEU.

In this sense, it can be argued that the Union's institutional framework does not automatically provide human rights with the same legal protection and enforcement as it does for market access, non-discrimination or other investment-related commitments contained in economic agreements such as the CAI.[401] However, the CAI is not unique in this respect; a comparable dynamic can be observed in case law and practice, which demonstrates how human rights objectives often obtain practical effect through different legal and institutional mechanisms. Particularly relevant is the development of HRIAs in the context of trade agreements, with special reference to the Ombudsman's 2016 recommendation concerning the EU-Vietnam Free Trade Agreement, in which she confirmed that EU law did not expressly impose a specific legal obligation to conduct an HRIA before the conclusion of the agreement; however, she considered such an assessment necessary, recalling the Union's human rights commitments governing its external action under Art. 21 TEU.[402] The Ombudsman's reasoning perfectly shows how the Union's human rights commitments can shape the fate of future economic agreements or trade policy objectives, even when the relevant legal basis does not itself establish a specific procedural mechanism related to human rights protection. Another example connected to EU case law is represented by the General Court's judgment in Frente Polisario v Council. In its judgment the Court held that the Council was indeed required to assess whether the conclusion of an international agreement could potentially affect the fundamental rights of the concerned population, and the failure to carry out such an assessment may undermine the legality of the Council's decision, demonstrating how human rights can be used as a conditionality for the legal review of the Union's external economic action.[403] Finally, a similar logic can be found in the GSP, where trade preferences were used as tools to promote human rights and labour standards, confirming the intertwined role of economic instruments and human rights commitments in the conduct of the EU's external action objectives.[404] Taken together, these examples illustrate how human rights provisions can act as cross-cutting constrains within the framework of EU external action, stretching from procedural duties and judicial review to trade conditionality.

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[401]Kube, V. (2016), p.13.

[402]European Ombudsman, Draft Recommendation in the inquiry into complaint 1409/2014/JN against the European Commission, para. 24; see also Velluti, S. (2016), p. 53; Kube, V. (2016), pp. 13–14.

[403]Case T-512/12 Frente Polisario v Council EU:T:2015:953, paras. 225 and 231.

[404]Velluti, S. (2016), pp. 50–54.

Finally, returning to the Agreement in Principle of the CAI, the gap between the inclusion of human rights and sustainable development commitments and its subsequent failure to enforce those commitments through a practical enforcement mechanism, also illustrates one of the greatest internal limitations of the agreement in terms of normative objectives. Nonetheless, this relatively weaker enforcement mechanism was not in itself the cause of the CAI's ratification stalemate, which arose when broader human rights concerns became institutionally relevant through the sanctions dispute and the Parliament's consent power set out in Art. 218 TFEU.

In conclusion, it is fair to state that human rights commitments actively play their role as political leverage and cross-cutting constraint through institutional practice and political accountability, even without the support of a properly functioning and well integrated enforcement mechanism within CCP instruments. More specifically, it is expressly required in the Treaties that the CCP must be conducted in relation to the Union's human rights objectives, however the binding status of those objectives does not automatically translate into an equivalent and effective enforcement mechanism within any future or present trade or investment agreement. The CAI illustrates this clearly, considering the significance that human rights considerations obtained with respect to the human rights violations in Xinjiang and the Parliament's response to the Chinese counter-sanctions episode. The agreement eventually shows that to successfully ensure the respect for human rights in the Union's external economic relations, their formal inclusion as provisions of an agreement is not sufficient enough. To achieve an effective degree of protection, the interaction between different institutions, different competences, and policy instruments is therefore needed, resulting in a broader institutional question. If the CCP, CFSP, and human rights commitments are formally differentiated in the Treaties, but at the same time, influence one another in practice, the central issue becomes whether the Union's institutional framework is capable of ensuring sufficient coherence across these different dimensions of external action. The last section of this chapter will therefore analyse the level of institutional coherence within the Union's external action framework.

