

# MASTER THESIS

The EU defense and enforcement of human rights  
through its trade relations with third countries.



Mathis Cayuela

LL.M International and European Law: European Law and Global risk track  
Department of European and International Public law - Tilburg University

Supervisor: Daniel Augenstein

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## LIST OF ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
ACP	African Caribbean and Pacific
CAI	Comprehensive Agreement on Investment
DCFTA	Deep and Comprehensive Free Trade Agreement
DG	Directorate General
EEAS	European External Action Service
EPA	Economic Partnership Agreement
EP	European Parliament
EU	European Union
FTA	Free Trade Agreement
GSP	Generalized Scheme of Preferences
HRIA	Human Rights Impact Assessment Investment Protection Agreement
IPA	
ILO	International Labour Organization
LGBT	Lesbian, Gay, Bisexual, and Transgender
NGO	Non-Governmental Organization
PCA	Partnership and Cooperation Agreement
SDGs	Sustainable Development Goals
SIA	Sustainability Impact Assessment
SSDS	State to State Dispute Settlement
TFUE	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
TSD	Trade and Sustainable Development
UN	United Nations

# CHAPTER I – INTRODUCTION

## 1.1 Background

The trade policy and the impact of European trade agreements on third countries has been a concern for several actors such as human rights activists, NGO or even civil society for several years. Indeed, trade and human rights are usually seen as two opposing concepts by most of us. However, the tight links of those concepts are expressly stated in the EU legal order.

Scholars questioned these links by wanting to know how trade impacts the promotion or the destruction of human rights. Some economists, like Robert Barro, argue that economic development promotes democracy.<sup>1</sup> The latter stated that the favorable effects on growth through economic development that is achievable with trade helps the maintenance of the rule of law, democracy and more globally human rights. Indeed, even if democracy and human rights are different concepts, they are linked. Democracy is the basis to each human right because it allows control mechanisms to ensure their respect. Thus, in theory, a democratic system should exclude from the beginning any violation of human rights thanks to the democratic guarantee. Consequently, it is important to remember that the respect of human rights is part of a democratic system.<sup>2</sup> On the other hand, some academics believe that human rights are simply the result of the fact that countries with democratic political cultures industrialized first.<sup>3</sup> According to them, it is not simply another element of social and economic development, otherwise our policy toward countries with authoritarian regimes should embrace free trade to encourage the process of economic development, and consequently should encourage the replacement of authoritarian regimes with more democratic successors that respect more human rights. Eventually, some scholars tried to mitigate those two ways of thinking by giving the conclusion that democracy and human rights are not just the result of an economic development; according to Przeworski and Limongi,<sup>4</sup> it can be initiated at any level of development.

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<sup>1</sup> Robert J. Barro, "Democracy and Growth." *Journal of Economic Growth* 1, no. 1 (March 1996) : p.1-2.. <http://www.jstor.org/stable/40215879> Accessed May 23, 2021

<sup>2</sup> Peter G. Kirchsclaeger "The Relation between Democracy and Human Rights" *Globalistics and Globalization Studies*, (2014) : p.112–125 [https://www.sociostudies.org/almanac/articles/files/globalistics\\_and\\_globalization\\_3/112-125.pdf](https://www.sociostudies.org/almanac/articles/files/globalistics_and_globalization_3/112-125.pdf) Accessed May 29, 2021

<sup>3</sup> Michael Leicht, "Trade Policy and Human Rights" [July/August 1998] 56(1) *Intereconomics* 33(4):171-1761 <https://doi.org/10.5167/uzh-156067> Accessed May 23, 2021

<sup>4</sup> Przeworski, Adam, and Fernando Limongi. "Modernization: Theories and Facts." *World Politics* 49, no. 2 (1997): 155-83. <http://www.jstor.org/stable/25053996>. Accessed May 23, 2021

However, this so-called race to development may be seen as problematic.<sup>5</sup> Indeed, some assume that the creation of human rights is a will initiated and led by the Western States. Therefore, the overall idea that human rights violation occurs outside our territory (generally in the Global South) and that the EU and other States part of the Global North have a responsibility to “save” them seems to be old and senseless for several reasons.<sup>6</sup> First because it neglects all the human rights violations in Western States and secondly because those states have no legitimacy to impose their ways of thinking knowing that today’s human rights regimes are founded on “The Western, mainly liberal protestant roots of the Human Rights Declaration.”<sup>7</sup>

Hence, knowing this complicated relation between trade and human rights and human rights point of view from different autonomous and equal states of the world, it is now up to the EU to choose the impact that the external trade policy can have on third countries concerning human rights.

In 2011, in a Joint Communication to the European Parliament and the Council known as “Human Rights and Democracy at the Heart of EU External Action - Towards a more effective approach”<sup>8</sup>, the Commission and more especially the High Representative of the European Union for Foreign Affairs and Security Policy tried to open a discussion with the other European institutions and especially the DG trade on how to make the EU’s external policy on human rights more active, more coherent and more effective. The introduction of this document summarizes some of the challenges that the EU has to face. One of the main challenges is that EU citizens have the “perception that the EU’s statements on human rights and democracy are not always fully matched by its external or internal policies”. By admitting that problems occurred in the past, the EU knows that it needs to act in different areas by revisiting its delivery mechanisms, processes and structures concerning the safeguarding of human rights in its trade policy with third countries. In that Communication, the Commission states that “EU external action has to comply with the rights contained in the EU Charter

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<sup>5</sup> Janne Mende, “Are human rights western—And why does it matter? A perspective from international political theory”, *Journal of International Political Theory* 2021, Vol. 17(1) 38–57.  
<https://journals.sagepub.com/doi/pdf/10.1177/1755088219832992> Accessed May 23, 2021

<sup>6</sup> Kapur R (2006) Human rights in the 21st century: Take a walk on the dark side. *Sydney Law Review* 28: 665–687.  
[https://www.researchgate.net/publication/259808567\\_Human\\_Rights\\_in\\_the\\_21st\\_Century\\_Taking\\_a\\_Walk\\_on\\_the\\_Dark\\_Side](https://www.researchgate.net/publication/259808567_Human_Rights_in_the_21st_Century_Taking_a_Walk_on_the_Dark_Side) Accessed May, 28, 2021.

<sup>7</sup> Panikkar R (1982) “Is the notion of human rights a Western concept?” *Diogenes* 30(120): 75–102.  
<<https://doi.org/10.1177/039219218203012005>> Accessed May, 28 2021

<sup>8</sup> “Human rights and democracy at the heart of EU external action - Towards a more effective approach.” Joint communication from the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and to the Council. COM (2011) 886 final, 12 December 2011. [EU Commission - COM Document] ,<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0886&from=EN> Accessed May 23, 2021.

of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights.” Therefore, in order to meet those new expectations, this document gives some tracks of answers.

First, this document defends a “tailor-made approach” to maximize impact on the ground of trade-partner countries. It also wants to make more space for human rights into other external policies. To meet these goals, the Commission advocates to build strong partnerships in order to use Europe’s collective weight more efficiently.

This document also advocates to use a country strategy to be able to have a real impact. Here, the EU uses a realistic point of view by preferring to have concrete results than a “one-size fits all” approach concerning human rights. In order to match the objectives in a country locally with the realities on the ground, the EU delegation and the Member States embassy have an important role to play by ensuring human rights dialogues. The Joint Communication states that the Common Commercial Policy is one of the most visible manifestations of the EU’s external action.

Then, it stresses the importance of having a coherent, transparent, predictable, feasible and effective agency concerning the EU's trade and human rights. To meet these expectations, the Commission has chosen to have positive incentives such as trade with preference and also restrictive methods where it is judged necessary.

In addition to that, the 2020-2024 Strategic Plan which sets out the short and medium terms targets states that the DG Trade will pursue its specific objectives under two of the Commission's general objectives: “An economy that works for people and a stronger Europe in the world.”<sup>9</sup>

In order to fulfill all of the objectives set out in the various described statements concerning trade and human rights, the EU's trade policy has different kinds of instruments to promote and to protect them in third countries. For the purpose of format, we will focus our study on the human rights assessment that is part of the sustainability impact assessment and the human rights clause.

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<sup>9</sup> European Commission - DG Trade, “Strategic Plan 2020-2024” : p3 (14/09/2020), [EU Commission - COM Document] <[https://ec.europa.eu/info/system/files/trade\\_sp\\_2020\\_2024\\_en.pdf](https://ec.europa.eu/info/system/files/trade_sp_2020_2024_en.pdf)> Accessed 8 March 2021

## 1.2 Legal basis

In order to develop a stronger Europe in the world, the EU needs a strong legal basis to achieve that ambitious objective. Basically, the long term objectives about the external trade policy are stated in the Treaties and the Charter whereas the short and medium terms targets are stated in the Strategic Plan of the DG for Trade that is adopted every four years. In that part, we will focus on the basic principles stated in the Treaties.

The first basis is outlined in Article 21(1) TEU that requires the EU's external action to be driven by noble principles.<sup>10</sup> Indeed, it clearly gives some guidance on the Union's action on the international scene. This Article states that the Union shall be guided by the *“principles which have inspired its own creation (...) 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 UN Charter and international law (...)”*

In order to make sure that those principles are respected, Article 208 TFEU launches the development of a European cooperation within the framework of the principles and objectives of the Union's external action.<sup>11</sup> The same article states that *“the Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”* and that the *“Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international”*. This Article acknowledges the fact that EU actions, and more specifically the external ones affect third countries and give a legal basis to have a more coherent, efficient and visible EU in the world by allowing the EU to better promote its values and interests worldwide.

We also have to highlight the fact that the EU plays an important role in the decision of Member States trade policy. Indeed, it is an exclusive EU competence as explained in Article 3 of the Treaty on the Functioning of the European Union. Consequently, the EU alone is able to legislate and to adopt binding acts.

Then, Article 207 (1) of the Treaty on the Functioning of the European Union gives the basic principles on how the EU commercial policy shall be based on : *‘The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action and how it gives a procedural explanation on how to exercise that policy’* In other words, this article states that the unicity of the external action has to be present within the trade external action with

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<sup>10</sup> Consolidate version of the Treaty on European Union [2012] OJ L 326/15/16.

<sup>11</sup> Consolidate version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01.

third countries. This explains the tight links between the European External Agency Service (EEAS) and the trade policy conducted by The DG trade.

Eventually, those very basic but important principles that are referred to in Article 207(1) can be found in Article 2 TFEU that states that the EU is founded on values such as “*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*”

### **1.3 Objective and research questions**

The link between human rights and the trade policy of the EU has been of high interest for several actors such as Member states that have given the EU their competence in that field, but also stakeholders and other non-governmental actors. This issue has impacted, impacts and will impact several thousands of persons throughout the world. Consequently, the EU has made commitments in order to improve its coherence and its actions. Therefore, several tools have been developed such as the human rights clause based on the conditionality principle, or the human rights aspect of the sustainability impact assessment. Those tools are a real opportunity to ensure the compliance of the trade policy with third countries with human rights, however, if not well used, they can turn out useless if not well done or if not taken into account in practice. In this respect, this thesis is based on an analysis that tries to understand whether the use of those mechanisms to address any potential violation of human rights resulting from an impact of a European trade agreement are useful in practice or not.

Therefore, this thesis will answer the following **main research question**:

*To what extent does the EU external policy respect and enforce human rights through its trade policy?*

To answer this question, several **sub-questions** must be dealt with first:

- 1. To what extent is the human rights clause based on the conditionality principle efficient?*
- 2. Are human rights in the current SIA in line with the real HRIA developed by the UN? What are the limits of that assessment? Should the EU develop its own HRIA?*



3. *With the recent example of the EU-China case study, has the EU improved its human rights policy?*

#### **1.4 Significance**

*“Economic globalization refers to the increasing interdependence of world economies as a result of the growing scale of cross-border trade of commodities and services, flow of international capital and wide and rapid spread of technologies”*<sup>12</sup>. In other words, a State’s trade policy is an answer to the challenges that the globalized economy in which we live presents. One of the main challenges is to ensure that the will of negotiating deals with third countries won’t become more important than the will to preserve our fundamental values that helped us to create the EU. This ethical problem is present today, however, the international and European will to take this problem into account seems to be increasing.

Indeed, the use of tools to ensure the good application of human rights is the only safeguard that the EU has in order to follow the principles stated in its treaties. Therefore, this analysis is significant because it aims at looking at the theoretical and practical use of those instruments in order to know if they accurately defend the EU values worldwide. Furthermore, this analysis, by scrutinizing a trade agreement that is currently in negotiation, aims at delivering the latest opinion on today’s and maybe future actions of the EU.

#### **1.5 Preliminary remarks and limitations**

The scope of this thesis cannot focus on all the instruments that the EU uses in order to mitigate risks concerning the trade policy and its compliance with human rights. Consequently, this thesis will focus on the two main instruments used in my sense in order to achieve that objective: the human rights clause and the human rights part of the sustainability impact assessment.

This thesis will not only be theoretical because it will also try to compare the wording of the EU with its concrete action. Therefore, examples of actions of the EU concerning the use of those instruments with past and current agreements will be used, especially during the last part where the EU-China CIA will be scrutinized.

The EU has made a commitment in relation to human rights but not only. Indeed, the values of the EU stated in Article 2 TFUE are the *“respect for human dignity, freedom, democracy, equality,*

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<sup>12</sup> Gao Shangquan, 2000. "Economic Globalization: Trends, Risks and Risk Prevention," CDP Background Papers 001, United Nations, Department of Economics and Social Affairs. <[http://www.un.org/en/development/desa/policy/cdp/cdp\\_background\\_papers/bp2000\\_1.pdf](http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf)> Accessed March 8, 2021

*the rule of law and respect for human rights, including the rights of persons belonging to minorities but also to democracy and legality*". For a question of format, this analysis will focus on human rights without trying to prioritize them. Indeed, with respect to the words of the EU "*All human rights – civil, political, economic, social and cultural – are universal in nature, valid for everyone, everywhere.*"<sup>13</sup> Consequently, not all kinds of human rights will be considered.

## **1.6 Methodology**

This thesis is primarily based on doctrinal legal research mainly on European academic literature on human rights protection and trade policy and on international relations and negotiation regarding human rights. Another main source will also be the public official documents of the EU such as some guidelines, handbooks, or trade agreements. It will try to be as practical as possible in order to address real life problems using some mechanisms. Consequently, regarding the difficulty to assess those issues, this analysis will use some real-life case examples, public interviews or informed news articles.

Finally, this analysis will try to focus on the very recent EU-China comprehensive agreement on investment (CIA) by trying to scrutinize that agreement more in detail. Because of its very current status, some judgments are subject to change with the further development of the EU. Since this agreement is very new, there is not a lot of literature available. Therefore, that last part will be an application of the principles and issues raised during the thesis to that new agreement in order to have an informed analysis.

## **1.7 Chapters overview**

The thesis will be structured in the following way: The first chapter corresponds to the introduction with the context and background of where the topic is based. The second chapter will analyze the human rights part of the sustainability impact assessment. In a first part we will compare this SIA to the human rights impact assessment firstly created by the UN. Therefore, we will determine the possible factors that the EU could improve in order to have a more efficient assessment. Afterward, in the third chapter, the principle of conditionality and its application to the

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<sup>13</sup> "Human rights and democracy at the heart of EU external action - Towards a more effective approach." Joint communication from the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and to the Council: p.4. COM (2011) 886 final, 12 December 2011. [EU Commission - COM Document],

<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52011DC0886&from=EN> Accessed May 23, 2021.

EU concept of the human rights clause in trade agreement will be analyzed. This chapter will also try to address the application of that clause in practice in order to understand the critics of use of that clause. In the fourth chapter we will analyze a current case study: the EU-China CIA that has been at the heart of debates for several years. We will try to understand the challenges that are rising from that future agreement for the EU but also for other actors such as stakeholders. We will therefore look at both the pros and cons of the EU actions on that precise case study. Lastly, in the fifth chapter, based on the analysis and results of the previous chapters, the conclusion will summarize the original conflict and try to give an informed answer on the present efficiency of the discussed instruments concerning the enforcement of human rights through the trade policy of the EU.

# CHAPTER II - THE HUMAN RIGHTS IMPACT ASSESSMENT

## 2.1 Chapter overview

In this Chapter we will try to have an informed understanding of the methodology of the human rights assessment that is part of the SIA. To do so, we will look at its background, looking more especially at the main inspiration source of that methodology, the UN guideline on HRIA. Afterward, we will compare the main points of those methodologies and try to understand what can be improved. Eventually, we will study the main concern that the SIA raises and therefore give some advice to improve the human rights part of this assessment.