### 5.4 Between Institutional Differentiation and Coherence: Insights from the CAI

As the previous sections of this analysis pointed out, one of the key arguments of this thesis is the coexistence, at the level of the Treaties, of a legal differentiation between the CCP and the CFSP, while establishing common objectives to be pursued by EU institutions in the conduct of the Union's external action. As a matter of fact, both policy areas must operate within a shared institutional framework governed by the vales and objectives listed in Arts. 3(5) and 21 TEU, which require the Union to pursue its external action with respect for human rights, international law and

the promotion of the Union's values.[405] Consequently, the resulting framework cannot be considered as fully fragmented nor as institutionally unified. Rather, it combines different competences with a common legal framework within which those objectives must be respected and pursued. At the same time, as already largely explained in the previous sections, this formal separation of competences operates differently in practice, as the Treaties do not prevent the actual interaction between policy areas, and the existence of a common legal system governing the achievement of external action objectives does not eliminate the institutional differences that deeply influence how these objectives are pursued in practice. In this regard, the developments surrounding the CAI provide some insights on how this dual structure operates in practice. Bearing in mind that the CAI was formally classified as a CCP instrument, consequently falling within the scope of the CCP with Art. 207 TFEU as its legal basis, the first insight is linked to its procedural pathway, which is rooted in Art. 218 TFEU. Moreover, its practical and political scope was shaped by a context of systemic rivalry, human rights concerns and increasing geopolitical competition.[406] Choosing to maintain the CAI within the exclusive competence of the Union as a CCP instrument, avoided any additional requirements associated with a mixed agreement. At the same time, even in the presence of CFSP considerations related to human rights violations, that eventually resulted in the adoption of restrictive measures, the legal basis of the CAI remained untouched. This demonstrates how an international agreement negotiated on the grounds of the CCP with Art. 207 TFEU as legal basis, cannot be understood without taking into consideration the broader geopolitical relationship between the Parties, which is deeply influenced by foreign policy and human rights concerns. In other words, the interaction in practice between different policy fields does not eliminate their legal differentiation. However, the CAI can be taken as an example to show how such differentiation is not equivalent to institutional insulation. It has already been demonstrated that the Treaties preserve this distinction between CFSP and non-CFSP competences through Art. 40 TEU, yet their classification does not prevent developments arising in one policy field from producing consequences in another. This dynamic became particularly visible after the reciprocal sanctions episode of March 2021 between the EU and China. Although the sanctions episode developed within a context related to foreign policy and human rights considerations, it adversely affected the institutional pathway through which the CAI had to be concluded, since the Chinese counter sanctions targeted several Members and bodies of the European Parliament, whose consent for the conclusion of the CAI was required under Art. 218(6)(a)(v) TFEU.[407]

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[405]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5) and 21 TEU.

[406]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Arts. 207 and 218 TFEU.

[407]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 218 TFEU.