## 2.2 Introduction and legal background

Trade agreements are related to human rights in many ways. Indeed, they can severely impact the right to food, the right to health, the labor rights or other significant rights.<sup>14</sup> Of course, those effects are generally side effects and states, while they are negotiating to enter into a trade agreement, want to avoid those issues but at the same time, they also want to make a deal that is interesting for their own territory and for their own people. This struggle becomes even more intense today in times of international economic crisis. Having said that, a question arises: shall a state protect its own economic interest, independently of human rights of other states, or shall a state focus on the human rights of other states and thus threaten its own economic interest?<sup>15</sup> This question has no clear answer but raises many concerns. Therefore, mechanisms of control concerning human rights impact of trade agreements on human rights have been developed. Those controls can be either *ex post* as the human rights clause that tries to act after the conclusion of an agreement (see chapter III). The controls can also be *ex ante* as the human rights impact assessment that tries to act before the conclusion of such trade agreements with a more preventive approach.<sup>16</sup>

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<sup>14</sup> Baxewanos, Fabiane; Raza, Werner (2013) : Human rights impact assessments as a new tool for development policy?, ÖFSE Working Paper, No. 37, Austrian Foundation for Development Research (ÖFSE), Vienna. <<https://www.econstor.eu/bitstream/10419/98807/1/734851294.pdf>> Accessed March 3, 2021

<sup>15</sup> Bürgi Bonanomi, Elisabeth, 2014. "EU Trade Agreements and their Impacts on Human Rights," Papers 656, *World Trade Institute*. <[http://www.wti.org/media/filer\\_public/7b/ab/7babcbd9-c7b9-48ca-b0dc-31bd513ad55b/01\\_cde\\_working\\_paper\\_buergi\\_2014.pdf](http://www.wti.org/media/filer_public/7b/ab/7babcbd9-c7b9-48ca-b0dc-31bd513ad55b/01_cde_working_paper_buergi_2014.pdf)> Accessed March 5, 2021

<sup>16</sup> Viorica Vita, "Ex ante fundamental rights conditionalities – a novel fundamental rights tool in the European Structural and Investment Funds architecture : locating it in the broader EU fundamental rights conditionality landscape" *Florence : European University Institute*, October 2014, p.19. EUI LLM thesis, Department of Law - Retrieved from Cadmus, European University Institute Research Repository. <<http://hdl.handle.net/1814/34407>> Accessed March 8, 2021

In order to try to mitigate the effects of those trade agreements, but also to answer the civil society critics, the EU has decided to conduct a so-called Trade Sustainability Impact Assessment (SIA) before the conclusion of any trade agreement. This SIA is in the line of the European sustainable development policy. Consequently, the Commission has published Handbooks and Guidelines for Trade Sustainability Impact Assessment to explain how to conduct trade SIAs and to provide a detailed methodology. The first edition was published in 2006 and set very ambitious goals with general guidelines that were not efficient because they were too complicated in practice.<sup>17</sup> In 2016, following the feedback of the first one, the Commission published a second edition. Some basic elements of methodology were not changed and the level of expectation remained high. However, it gives a more specific methodology than the first one. It also gives a more coherent approach for the selection of external consultants, time limits and feasibility of the goals. Generally, this second edition actualizes the first one with, for instance, the use of websites or other electronic tools.<sup>18</sup> We have to note that the adoption of that new edition resulted from the UN 2030 Agenda for Sustainable Development, including the Sustainable Development Goals (SDGs).<sup>19</sup>

However, even if we can see that some progress has been made, critics remain active against that type of assessment. Indeed, as an example, these trade SIAs only start after the negotiating mandate was provided. This timing related issue clashes with the independence that SIAs should have as studies that take place hand-in-hand with the negotiations.<sup>20</sup> Therefore, according to the literature, this kind of impact is biased because the assessment is not a real part of the negotiation phase but is more seen as an accessory to it. Human rights advocates argue that the current trade SIA theory and practice failed to do an adequate assessment of the real impact of the EU trade agreement on third countries' national human rights. Moreover, they also argue SIAs failed to address fundamental challenges faced by developing countries such as their “weak productive capacity”, their “vulnerability to external shocks due to limited diversification” or their “high unemployment” and “lack of infrastructure.”<sup>21</sup>

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<sup>17</sup> Joseph Francois (World Trade Institute, University of Bern and CEPR) Bernard Hoekman (EUI and CEPR) Hugo Rojas-Romagosa (World Trade Institute, University of Bern): “EU Trade Sustainability Impact Assessments: Revisiting the Consultation Process” December 2020 p.9.

<[http://respect.eui.eu/wpcontent/uploads/sites/6/2021/01/Francois\\_Hoekman\\_RojasRomagosa\\_SIA\\_Dec2820201.pdf](http://respect.eui.eu/wpcontent/uploads/sites/6/2021/01/Francois_Hoekman_RojasRomagosa_SIA_Dec2820201.pdf)> Accessed March 15, 2021

<sup>18</sup> Ibid. p. 9

<sup>19</sup> UN General Assembly, “Transforming our world : the 2030 Agenda for Sustainable Development”, 21 October 2015, A/RES/70/1. <<https://www.refworld.org/docid/57b6e3e4.html>> Accessed 23 May 2021

<sup>20</sup> European Commission – DG trade, “Handbook for trade sustainability impact assessment” - Second edition, 2016 p.8. <[https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154464.PDF](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF)> Accessed March 20, 2021

<sup>21</sup> Elisabeth Bürgi Bonanomi, Measuring Human Rights Impacts of Trade Agreements—Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with

Consequently a more complete and coherent SIA concerning human rights is today needed. Therefore, the idea of human rights impact assessment may now be heard.

Following the international community guideline, several governments launched a so-called “human right impact assessment” (HRIA). The Human Rights Council of the United Nation defined the human rights impact assessment in 2011 by saying that “The main purpose of HRIA is to identify any inconsistency between a state’s human rights obligations and other legal obligations that it has agreed to respect, for example those stemming from a trade agreement.”<sup>22</sup>In order to develop this HRIA, some guiding principles were prepared by the UN Special Rapporteur on the Right to Food named Olivier De Schutter after expert consultation. As a consequence to those process initiatives, the EU started to integrate more human rights in its SIA (Even if the first real integration of human rights into its trade SIAs was in 2009 with the so-called “new generation SIAs” but not systematically.) Those guidelines were a source of inspiration for the new edition of the 2016 handbook. Indeed, as a proof, the new version has now devoted a proper section on that topic.

According to those principles developed by the UN, the EU made a commitment in several documents. For instance, in 2011 the Commission published a joint communication to the Parliament and the Council on “Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach.”<sup>23</sup> More recently, the Commission published the EU Action Plan on “Human Rights and Democracy 2020-2024” that sets out very ambitious priorities in the field of external relations with third countries.<sup>24</sup> On 25 June 2012, the Council adopted a Strategic Framework on Human Rights and Democracy accompanied by an Action Plan, this document called for action to “incorporate human rights in all impact assessments on an on-going basis” and to develop a “methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements”. Therefore, attempts in this direction are now being made in the context of the new methodology of SIA given in the handbook second edition. However, to what extent can we say that this is sufficient? Is this new SIA in line with the UN’s HRIA? What can be improved?

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Human Rights Impact Assessment Methodology, *Journal of Human Rights Practice*, Volume 9, Issue 3, November 2017, Pages 481–503. <<https://doi.org/10.1093/jhuman/huy00>> Accessed March 30, 2021

<sup>22</sup> UN General assembly, “Report of the Special Rapporteur on the right to food, Olivier De Schutter Addendum Guiding principles on human rights impact assessments of trade and investment agreements”, 19 December 2011, A/HRC/19/59/ <[http://www.srfood.org/images/stories/pdf/officialreports/20120306\\_hria\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf)> Accessed April 1, 2021

<sup>23</sup> Ibid, p.8

<sup>24</sup> European Commission, “EU Action Plan on Human Rights and Democracy 2020-2024”, Joint communication to the European Parliament and the Council EU, Join /2020/5 final [EU Commission - COM Document],. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005>> Accessed April 1, 2021

### 2.3 Analysis of the methodology of the HRIA compared to the SIA one

Before anything, we have to highlight that the EU does not operate a clear human rights impact assessment as imagined by Olivier De Schutter when he published his guideline on the HRIA methodology. Indeed, The EU operates a so-called Sustainability Impact Assessment but what are the major differences? In this part we will see on what main points those types of assessment differ and we will assess if this difference is well justified or if the EU should consider developing its own HRIA.

First, we have to look at the basis of both HRIA and SIA. HRIAs are based on the duty of States to respect human rights obligations contrary to SIAs that are based on a general policy goal and civil society concern.<sup>25</sup> Indeed the Guideline on HRIA clearly states that HRIA aims at addressing a potential breach of international law “since States are bound by these pre-existing treaty obligations, they are prohibited from concluding any agreements that would impose on them inconsistent obligations”<sup>26</sup>. On the other hand, the SIA does not look for any breach of international obligation regarding human rights, this assessment is only an opportunity for stakeholders to share their view regarding the impact that the agreement may have on third countries to help and support trade negotiation.<sup>27</sup> Consequently, the purpose of those two mechanisms are different because at first, the SIA helps the Commission to increase the participation of stakeholders but nothing is related to the legal aspect that a trade agreement can have regarding a breach of an international duty. Since 2012, this difference has become less obvious with the appearance of the new form of trade agreement named Deep and Comprehensive Free trade Agreement (DCFTA). With that new form of trade agreement, the approach of the SIA is different: “the EU does approach FTAs as part of a constitutional framework to support democracy, political stability and respect for Human Rights.”<sup>28</sup> Therefore, we can say that it is more than just an assessment for policy concern compared to what it was. However, scholars think that it would be better to make that link between trade and human rights more explicit by using terms such as “human rights–sensitive trade” for instance.<sup>29</sup> The same issue occurs with the impact assessment. The reedition of the 2016 handbook did not change the name of

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<sup>25</sup> Guiding Principles on HRIA 2011: I (ibid, p11)

<sup>26</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter Addendum Guiding principles on human rights impact assessments of trade and investment agreements Accessed 28 May 2021, Accessed 25 May 2021

<sup>27</sup> (Ibid) Handbook 2016 p. 4

<sup>28</sup> SIA of the EU-Georgia DCFTA. p. 76.