As a result, the agreement remained legally governed by the CCP, but its political feasibility became dependent on developments related to CFSP and human rights considerations. Therefore, the second insight concerns the role of the European Parliament and its consent power under Art. 218 TFEU. Whereas under the CFSP the Parliament's role is quite limited, as it does not have the possibility to adopt any kind of restrictive measures and sanctions, the CAI showed how the Parliament became the institutional channel through which human rights and CFSP concerns re-entered the process, deeply shaping the future of the agreement. Essentially, it can be argued that the role of the Parliament throughout the negotiations of the CAI can be used to illustrate how its procedural power, traditionally linked to the legal review of external economic agreements, evolved over time, until it reached a deeper political significance that can eventually delay or obstruct the conclusion of an agreement. With its 2013 resolution on the opening of the CAI's negotiations, the Parliament requested the Commission to conduct an assessment of the potential human rights implications of the agreement, thereby already introducing different concerns not directly linked to the traditional scope of an economic agreement.[408] In 2018, it further asked for the inclusion of a sustainable development chapter containing binding commitments to international labour standards; which was eventually integrated in Section IV of the final Agreement in Principle.[409] However, the Parliament's position became even more significant only after the political stalemate surrounding the CAI. In its resolution of 21 January 2021, concerning the repressions of the democratic opposition in Hong Kong adopted before the CAI's freezing, the Parliament expressly criticised the failure to use such an investment agreement as leverage to safeguard Hong Kong's autonomy, and it made clear that China's broader human rights record would be taken into account when the Parliament is asked to give its consent for the conclusion of the CAI under Art. 218(6)(a)(v) TFEU.[410] Finally, the CFSP dispute arising from the sanctions episode examined in the previous chapters, not only reinforced the Parliament's leverage in the conclusion of the CAI, since the Chinese counter-sanctions targeted the Subcommittee on Human Rights and individual MEPs; but also provided the Parliament with a proper justification to invoke its consent power, making the exercise of that power practically inseparable from the human rights dispute itself.[411]

[408]Grieger, G. (2026), pp. 7-10.

[409]Ibid.

[410]European Parliament Resolution of 21 January 2021 on the crackdown on the democratic opposition in Hong Kong (2021/2505(RSP)); see also Grieger, G. (2026), p. 7.

[411]Parry, M. (2021); see also Mendes, C.A. (2023), pp. 63-68.

Following this reasoning, the consent power that the Parliament exercised with the CAI, more broadly illustrates how the competences attributed to this institution under Art. 218 TFEU represent the ultimate channel through which wider foreign policy and human rights considerations can directly affect the conclusion and ratification of any future trade agreement. Finally, the role of the Parliament and the legal separation between the CCP and CFSP competences and their practical interaction are also crucial for understanding the role of institutional coherence in EU external action. The analysis, supported by the findings mentioned above, shows that the institutional framework governing the external action of the Union does not intend to achieve coherence by removing those boundaries between the CCP and the CFSP. On the contrary, coherence must be pursued regardless of their distinction and through their respective institutional actors that may control different stages or instruments of the Union's external action. Furthermore, the CAI therefore provides some insight into the practical application of the principle of consistency under Art. 21(3) TEU. Under this principle the Union aims at ensuring that its external and internal policies are aligned with the principles and objectives set out in Art. 21 TEU, but it does not establish an integrated mechanism capable of reconciling commercial, foreign policy and human rights considerations at every stage of the decision-making procedure. As the CAI was negotiated within the scope of the CCP despite the growing human rights concerns, insights related to the evolution of the agreement suggest that this principle may not be perfectly observed in practice. To further explain, whereas the Agreement in Principle was reached in December 2020, despite significant human rights violations in Xinjiang and poor labour conditions, the principle of consistency was not secured ex ante during the design of the agreement. Instead, it emerged ex post, after the sanctions episode and the Parliament's resolution of May 2021, in which the CAI was considered as justifiably frozen as long as the Chinese sanctions remained in place[412]. Consequently, this first set of insights coming from the CAI can be summarised with two main observations. Firstly, the formal separation between the CCP and the CFSP within the EU legal system allowed the negotiation of the agreement to be pursued on the grounds of economic interests and trade objectives, even though broader concerns relating to human rights and labour conditions had already become part of the Union's wider approach towards China.[413] Secondly, this institutional separation does not prevent CFSP and human rights considerations from re-entering the negotiations as decisive political leverage at a later stage, through the Parliament's consent power under Art. 218(6)(a)(v) TFEU.

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[412]European Parliament Resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)), paras 1–6; see also European Parliament, 'MEPs Refuse Any Agreement with China Whilst Sanctions Are in Place' (Press Release, 20 May 2021).

[413]Płóciennik, S. et al. (2021), p. 10.

Therefore, the key takeaway is the idea that the Union's legal system provides some rules for managing tensions between commercial objectives, CFSP dynamics and human rights commitments; however, the CAI is the perfect example to show how these tensions may remain unresolved during the negotiation phase, but eventually become decisive at the ratification stage.[414] At the same time, other significant observations arising from the CAI still require further explanation. The first point concerns the role of human rights as a de jure constraint within EU external action. In this sense, human rights are formally recognised under the law and form part of the institutional framework governing EU external action. Their relevance is therefore not merely political or aspirational; on the contrary, they are classified as binding objectives under Arts. 3(5) and 21 TEU, and are considered as fundamental principles guiding the European Union across the different areas of its external action, including trade and investment policy. The CAI, however, depicts a very different picture. Bearing in mind that the binding character of human rights is clearly stated in the Treaties, their practical effect depends heavily on an institutional system that is capable of ensuring that those objectives are translated into action. Human rights considerations and labour standards were included in the CAI only through Section IV related to sustainable development provisions.[415] As already discussed in Chapter 4, those provisions lacked the support of a proper enforcement and dispute settlement mechanism equivalent to those applicable to the agreement's core commercial and investment commitments. As a result, this suggests that within each instrument of EU external economic action, the level of human rights protection might differ from their formal recognition.[416] As a result of the sanctions and counter-sanctions episode, human rights were transformed into a broader institutional and political dispute, where they played a decisive role as cross-cutting constraint capable of shaping the future of the agreement through the Parliament's consent power. Therefore, the CAI shows that the classification of human rights as binding objectives under the Treaties does not necessarily guarantee that a CCP instrument must contain an equally binding dispute settlement mechanism capable of ensuring their enforcement.[417] In the CAI, the relatively limited enforceability of human rights commitments stand in contrast to their decisive role in at the stage of political approval. Last but not least, the CAI widely demonstrates that EU trade and investment policy operates within a broader geopolitical environment that is deeply influenced by the current challenges that shape the Union's international relations.

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[414]Koutrakos, P. (2019), p. 6.

[415]CAI, Section IV; see also Zhang, A. (2024), p. 236.

[416]Cotula, L. (2021), p. 365.

[417]Zhang, A. (2024), p. 248.

The result is that economic instruments, such as the CAI, cannot be considered in isolation from other CFSP objectives. Although the agreement was designed with the aim of improving market access, investment conditions and level playing field commitments between the Union and China, its freezing was caused by developments falling outside the commercial sphere and related to growing concerns over human rights, showing how, in certain political and institutional circumstances, the political viability of an investment agreement may be affected by foreign policy dynamics that are not formally linked to its legal basis. This development reflects the broader trend towards the geopoliticisation of EU external economic policy, and to the broader concept that trade policy must contribute to economic growth and market liberalisation, but also to enhance the promotion of CFSP objectives, such as human rights and the defence of the Union's fundamental values and external interests.[418] With respect to the CAI, while its legal basis under Art. 207 TFEU remained unchanged even after the CFSP dispute that affected its ratification, the CAI ultimately illustrates that the framework of EU external action cannot be understood as a set of isolated policy fields. Instead, it operates in a system within which legal competences, institutional procedures and geopolitical considerations are deeply connected and interact with each other. This reasoning is eventually interconnected with the aforementioned argument stating that the traditional legal distinction between the CCP, the CFSP and human rights commitments in the Treaties stands in contrast to their close interaction in practice, where the CCP must comply with Art. 21 TEU, CFSP sanctions may affect external economic agreements, and human rights concerns may acquire institutional significance through to the Parliament's consent power under Art. 218 TFEU. Thus, the final conclusion of this thesis is that the tensions between economic interests, foreign policy objectives and human rights protection are not formally eliminated within the legal system governing the external action of the Union, but rather the institutional framework channels these tensions through a differentiated system of competences, procedures and institutional powers. The CAI therefore reveals the dual nature of EU external action: formally divided with respect to legal bases, institutional procedures and decision-making mechanisms, yet held together by common fundamental and binding objectives listed in Arts. 3(5) and 21 TEU. In this sense, coherence does not arise from the absence of institutional boundaries, but rather from the connection and interaction of different policy areas and from the capacity of EU institutions to use the powers granted to them by the Treaties in pursuit of the Union's broader external objectives.