<sup>29</sup> Elisabeth Bürgi Bonanomi, Measuring Human Rights Impacts of Trade Agreements—Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology, *Journal of Human Rights Practice*, Volume 9, Issue 3, November 2017, Pages 481–503. <<https://doi.org/10.1093/jhuman/huy00>> Accessed March 30, 2021

that assessment. This may appear as a cosmetic issue but this is maybe a reflection of the first incentive of that kind assessment. In my sense, the problem does not refer to the name but to the essence of the SIA. It is essential to remember that the EU has had an international legal obligation since the Treaty of Lisbon that states that the EU's external policy must respect the principles of the UN Charter and international law.<sup>30</sup> Therefore, this impact assessment should be considered as a mechanism to help the EU comply and to prevent it from breaching those legal requirements.<sup>31</sup> Hence, the SIA does not provide that effective legal protection for the EU.

A central question of the HRIA's and SIAs's mechanisms is to know what impacts those assessments want to assess. Scholars have related the assessment of the impact trade agreement with human rights with the so-called "legal coherence theory".<sup>32</sup> According to that theory, there are mainly two types of legal conflicts.

The first one is about texts that are "formally incoherent"; usually this is about a mistake that is obvious when rights and duties don't correspond to each other. The other type of incoherence that the assessment looks at is about the "substantive incoherence". That kind of incoherence is the most important one, indeed, it looks at the *de facto* incoherence of the text regarding several factors such as the context for instance. That legal coherence theory aims at assessing if the trade agreement is a benefit or not for the human rights cause in the partner countries.<sup>33</sup> In order to find the so-called substantive incoherence, the researchers face two main difficulties: the first one is to find the violation of human rights and the risks of future violation.

The latter one is related to the so-called "dynamic effect". Indeed, the human rights situation in a country can change from one day to another. This being said, it is complicated to capture such a situation. The Guideline principle on the HRIA states that there are "limitations of quantitative and qualitative methods in capturing dynamic effects."<sup>34</sup> In order to answer this problem, the EU states that to be the most accurate possible while starting a human rights situation in a future trade partner, "researchers must keep in mind the 'whole picture' and not only look for risks, but also for new

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<sup>30</sup> see Article 208(2) TFUE

<sup>31</sup> Lorand Bartels, Human Rights and Sustainable Development Obligations in EU Free Trade Agreements, Legal Studies research paper series, University of Cambridge, Paper No. 24/2012 September 2012. [https://www.coris.uniroma1.it/sites/default/files/Bartels-2012\\_0.pdf](https://www.coris.uniroma1.it/sites/default/files/Bartels-2012_0.pdf) Accessed 29 may 2021

<sup>32</sup> United Nation, Koskenniemi, Martti, Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" Yearbook of the International Law Commission, 2006) 13 April 2006, A/CN.4/L.682. <[https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf)> Accessed March 30, 2021.

<sup>33</sup> Guiding Principles on HRIA 2011: II. 2.1.

<sup>34</sup> Guiding Principles on HRIA 2011: IV.4.3.



opportunities that are likely to emerge.”<sup>35</sup>. The second edition of the handbook that the methodology presents requires that “the analysis should combine both quantitative and qualitative approaches covering potential impacts”<sup>36</sup>. The whole key in that kind of assessment is the causality of the trade assessment and the deterioration/amelioration of the human rights situation in a country. This task is not well assessed by the SIA especially because there are no exact findings but only simple estimation about an element of a more broader economic policy. Scholars think that this “global thinking” is lacking in the EU trade agreement compared to the HRIA proposed by the UN. Indeed, the SIA does not provide an in-depth analysis of the global impact that the trade agreement could have. Therefore, the methodology of the SIA turns out to be unable to work in practice. This may be explained by several factors. The absence of quantification is one of them.<sup>37</sup> Any trade agreement will impact third countries’ citizen’s rights because they are related to an economic level in some ways. The effects of these impacts are “heterogenous and conditional” following the citizens. Consequently, some groups of the population will see their human rights affected at different levels. Thus, the important question is to know how much the agreement will affect those rights and not if the population will be affected. There is a clear need for a quantitative assessment instead of a qualitative one that just establishes a link between the trade agreement and the human rights that may be impacted. The present analysis is only speculative and lacks analysis. Indeed, without an evidence-based analysis, the purpose of conducting an analysis seems useless. The Guideline on the analysis of human rights’ impacts published by DG trade of 2016 does not give us a real explanation on how this assessment should be conducted in practice. They request to assess the impact of the trade agreement with a baseline scenario, however, there are so many factors to take into account that are not actually taken into consideration that the scenarios imagined in the SIA are unlikely to happen as planned.<sup>38</sup> This is for instance the case of the EU-Georgia DCFTA that assumes that a “potential reduction in government revenue due to a loss in tariff revenue will be compensated by increased income taxes.”<sup>39</sup>

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<sup>35</sup> E.g: European Commission – DG trade, “Handbook for trade sustainability impact assessment” - first edition, 2006 p.16 [EU Commission - COM Document], <[https://www.wto.org/english/forums\\_e/public\\_forum\\_e/sia\\_handbook.pdf](https://www.wto.org/english/forums_e/public_forum_e/sia_handbook.pdf)> Accessed March 20, 2021

<sup>36</sup> European Commission – DG trade, “Handbook for trade sustainability impact assessment” - Second edition, 2016 p.15 [EU Commission - COM Document], <[https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154464.PDF](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF)> Accessed March 20, 2021

<sup>37</sup> EU Trade Sustainability Impact Assessments: Revisiting the Consultation Process\* Joseph Francois (World Trade Institute, University of Bern and CEPR) Bernard Hoekman (EUI and CEPR) Hugo Rojas-Romagosa (World Trade Institute, University of Bern) December 2020 p.27.  
<[http://respect.eui.eu/wpcontent/uploads/sites/6/2021/01/Francois\\_Hoekman\\_RojasRomagosa\\_SIA\\_Dec2820201.pdf](http://respect.eui.eu/wpcontent/uploads/sites/6/2021/01/Francois_Hoekman_RojasRomagosa_SIA_Dec2820201.pdf)> Accessed May 29, 2021

<sup>38</sup> European Commission – DG trade, “Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives” p.9. [EU Commission - COM Document]. [https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf) Accessed April 13, 2021

<sup>39</sup> SIA of the EU-Georgia DCFTA: p. 77.

This may be true but the problem is that there is no assessment of the overall taxes system in the country and an overall assessment about the population. Therefore, an increase of taxes can be a very problematic issue for some citizens that can threaten some basic human rights such as the right to food for instance. Thus, speculations are not really efficient. Therefore, a more precise assessment of an overall situation in a country would be preferable.

In my sense, the analysis would require more than the “general *equilibrium* effects” provided by the SIA. Indeed, it would also require a detailed micro-economic analysis of the households and their economic, social and legal environment. Consequently, the HRIA could have been better implemented on an EU level because it does provide more speculation than an assessment.

Another question concerning the difference between the HRIA and the SIA relates to the selection of the impact of the trade agreement that should be assessed. According to the general impact assessment theory, the “impact assessments are meant to contribute to identifying ‘most optimal regulatory options.’”<sup>40</sup> It is often not that easy for researchers to identify all the options that are available. Consequently, in 2009 the Commission explicitly said that in order to have a complete impact assessment we need to consider “a wide but credible range of options”. The overall purpose is to force the researchers to think “out of the box.”<sup>41</sup> This wording hasn't exactly been used by the HRIA guideline but its spirit is still present. Indeed, to establish options for human rights while negotiating a trade agreement, all the possible outcomes need to be examined.<sup>42</sup> On the European level, the SIA faces issues concerning that point. Indeed, in practice while assessing the possible outcomes of a trade agreement on human rights, the researchers do not look “out of the box” and examine options that are very close to each other. For instance, in the same EU-Georgia negotiation of DCFTA, only two scenarios were studied: “the impact of the DCFTA is analyzed by comparing a specified liberalization/integration scenario encompassing the DCFTA, with a baseline scenario that assumes no DCFTA in place.”<sup>43</sup> In other words, the assessment was too black or white.