[418]Szép, V. (2024), p. 4; see also Blockmans, S. (2020); Freudlsperger, C. and Meunier, S. (2024), pp. 1063–1065.

At the same time, the CAI shows that, in cases where the coordination between different areas of EU external action is not fully integrated during the negotiation phase, tensions between economic interests, foreign policy objectives and human rights concerns may remain unresolved until they acquire a greater political significance at a later stage. Ultimately, the significance of the CAI lies precisely in this last argument: it shows that the effectiveness of EU external action does not depend on institutional unity, but rather on the capacity of the Union to navigate and reconcile legally differentiated competences in a world where economic, geopolitical and normative imperatives are increasingly intertwined.

# Conclusions

This thesis answers the question of how the institutional framework governing EU external action structures the interaction between the CCP, the CFSP and the Union's commitment to human rights. The analysis was structured around the progressive reconstruction of the Treaty framework governing the Union's external action, the evolution of EU investment policy and the transfer of competences over FDI following the Lisbon Treaty, the significant role of human rights in EU external action, finally concluding with some insights related to the developments surrounding the EU-China CAI. The main conclusion is that the EU legal framework does not describe external action as a strict separation between commercial interests, foreign policy objectives and human rights considerations. On the contrary, while from the legal point of view these policies remain governed by different legal bases, institutional procedures and decision-making rules, at the practical level, they are deeply intertwined with each other. As demonstrated by the findings presented in Chapter 1, after the Lisbon Treaty human rights provisions were not merely added into the CCP and the CFSP as an afterthought; on the contrary, they were embedded as a set of values and objectives, such as respect for international law, democracy, the rule of law and the universality of human rights, which the Union is required to pursue in the conduct of its external action under Arts. 3(5) and 21 TEU, binding the Council, the Commission and the High Representative to ensure consistency through Art. 21(3) TEU.[419] At the same time, as shown in Chapter 2, the Union's exclusive competence over FDI, resulting from the transfer of competences under Art. 207 TFEU following the Lisbon Treaty, can be considered another example of the deep interconnection between policy fields in EU external action. As a matter of fact, Art. 207 TFEU expressly requires that the CCP must be conducted in accordance with the fundamental values and objectives of the Union's external action set out in Arts. 3(5) and 21 TEU, showing that even a pure economic instrument cannot be understood in isolation from foreign policy objectives.[420] This development allowed the Union to negotiate and potentially conclude investment agreements with third countries, in a field that was traditionally dominated by bilateral investment treaties (BITs) concluded by each Member States. In this context, also the Court's own case law, with particular reference to Opinion 2/15, Opinion 1/17 and Achmea, consistently treated investment policy as a matter falling within the wider institutional

[419]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5) and 21(1)-(3) TEU; see also Kassoti, E. and Wessel, R.A. (2023).

[420]Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207 TFEU.

order of the Union, showing once again the level of interaction between these policy fields.[421] Considering how Chapter 1 established the importance of the respect and promotion of human rights in EU external action, Chapter 3 finally completed this picture. Traditionally, human rights considerations were confined within the CFSP, almost as something purely aspirational. However, through the developments introduced by the Lisbon Treaty, they became overacting objectives and a genuine evaluative parameter for the Union's external action as a whole. At the same time, they became judicially enforceable within the limits defined through the Rosneft case, where the Court established that CFSP restrictive measures could still be subject to judicial review, and through the General Court's judgment in the Frente Polisario case, which required the Council to carry out an assessment of whether the conclusion of a commercial agreement could adversely affect the fundamental rights of the concerned population.[422] Through the General Court's judgment in the Frente Polisario v Council case, it was also clarified how human rights considerations increasingly came to be regarded as legal constraints across different areas of EU external action. Chapters 4 and 5 applied this framework to the CAI, demonstrating how the legal recognition in the Treaties of common objectives to govern the conduct of different policy fields in EU external action, does not necessarily provide an institutional mechanism capable of effectively reconciling the CCP, the CFSP and human rights considerations during the negotiation of a CCP international agreement. Three main findings support this conclusion, starting with the choice of the legal basis for the CAI. As a matter of fact, the CAI was deliberately confined within the scope of the Union's exclusive competence over the CCP under Art. 207 TFEU, avoiding the involvement of Member States in the long ratification process typical of a mixed agreement. At the same time, negotiations were mainly conducted through CCP institutional channels, with no obligatory coordination with the High Representative or the Political and Security Committee, even though the Commission itself described China as a systemic rival in its 2019 Strategic Outlook.[423] Although it has already been stated that the CAI was formally negotiated as a CCP instrument, its freezing was caused by developments rooted in the CFSP.

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[421]Meunier, S. (2017); see also Opinion 2/15 Free Trade Agreement between the European Union and the Republic of Singapore EU:C:2017:376, Opinion of the Court, 16 May 2017; Opinion 1/17 Comprehensive Economic and Trade Agreement between Canada and the European Union EU:C:2019:341, Opinion of the Court, 30 April 2019; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207(1) TFEU; Case C-284/16 Slowakische Republik v Achmea BV EU:C:2018:158, judgment of the Court (Grand Chamber), 6 March 2018.

[422]Van Elsuwege, P. (2017); see also Cremona, M. (2018) 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' European Constitutional Law Review 14/1: 231–259; Case C-72/15 Rosneft Oil Company OJSC v Her Majesty's Treasury and Others EU:C:2017:236; Case T-512/12 Frente Polisario v Council EU:T:2015:953.

[423]European Commission and High Representative of the Union for Foreign Affairs and Security Policy, EU-China – A Strategic Outlook, JOIN (2019) 5 final, 12 March 2019; see also Płóciennik, S. et al. (2021), pp. 8-10; Parry, M. (2021).

Human rights considerations were included in the CAI as sustainable development provisions and labour standards in Section IV, yet they were granted considerably weaker legal force and were supported by an enforcement mechanisms incapable of producing binding resolutions or countermeasures. On the contrary, market access and level playing field considerations, considered to be the main objectives of the agreement, were protected by a proper dispute settlement mechanism.[424] In other words, economic and investment objectives were enforced through the ordinary State-to-State dispute settlement (SSDS) mechanism, whereas human rights and sustainable development commitments were dealt with an independent panel of experts, only capable of producing non legally binding recommendations in the absence of an amicable solution.[425] On the other hand, the exchange of sanctions between the EU and China in 2021, starting from the restrictive measures adopted by the Council in response to serious human rights violations in Xinjiang based on the EU Global Human Rights Sanctions Regime, and ultimately the Chinese counter-sanctions against European individuals and entities, including Members of the European Parliament and the Parliament's Subcommittee on Human Rights, transformed the CAI from a simple economic agreement into a contested instrument with human rights as a form of political leverage, eventually demonstrating how CFSP dynamics can directly influence the fate of an agreement formally rooted in the CCP.[426] Third, the aforementioned gap between the role of human rights as cross-cutting constraint in EU external action and their practical legal enforcement, is one of the central points of friction identified by the thesis. Within the CAI, human rights considerations became decisive not through the sustainable development chapter within the agreement, or the consistency principle under Art. 21 TEU, but as a result of the European Parliament's strategic use of its consent power under Art. 218(6)(a)(v) TFEU.[427] The Parliament, in its resolution of May 2021, refused to proceed with the ratification of the CAI while Chinese sanctions against its members and institutional bodies remained in place, perfectly showing how human rights can act as a political and institutional constraint on EU external action, even if the agreement itself did not provide for an enforcement mechanism capable of ensuring their protection.