Elisabeth Bürgi Bonanomi deplores that poor assessment because, according to her, it does not explore the full range of possible scenarios that could impact negatively the human rights in Georgia for instance: “Hence, no further scenarios (including scenarios of partial trade integration) are assessed for whether they would result in less negative human rights”. The same methodology applies

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<sup>40</sup> Elisabeth Bürgi Bonanomi, “Sustainable Development in International Law Making, History, Concept, Institutions, Processes, The example of trade in agriculture”, 2015, Edward Elgar publishing.

<sup>41</sup> European Commission, “Impact Assessment Guidelines”, January 15, 2009 p. 29. [EU Commission - COM Document]. [https://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf) Accessed on Avril 7, 2021

<sup>42</sup> UN Guiding Principles on HRIA 2011: II.2.1.

<sup>43</sup> SIA of the EU-Georgia DCFTA: p. 13.

for the second edition of the handbook that looks at two options: either the agreement is implemented or not. Therefore, the HRIA could, once again, be better implemented at the EU level.

Another important difference between HRIA and SIA methodology is the choice of the focus of the assessment. Human rights are universal and therefore shall be respected equally on both sides of the trade agreement. HRIAs aim to assess the impacts a trade agreement will have both at home and abroad.<sup>44</sup> The SIA has the same purpose indeed, the handbook states that “impacts on third, i.e. non-EU, countries should be analyzed together with those in the EU.”<sup>45</sup> However, in practice there are some differences. This is for instance the case of trade agreements such as the EU–ACP EPAs that focuses on the other party and not on the EU. One can argue that human rights in Europe are generally more respected than in ACPs countries. However, if the procedure of the SIA is not respected by the EU and does not focus on an overall impact assessment on both countries, the aim of the SIA to respond adequately to human rights requirements on both sides is not respected. This is for instance the case of the same DCFTA EU-Georgia that includes general reflections on the EU, but that mainly focuses on Georgia. That problem is still the same with the 2016 Handbook. Indeed, in the very new EU-Myanmar IPA, there is an overall and well explained situation of human rights in the SIA but nothing similar for the EU.<sup>46</sup> The HRIA insists on assessing the two parties of the agreement and not only one. On that very specific point, the SIA and the HRIA differ.

This brings us to the question of prioritization of human rights. What human right should the assessment concentrate on? Regarding the difficult question of whether we need to prioritize human rights or not, both HRIAs and SIAs methodology states that every assessment should be limited to some points due to limited time and resources. The methodology gives advice on how to select priorities.

Following the HRIA’s methodology, if possible, the analysis of the impact should take into account all the costs and benefits of the trade agreement in both countries on the ground that “all human rights are universal, indivisible and interdependent and interrelated.”<sup>47</sup> However, in practice this ideal is hard to achieve. Indeed, following the methodology, the analysis should be proportional to the financial

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<sup>44</sup> UN Guiding Principles on HRIA: II.2.6

<sup>45</sup> E.g: European Commission – DG trade, “Handbook for trade sustainability impact assessment” - first edition, 2006 p.15 [EU Commission - COM Document],. <[https://www.wto.org/english/forums\\_e/public\\_forum\\_e/sia\\_handbook.pdf](https://www.wto.org/english/forums_e/public_forum_e/sia_handbook.pdf)> Accessed March 20, 2021

<sup>46</sup> Sustainability Impact Assessment (SIA) in support of an investment protection agreement between the European Union and the Republic of the Union of Myanmar, June 2016. <<https://op.europa.eu/en/publication-detail/-/publication/e9bc7449-bdde-11e6-a237-01aa75ed71a1>> Accessed 21 May, 2021

<sup>47</sup> Art 5. UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23. <https://www.refworld.org/docid/3ae6b39ec.html> Accessed 24 May 2021

and time resources; therefore, it should focus on the point where human rights are the most threatened. Following the results, the researchers should take into account which element of the trade agreement is the most likely to negatively impact human rights and to whom precisely.

The same idea also drives the SIA's methodology. The 2006 SIA's handbook states that every analysis should be "adapted to the likely significance of the trade measures"<sup>48</sup>. Later on, the handbook gives us advice to assess the significance of a measure. Indeed, a measure is considered significant if it has a sufficient "magnitude" and if it is "irreversible"<sup>49</sup>. These requirements have led to difficult situations that have left sectors without proper assessment. This is for instance the case of the smallholder farming sector in the EU-ACP EPAs. This essential right of food assessment may have been forgotten in those agreements. Therefore, this makes it hard to judge and prioritize human rights by only looking at their "significance" as the SIA handbook advises us to do. In the 2016 guideline, the problem remains the same with a differentiation between "direct vs indirect and Major vs minor impact on human rights". Should a minor impact on human rights resulting from an EU trade agreement be accepted, or worse, shouldn't it be assessed due to limited resources?<sup>50</sup>

On that point, both the SIA and the HRIA have been criticized. Indeed, the aim of those assessments is to be more efficient than specific. However, without an in-depth analysis it is hard to obtain an efficient assessment.

## 2.4 Remaining issues with the current European SIA

Now that we have seen that the SIA could have better implemented the HRIA guideline, we have to look at the current issues concerning the European SIA.

The most problematic issue remains the actual practice of the SIA. According to the Better Regulation Guidelines, "an impact assessment should be comprehensive, proportionate, evidence-based, open to stakeholders views, unbiased, (...) transparent and of high quality"<sup>51</sup>. The independence of consultants is a key element of the SIA. Indeed, the purpose is to be the most objective possible. However, we

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<sup>48</sup> Trade SIA Handbook 2006: p. 16. European Commission – DG trade, "Handbook for trade sustainability impact assessment" - first edition, 2006 p.16 [EU Commission - COM Document]. <[https://www.wto.org/english/forums\\_e/public\\_forum\\_e/sia\\_handbook.pdf](https://www.wto.org/english/forums_e/public_forum_e/sia_handbook.pdf)> Accessed March 20, 2021

<sup>49</sup> European Commission – DG trade, "Handbook for trade sustainability impact assessment" - first edition, 2006 p.32 [EU Commission - COM Document]. <[https://www.wto.org/english/forums\\_e/public\\_forum\\_e/sia\\_handbook.pdf](https://www.wto.org/english/forums_e/public_forum_e/sia_handbook.pdf)> Accessed March 20, 2021

<sup>50</sup> European Commission – DG trade, "Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives" p.5. [EU Commission - COM Document]. [https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf) Accessed April 13, 2021

<sup>51</sup> European Commission, "Better Regulation Guidelines", 7 July 2017, p.6 . [EU Commission - COM Document]. <https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines.pdf> Accessed April 14, 2021

can see that those principles are not always in line with real life practice. In 2011, Ergon Associates published a study that stated that the quality of engagement, particularly with social partners, needed to be improved in trade SIAs because “many contractors and stakeholders believed that Brussels consultation meetings had become stale, partly as a result of dwindling stakeholder interest.”<sup>52</sup> Therefore, the transparency of the SIA either for the stakeholders or for the public opinion is a key element that needs to be improved. The new guideline and the reedition of the handbook try to improve that point. However, some problems of transparency are still ongoing, for instance, the SIA for the EU-China CIA that has been in negotiation since 2014 was only published to everyone in 2017 (see chapter IV). A solution could be a public access to every phase of the negotiation and to the finding of the ongoing SIA at the same time.

The use of the SIA needs to be understood as a tool in order to make good decisions during the trade agreement negotiation process. However, some concerns arise following the period of time between the SIA and the real negotiation of the trade agreement. Indeed, in order to be effective, the SIA needs to be immediately fed into the trade negotiations. The SIA handbook clearly states that the Commission has “a commitment to do so” and “that it is at the core of the Trade SIA”<sup>53</sup>. In practice, this integration of the SIA to trade negotiation is usually limited. Some scholars think that this assessment is biased because they found out that some studies were finalized in the last phase of negotiations.<sup>54</sup> Therefore, it is hard to really understand the purpose of assessing an impact if the results are not taken into account during the negotiations. This is what happened in the SIA of the Euro-Mediterranean FTA for instance.