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[424]Zhang, A. (2024), pp. 235-236 and 247-248.

[425]Cotula, L. (2021), p. 365.

[426]Parry, M. (2021) Chinese Counter-Sanctions on EU Targets. European Parliamentary Research Service, At a Glance, PE 690.617, May 2021; see also Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel', 22 March 2021.

[427]European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)); see also van der Made, J. (2021) 'European Parliament Votes to Freeze EU-China Investment Deal'. RFI, 20 May. Available at: https://www.rfi.fr/en/business/20210520-european-parliament-votes-to-freeze-eu-china-investment-deal-cai-human-rights-sanctions-xinjiang-hong-kong.

Although the Parliament's powers with respect to CFSP matters remain limited, the CAI showed that this institutional body can play a crucial role in the conclusion of international agreements falling within the CCP, and consequently in the coherence of EU external action. The CAI also revealed that the Parliament's consent power can act as an institutional checkpoint, through which broader concerns, including those relating to human rights, can affect the fate of external economic agreements when there are some tensions between the commercial policy and the values of EU external action established by the Treaties. The research question can therefore be answered as follows. The institutional framework governing EU external action designs the interaction between the CCP, the CFSP and the Union's human rights commitments by placing them under a common set of external action objectives under Arts. 3(5) and 21 TEU and ensuring their procedural autonomy through Article 40 TEU. However, the practical interaction between the CCP, the CFSP and human rights is governed through a dual logic of separation and interdependence. The Treaties differentiate these policy areas through different legal bases, procedures and institutional roles. The CCP is labelled as an exclusive competence of the Union under Art. 207 TFEU, the CFSP enjoys a more intergovernmental institutional structure and is governed by specific rules and procedures under Art. 24 TEU, while human rights are treated as fundamental overarching objectives under Arts. 3(5) and 21 TEU. At the same time, the framework connects these policy areas through the principle of consistency under Art. 21 TEU and the requirement that the CCP must be conducted in accordance with the Union's external action objectives.[428] What it does not provide is a binding institutional mechanism capable of reconciling these dimensions before an agreement is negotiated and concluded. The comparative observations that can be drawn from the developments surrounding the CAI clearly confirm this conclusion. Limiting the agreement within the scope of the Union's exclusive competence under Art. 207 TFEU has proven effective with respect to avoiding the ratification burden of a mixed agreement, but at the same time it left the agreement exposed to CFSP and human rights considerations, while also failing to provide a proper enforcement mechanism capable of reconciling the CCP and the CFSP before its conclusion. In the case of the CAI, coherence, instead of being produced ex ante, emerges ex post and as a result of the institutional leverage that individual actors possess, as the Parliament's involvement in the freezing of the negotiations shows.

[428]Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Arts. 3(5), 21, 40 TEU; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art. 207 TFEU; see also Kassoti, E. and Wessel, R.A. (2023); Kube, V. (2016).

Taken together, these findings also carry broader implications for the Union's external action that go beyond the CAI itself. As Szép argues, the boundary between the CCP and the CFSP has become increasingly blurred and difficult to maintain in practice (Szép, 2024), as they became particularly visible after the adoption of instruments within the scope of the CCP but with the aim of pursuing broader geopolitical objectives.[429] The Anti-Coercion Instrument (ACI), examined in Chapter 3, represents a relevant example in this regard. Although such instrument is based on Art. 207 TFEU and therefore remains formally placed within the framework of the CCP, its relevance lies in its ability to enable the Union to respond to economic coercion by third countries through deterrence and, if necessary, with the adoption of suitable countermeasures.[430] In this sense, the Anti-Coercion Instrument, can be read as a partial response to the aforementioned gap identified in this thesis, as it combines foreign policy sanctions as an enforcement mechanism into a CCP instrument with Art. 207 as its legal basis.[431] More broadly, while maintaining the CCP as its legal basis, the ACI demonstrates how a trade instrument may successfully address geopolitical and foreign policy pressures.[432] At the same time, the Joint Statement of the European Parliament, the Council and the Commission on Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries, expressly emphasises the nature of the ACI describing it as "*strictly subject-specific*" (European Parliament, Council, European Commission, Regulation (EU) 2023/2675), while stating that it should not be viewed as a precedent for other legislative acts with Art. 207 TFEU as their legal basis.[433] Following this classification of the Anti-Coercion Instrument, it can therefore be argued that such an instrument cannot be taken as an example of reconciliation between the CCP and the CFSP, however it demonstrates how instruments formally situated within the CCP, can also be used in response to geopolitical needs while maintaining a strict legal and procedural distinction between the CCP and the CFSP.