Moreover, even if an impact assessment is *ex ante* it doesn't necessarily mean that the work of assessing the impact of the agreement on the partners countries is over when the assessment is done. Indeed, according to the general impact assessment theory, even after the trade agreement has entered into force, it should be possible to declare it void or to guarantee a right to denunciate its application. In the EU, the idea of changing the agreement *ex post* is not possible yet following the SIA methodology. The handbook prefers to “list the recommendation on how the agreement may be

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<sup>52</sup> Ergon Associates, “Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms”, Final Report, Executive Summary (Ergon, 2011), p. 6. [https://circabc.europa.eu/sd/a/d509f2ab-5fd9-4585-be9e-9ebdae2a13bf/LF\\_20101015\\_pres.pdf](https://circabc.europa.eu/sd/a/d509f2ab-5fd9-4585-be9e-9ebdae2a13bf/LF_20101015_pres.pdf) Accessed April 16, 2021

<sup>53</sup> Trade SIA Handbook 2006, p. 13 European Commission – DG trade, “Handbook for trade sustainability impact assessment” - first edition, 2006 p.13 [EU Commission - COM Document], <[https://www.wto.org/english/forums\\_e/public\\_forum\\_e/sia\\_handbook.pdf](https://www.wto.org/english/forums_e/public_forum_e/sia_handbook.pdf)> Accessed March 20, 2021

<sup>54</sup> George Clive and Kirkpatrick Colin, “Sustainability Impact Assessment of Trade Agreements: from public dialogue to international governance”; *Journal of Environmental Assessment Policy and Management* Vol. 10, No. 1 (2008), p. 67-89, <<https://www.worldscientific.com/doi/10.1142/S1464333208002956>> Accessed 27 March 2021

applied in practice”<sup>55</sup> or “to present recommendations for measures to be addressed in the trade policy”<sup>56</sup>. This is a bit of a non-sense because the guideline does not control how an agreement is genuinely applied. However, the EU has improved on that point with the new chapters of the new generation of trade agreements. Indeed, the monitoring of sustainability impacts or civil society dialogue mechanisms are more present in these more recent agreements.<sup>57</sup> This is for instance the case of the EU–Chile Association Agreement. Those mechanisms are a benefit concerning the *ex post* monitoring of the *ex ante* assessment, however, it still does not allow to amend the agreement in case of a big change of the situation that has been previously assessed or in case of a non-respect of the list of recommendations.

Eventually, on a more positive note, we also have to say that the revised version of the SIA handbook has been able to address the critics saying that the consultations of stakeholders were not enough taken into consideration. Indeed, a whole chapter on that topic has been added.

## 2.5 Conclusion

This chapter tried to conduct an analysis of the present SIAs of the new trade agreement in relation to human rights. There are multiple ways of improving that mechanism especially in regard to the HRIA methodology. Indeed, the current European methodology needs to take into account a more quantitative and broader assessment in order to capture the reality of the impact of its trade agreement with third countries in practice. Regardless of the HRIA methodology, there are still some concerns that the SIA has to face, especially concerning the independence, the transparency, the timing and the monitoring of those assessments. If no changes are conducted, the assessment will turn out useless because it is inefficient.

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<sup>55</sup> Ibid p.16

<sup>56</sup> European Commission – DG trade, “Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives” p.12. [EU Commission - COM Document]. [https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf) Accessed April 13, 2021

<sup>57</sup> Ergon Associates, “Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms”, Final Report, Executive Summary (Ergon, 2011), p. 17. [https://circabc.europa.eu/sd/a/d509f2ab-5fd9-4585-be9e-9ebdae2a13bf/LF\\_20101015\\_pres.pdf](https://circabc.europa.eu/sd/a/d509f2ab-5fd9-4585-be9e-9ebdae2a13bf/LF_20101015_pres.pdf) Accessed April 16, 2021

# CHAPTER III - THE HUMAN RIGHT CLAUSE

## 3.1 Chapter overview

The EU has different approaches to defend and enforce human rights through its trade policy. The use of conditionality-based instruments is one of them. The main instrument based on that principle of conditionality is the human rights clause in the EU's international trade agreements. In this chapter, we will try to understand the human rights conditionality clause in a more detailed way. After a brief overview of the background and its legal basis, we will try to understand the core principle of human rights conditionality on which the human rights clause is based. After that, we will see that this system is far from being perfect. Indeed, we will look at the main default of that clause (for a question of format, we will not be able to study all of them). In a last part, we will try to understand the reasons why the practical application of that clause in real life agreement does not meet the expectations of the theory of the human rights clause.

## 3.2 Background and legal basis

In order to link human rights with trade, the EU (and other important trade powers, such as the US and Canada) have developed the “essential elements” human rights clause that enables one party to an agreement to take measures if the other party is found in a situation of breach of human rights. This mechanism is in line with the purpose of the EU's external actions stated in the Treaties but not only. Indeed, this mechanism is also in line with the EU's official policy on the matter that the Council of the European Union and the Commission developed through the “Reflection paper on Political Clauses in agreements with third countries”<sup>58</sup>. This document was requested by the Committee of Permanent Representatives (COREPER) in 2009 and states that political clauses should be systematically included in agreements with third countries with the aim of promoting the EU's values.

The first reference to human rights in an EU agreement was in Article 5 of the fourth Lomé Convention, concluded in December 1989<sup>59</sup>. This clause underlined the importance of the respect of

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<sup>58</sup> Note from the Commission and the General Secretariat of the Council to Delegations: "Reflection paper on Political Clauses in agreements with third countries" (doc. 7008/09 of 27 February 2009 + COR 1 of 29 May 2009) [EU Commission - COM Document].

<sup>59</sup> Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, Document 21991A0817(01)

human rights to achieve a sustainable development. However, this article did not provide any legal basis that allowed the suspension of the agreement in case of breach of the article. The EU had to wait until 1992 to introduce human rights as an “essential element” with the agreements with Brazil, the Andean Pact countries, the Baltic States and Albania. For the first time, this agreement makes human rights the subject of common interest by emphasizing the dialogue on it for the two parties. Moreover, if an offense concerning human rights is established, it enables the parties, when necessary, to take restrictive measures in proportion to the gravity of the breach. This first agreement states that the aim is to keep a dialogue going, and that it is “crucial that the population should not be penalized for the behavior of its government.”<sup>60</sup>

This clause finds its legal basis in international law. Indeed, it is based on the 1969 Vienna Convention on the law of treaties,<sup>61</sup> more specifically Article 60, named “Termination or suspension of the operation of a treaty as a consequence of its breach”, which states that: “1. *A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. [...] 3. A material breach of a treaty, for the purposes of this article, consists in: [...] (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.*” The clause is usually nearly formulated the same way in every case even if some agreements make reference to the Universal Human Rights Declaration and others do not.

### **3.3 The principle of conditionality in the EU trade relations**

The European human rights clause aims at positively affecting the respect of human rights outside the EU. This clause is based on the “conditionality principle” which is an old policy principle that has been used for other purposes than the promotion of human rights outside of the EU territory. Indeed, the basic principles of the EU are in a way, based on that conditionality. This is for instance the case of the Stabilization and Association Agreements under the Stabilization and Association Process which is expressed in the Copenhagen Criteria.<sup>62</sup> This example shows us that this principle is not necessarily or only used in relation to trade agreements. However, this paper is going to focus

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<sup>60</sup> Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (COM(95)0216 - C4-0197/95) ; OJ C 320, 28.10.1996, p. 261 [EU Commission - COM Document]. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51996IP0212> Accessed Avril 25, 2021

<sup>61</sup> Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331)

<sup>62</sup> Bernard Steunenbergh and Antoaneta Dimitrova, “Compliance in the EU Enlargement Process: The Limits of Conditionality” (2007); 11 *European Integration online Papers*, 3. <<http://eiop.or.at/eiop/texte/2007-005a.htm>> Accessed 27 Avril 2021.



its analysis on the human rights part of that principle in relation to trade agreements with third countries.

This conditionality principle is part of the *ex post* control that the EU exercises. Indeed, the human rights clause tries to act after the conclusion of a trade agreement and not before (see *ex ante* control chapter II)<sup>63</sup>.

Conditionality is based on a very simple idea that scholars simplified as either the ‘carrots’, when the party of a contract has incentives to behave well in order to get some rewards such as financial aid or in our case EU market access. On the other hand, it can also be based on the ‘sticks’ if the contracting party is punished because of its bad behavior. In our case, withdrawal of the EU internal market access would be the sanction.<sup>64</sup> Generally, the EU uses “a positive, incentive-based form of conditionality”, which is considered “more legitimate and potentially more effective”<sup>65</sup>

This system of conditionality appears in several forms of EU trade agreements such as the bilateral free trade agreement (FTA), the Economic Partnership Agreement (EPA) but not only. Other instruments on financial and technical cooperation, such as the European Neighborhood and Partnership Instrument and the Development Cooperation Instrument, use conditionality clauses.<sup>66</sup> This is also the case of the GSP and GSP+ that give preferential benefits to countries that fulfill some requirements. Those benefits can be withdrawn in case of non-respect of the contract. From an external point of view, there are numerous examples where sanctions have been imposed such as on Fiji, the Central African Republic, Guinea-Bissau, Mauritania, Guinea and Madagascar in response to *coups d'état*.<sup>67</sup> Moreover, those economic sanctions in relation to trade agreements can be completed with restrictive measures pursuant to Article 215 TFEU if rights have been violated.<sup>68</sup> In

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<sup>63</sup> Elena Fierro, “The EU's Approach to Human Rights Conditionality in Practice”, (Leiden, Nederland: Brill | Nijhoff, 01 Dec. 2002)p.175,<https://brill.com/view/title/8995> .Accessed May 25, 2021

Frank Schimmelfennig, “Europeanization Beyond Europe” *Living Reviews in European Governance* 7(1), January 2012, <http://www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/download/lreg-2012-1Color.pdf>.Accessed April, 27 2021.