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[429]Szép, V. (2024), p. 4.

[430]European Commission, Communication from the Commission to the European Parliament and the Council on measures within the Commission's powers which the Commission can adopt when it determines, pursuant to the Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, that the Union takes response measures to counteract a third-country measure of economic coercion, COM (2021) 774 final, 8 December 2021.

[431]Freudlsperger, C. and Meunier, S. (2024) 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument' Journal of Common Market Studies 62/4: 1063–1079.

[432]Szép, V. (2024) 'The Geopoliticization of EU Trade Policy: Exploring the Growing Links Between the Common Foreign and Security Policy and the Common Commercial Policy' European Foreign Affairs Review 29/4: 1–20; p.4; see also Freudlsperger, C. and Meunier, S. (2024) 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument' Journal of Common Market Studies 62/4: 1063–1079.

[433]European Parliament, Council of the European Union and European Commission, Joint Statement on Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries, C/2023/1340, 7 December 2023, ELI: http://data.europa.eu/eli/C/2023/1340/oj

However, the CAI also shows that, without a practical interaction between different legal bases, an investment agreement negotiated with a third country based on Art. 207 TFEU alone, remains structurally vulnerable to external CFSP and human rights considerations, that may or may not alter its political and institutional viability, while leaving its legal bases untouched. At the same time, it is rather inappropriate to believe that any further EU investment or trade agreement with a partner comparable to China, will eventually end up in the same circumstances that were unfolded with the EU-China CAI. On the contrary, the significance of the CAI precisely lies in how it reveals institutional tensions that may also arise in other external economic relations between the Union and a third party. Further research may prove useful to extend the comparative method adopted in this thesis to test the interaction of these different policy areas in the framework of EU external action, as illustrated by the CAI, also for other post-Lisbon investment or trade agreements negotiated between the Union and other trading partners, such as the still-unratified EU-Mercosur Association Agreement. Finally, additional research could also analyse, from an institutional perspective, whether and how an integrated coordination mechanism between CCP interests, CFSP dynamics and human rights protection might eventually promote greater consistency between this different policy areas, during the negotiation and conclusion of an international investment and trade agreements like the EU-China CAI. Overall, this thesis uses the stalemate status of the EU-China CAI, as neither ratified nor formally abandoned, as a clear example to show how the current institutional design formally divides the CCP and the CFSP competences in the Treaties, while binding them together under the fundamental objectives listed in Arts. 3(5) and 21 TEU. As illustrated by the European Parliament's use of its consent power in the CAI ratification process, coherence in EU external action does not derive from the absence of institutional boundaries, but rather from an intertwined interaction between different policy areas and from the capacity of EU institutions to use the powers granted to them by the Treaties in pursuit of the Union's broader external objectives. Ultimately, the significance of the CAI lies precisely in this final point: it demonstrates that the effectiveness of EU external action does not depend on institutional unity, but rather on the Union's capacity to reconcile and coordinate deeply intertwined but distinct legal competences, within a world increasingly shaped by economic, geopolitical and normative demands.

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