<sup>64</sup> Schimmelfennig F. (2005) “The EU: Promoting Liberal-Democracy through Membership Conditionality”. In: Flockhart T. (eds) *Socializing Democratic Norms*. Palgrave Macmillan, London. [https://doi.org/10.1057/9780230523067\\_6](https://doi.org/10.1057/9780230523067_6) Accessed April 27 2021

<sup>65</sup> K.E SMITH, (2006), “Speaking with One Voice? European Union Coordination on Human Rights Issues at the United Nations”. *JCMS: Journal of Common Market Studies*, 44: 113-137.<<https://doi.org/10.1111/j.1468-5965.2006.00616.x>> Accessed April 27, 2021

<sup>66</sup> Directorate-General for External Policies of the Union/Lorand Bartels, “The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements” (February 2014) EXPO/B/DROI/2012-09, 8. [EU Commission - COM Document]. < <https://www.europarl.europa.eu/cmsdata/86031/Study.pdf>> Accessed April, 27 2021

<sup>67</sup> Directorate-General/Bartels, “The Application of Human Rights Conditionality” (n 18) 7, 9–10; Clara Portela, *European Union Sanctions and Foreign Policy* (Routledge 2010) 127, 148

<sup>68</sup> Marco Gestri, ‘Sanctions Imposed by the European Union: Legal and Institutional Aspects’ in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016) 70, 75. <https://www.iai.it/en/publicazioni/coercive-diplomacy-sanctions-and-international-law-0> Accessed April, 27 2021

that sense, the EU imposed sanctions on China after the Tiananmen Square incidents and against individuals in Iran and Ukraine. Sanctions are generally imposed in response to human rights violations but not necessarily.<sup>69</sup> In some cases, sanctions can be the termination of any preferential relation with the EU market. The European Council highlighted the fact that such restrictive measures shall be in respect of international law. Moreover, the measures imposed must always be proportionate to their objective.<sup>70</sup> Therefore, questions arise; what is proportionate for a human rights sanction and who is really going to be impacted by the sanction? Does the conditionality principle aim at correcting all wrong behaviors from all of our third countries' trade partners or does this clause just try to do its best in order to mitigate the consequences of human rights litigation?

Ionel Zamfir explained that the EU human rights clause is not a requisite to enter a trade agreement with the EU.<sup>71</sup> Indeed, the practice shows that some trade partners of the EU do not respect basic human rights and still have trade agreements, sometimes preferential ones, with the EU. According to him, the role of that clause is usually either to postpone the adoption of a free trade agreement after the conclusion of negotiations or to give sanctions to the other party of the agreement that violates human rights. Therefore, the role of that conditionality and especially that clause is not always efficient in practice because of problems of application or because of problems of perception of the role of that clause. The human rights clause is stricter in the words of the agreement than in real life. Indeed, it often happens that the human rights clause is not activated or that sanctions are irrelevant. This is for instance the case of the EU-Burundi trade agreement. From 2015 to 2017, Burundi encountered a political crisis where human rights violations were reported. Consequently, the EU instituted sanctions against this country. Those sanctions were targeted sanctions against individuals and a suspension of budget aid. Those sanctions were irrelevant, indeed the Council adopted travel restrictions and an asset freeze measure in respect of only four persons. However, the human rights clause as it was stated in the trade agreement was not activated, thus there was no “termination or suspension of the operation of a treaty as a consequence of its breach”. Consequently, what is the

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<sup>69</sup> European Commission's website, 'European Union Restrictive measures (sanctions) in force'. [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en) Accessed 27 Avril 2021.

<sup>70</sup> European Council, "Guidelines on implementation and evaluation of restrictive measures (sanctions)" (n 34) para 9. From the General Secretariat of the Council to the Permanent Representatives Committee/Council Brussels, 4 May 2018, 5664/1 [EU Document]. <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> Accessed 27 Avril 2021

<sup>71</sup> Ionel Zamfir, "Human rights in EU trade agreements: The human rights clause and its application"; European Parliamentary Research Service', July 2019, PE 637.975. <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS\\_BRI\(2019\)637975\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf)> Accessed 29 Avril 2021.

benefit of such a clause if it is almost never activated? Scholars made some criticisms about this flawed system and argued that the system needed to be revised in order to line up the human rights values of the EU with its trade agreements.

### 3.4 Critics and application of the human rights clause

The factual implementation of the EU human rights clause is often criticized on several grounds. Indeed, does the EU really activate this conditionality when it is needed? If not, what are the reasons for not doing it? How can it be upgraded?

In the last decade, the human rights clause has only been activated in a relatively small number of cases compared to the potential number of cases in which the clause could have been activated.<sup>72</sup> In other words, in several cases of EU trade agreements where human rights were violated, it has been reported that the EU did not often really act on the basis of that clause. This problem has raised several concerns on the relevance of that clause. It has been noted that after a suspension of trade benefits, the partner country wanted to have them again under some conditions, including some linked to human rights.<sup>73</sup> Therefore, if this clause is never activated, the partner country may never make an effort to improve human rights in its territory because it will never see the purpose. This issue also impacts the credibility of the power of action of the EU. The European Parliament highlighted this problem in a resolution that was considering that the non-activation of the clause could threaten the international credibility of the EU. This paper stated that the “failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union’s human rights strategy, sanctions policy and credibility”.<sup>74</sup>

Another issue of the human rights clause is linked to the consistency of its application that differs from country to country.<sup>75</sup> Scholars like Zwagemakers have raised concern about a double standard of application of the clause. Indeed, it seems that the EU would have less problems activating that

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<sup>72</sup> Directorate-General/Bartels, ‘The European Parliament’s’ (n 23)

<sup>73</sup> BARTELS, L, “The Application of Human Rights Conditionality in the EU’s Trade Agreements and Other Trade Arrangements with Third Countries European Parliament” Directorate for External Relations, 2008. [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA\\_ET\(2008\)406991\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf) Accessed 28 April 2021

<sup>74</sup> European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU’s actions and policies in the area of human rights (2008/2031(INI)), para 21. <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0309+0+DOC+XML+V0//EN&language=EN> Accessed 30 April 2021

<sup>75</sup> FIERRO, E., “European Union’s Approach to Human Rights Conditionality in Practice”, Martinus Nijhoff, 2003, p. 211. Elena Fierro, “The EU’s Approach to Human Rights Conditionality in Practice”, (Martinus Nijhoff (Brill Academic Publishers) *International Studies in Human Rights*, Vol.76, 2003 p.211. <https://brill.com/view/title/8995> Accessed May 25, 2021.

clause with countries that have less international power than others. Studies show that the clause was activated against countries that are part of the ACP Group of States.<sup>76</sup> Some other cases that were happening in other countries were sometimes described by Døhlie Saltnes as “non-case” but had the same human rights concerns as the ones in the ACP. The European Parliament has criticized this double standard of concern regarding human rights. Indeed, there should not be any hierarchy in a human rights protection policy in order to remain credible on the international scene.<sup>77</sup> This hierarchy in human rights is also criticized concerning the *ex-ante* control (see chapter II).

Moreover, the use of that clause is not consistent with the purpose of protection of human rights but more with a change in the political situation of the partner country. In the 23 initiations of activation of that clause, 15 cases were related to political unrest such as *coup d'état*, flawed elections and other rule of law concerns (as of 2019).<sup>78</sup> Therefore, in its application, the only human rights concern seems to be insufficient to the activation. The European parliament has also criticized the selection of human rights related issues that are the basis for the activation of the clause. Indeed, violations of other rights than major political change like women's rights, minority rights, LGBT+ rights and children's rights, do not seem sufficient to trigger the activation either. That selection is of course contrary to the goal set up in the EU Action Plan on Human Rights and Democracy 2020-2024 where it is stated that “No one should be left behind, no human right ignored”.

This inconsistency in application may be explained by the historical difference within the EU Member States concerning their view of human rights priorities. Indeed, some eastern European countries with a communist tradition don't have the same focus on human rights as countries with liberal democratic roots. This could be an explanation to the “disproportionate focus on civil and political rights, while socio-economic rights are given less attention”.<sup>79</sup> In addition, some Member States have different priorities concerning human rights following a special historical relationship (e.g: former colonies). That special link may prevent them from acting by wanting to protect them in order to keep a good term relationship. This is an explanation for the difference of EU strategies and governance towards

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<sup>76</sup>Directorate-General/Bartels, ‘The European Parliament's Role’ (n 23) 12.

<sup>77</sup> European Parliament Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights P6\_TA(2008)0405, para 21.

<sup>78</sup>C. Prickartz, I. Staudinger, ‘Policy vs practice: The use, implementation and enforcement of human rights clauses in the European Union's international trade agreements’ [2019] 3(1): 2. *Europe and the World: A law review* [23]. <https://doi.org/10.14324/111.444.ewlj.2019.12> Accessed 26 May 2021

<sup>79</sup> Alexandra GATTO, “The Integration of Social Rights Concerns in the External Relations of the European Union”, in Grainne DE BURCA (ed), BRUNO DE WITTE (ed), *Social Rights in Europe*, New York, Oxford University Press, 2005, 339-369 Retrieved from Cadmus, *European University Institute Research Repositor*. <http://hdl.handle.net/1814/4196> Accessed May 25, 2021.

other regions of the world that can “vary from ‘Realpolitik’ towards Russia, to ‘imperialism’ towards Kosovo and “status quo player” towards North Africa”<sup>80</sup>

This explains but doesn't justify the incoherent application of the clause. Therefore, in order to answer those critics, we need to look at the recent development of the so-called “value-based” policy of the EU: the new “Trade and Sustainable Development” chapters (TSD). By using the recommendation made on that instrument that is not primarily focused on human rights, there is a real solution to upgrade or even substitute the present human rights clause.

Those TSD chapters try to link environment and labour values in the newest FTAs (The EU-Korea was the first FTA to have this chapter in 2010). Gracia Marín Durán defined this chapter as being the new effort of the EU to develop a “distinct promotional model for regulation trade-environment and trade labour linkage in free trade agreements.”<sup>81</sup> The human rights clause and the TSD chapters are similar in some ways, especially regarding the dispute settlement methods on trade commitment because in both cases the dispute is managed by independent experts that have to find the compatibility of the infringement with the European Treaty in question.<sup>82</sup> Like the human rights clause, the TSD chapters are subject to criticism. Indeed, some scholars and the European Parliament think that this type of chapter does not meet the first expectation. More especially, they talk about a so-called “compliance gap” between the purpose of the TSD chapters and their practice. They point out that this promotional approach lacks effective dispute settlement resolution and that a sanction-based approach should be used like it is the case in the Montreal Convention for instance.<sup>83</sup> In that Convention, if a member states fails to comply, the other party of the convention can collectively decide to impose trade sanctions.<sup>84</sup>

As a result of those criticisms, the European Commission published a non-paper in July 2017 in order to propose a revised form of the TSD chapters with, for instance, a new model. Two main points have

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<sup>80</sup> Nathalie Tocci (ed), *The European Union as a Normative Foreign Policy Actor* (CEPS Working Document 281 2008) <http://aei.pitt.edu/7582/1/Wd281.pdf> Accessed May 25, 2021

<sup>81</sup> Marin Duran, G; (2020) “Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues” *Common Market Law Review*, 57 (4) pp. 1031-1068 <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020715>. Accessed May 25, 2021

<sup>82</sup> Marco Bronckers, Giovanni Gruni, Retooling the Sustainability Standards in EU Free Trade Agreements, *Journal of International Economic Law*, Volume 24, Issue 1, March 2021, Pages 25–51, <https://doi.org/10.1093/jiel/jgab007> Accessed March 27, 2021

<sup>83</sup> Montreal Protocol, Annex II: Non-compliance procedure (1998); Annex V: Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol

<sup>84</sup> Anna Huggins, ‘Administrative Procedures and Rule of Law Values in the Montreal Compliance System’, in Christina Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge: Cambridge University Press, 2019) 339–63

been raised in that non-paper. First, the Commission does not give any empirical analysis of the situation.<sup>85</sup> It is therefore hard to have an informed analysis of the situation. The second point is that the non-paper focuses on the situation of the trade partner but not enough on the situation of the EU member states. Therefore, the very first principle of bilaterality of the agreement is biased (see chapter II). We can clearly see that the human rights clause raises the same issues. Those recommendations should also be applied in the human rights clause.

Following the publication of this non-paper, this chapter was activated recently in 2018 in the EU-Korea FTA following the incapacity of Korea to prove “sustained and continuous efforts to ratify 4/8 fundamental ILO conventions.”. This recent activation could maybe be seen as a new form of safeguard regarding labour standards if the criticism concerning dispute settlement and enforcement are taken into account. This also proves that the monitoring system may be more effective than in the human rights clauses. Indeed, this chapter is monitored by a variety of organs established by the agreement. The bilateral committee is one of them and has a broad mandate to discuss all the sustainable-related issues. Knowing that human rights are in a sense a sustainable issue,<sup>86</sup> TSD chapters' organs have a mandate to manage human rights-related issues that could/should also have been managed by the human rights clause.<sup>87</sup> Consequently, TSD chapters can be seen at least as a “safety net” if the human rights clause is well applied in practice. At most, they can also be seen as a double-safeguard for the human rights protection that could turn out very useful if the dispute settlement resolution mechanism is upgraded in the near future as previously discussed.

### 3.5 Conclusion

According to the above-mentioned arguments, the *ex-post* control mechanism of the human rights clause based on conditionality is flawed. Indeed, we have seen that the main problem concerns the activation of the human rights conditionality. Critics have been heard by the EU therefore it has been agreed to find a new way of having a more consistent action on human rights. In the EU Strategic Framework and Action Plan on Human Rights and Democracy from 2012, the Council committed

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<sup>85</sup> European Commission, Non-Paper on Trade and Sustainable Development Chapters (TSD) in EU Free Trade Agreements (FTAs), 11 Jul. 2017 [2017 Commission Non-Paper], at 5-9. Accessed 23 May 2021  
[http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf)

<sup>86</sup> UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html> [accessed 31 May 2021]

<sup>87</sup> L. Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements, Legal Studies research paper series” University of Cambridge, Paper No. 24/2012 September 2012.  
<[https://www.coris.uniroma1.it/sites/default/files/Bartels-2012\\_0.pdf](https://www.coris.uniroma1.it/sites/default/files/Bartels-2012_0.pdf)> Accessed May 29, 2021

itself to promoting human rights “in all areas of its external action without exception”. In 2015, the Council adopted a new action plan and added a part to “foster better coherence and consistency with trade and investment policy”. However, the solution to have a more effective safeguard of human rights might be elsewhere than in the human clause. Indeed, the recent TSD chapters and the organs that these chapters establish to monitor sustainable issues may permit a more effective enforcement of the human rights obligation than the EU has toward third countries.

# CHAPTER IV - THE CASE OF THE EU-CHINA COMPREHENSIVE AGREEMENT ON INVESTMENT

## 4.1 Chapter overview

This final analytical chapter will provide an applied illustration of a real European trade agreement negotiation. Indeed, looking at a real case will help us to understand what the issues in the trade agreement between the EU and a third country are and how they can be solved, or at least improved. By scrutinizing the negotiation and agreement, we will see the practical consequences of the principles brought in this thesis, respectively the human rights clause and the Sustainability impact assessment.

We will focus our case study on the new EU-China Comprehensive Agreement on Investment that was concluded — in principle — on 30th December 2020 after seven years of negotiation.<sup>88</sup> Supposedly, China has committed to open market access for EU investors. China is also making commitments to ensure an improvement relative to human rights. For instance, this is the first time that China has agreed to ambitious provisions against forced labor and on the ratification of the relevant ILO fundamental Conventions.<sup>89</sup> However, this agreement has raised some concerns in civil society but also in Brussels. Indeed, China was accused by several NGO, States and even by the European Parliament of violation of human rights.

This part will deal with the current possibilities the EU has to enforce human rights through that trade agreement. We will look at both the human rights clause and the SIA part of that agreement.

## 4.2 The negotiation of the human rights clause

First, we need to look at the context of that agreement. The EU-China Comprehensive Agreement on Investment (CAI) is at stake for both the EU and China. The President of the European Commission, Ursula von der Leyen, highlighted this importance by saying that “Today’s agreement is an important landmark in our relationship with China and for our values-based trade agenda. It will

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<sup>88</sup> Miguel Silva, “EU-China Comprehensive Agreement on Investment (CAI) Negotiation Analysis”, November 2020. Accessed 25 May 2021.

[https://www.researchgate.net/publication/349215385\\_EUChina\\_Comprehensive\\_Agreement\\_on\\_Investment\\_CAI\\_-\\_Negotiation\\_Analysis](https://www.researchgate.net/publication/349215385_EUChina_Comprehensive_Agreement_on_Investment_CAI_-_Negotiation_Analysis)

<sup>89</sup> “Press Corner”. *European Commission - European Commission*, <https://ec.europa.eu/commission/presscorner/home/en> Accessed on 14 May 2021



provide unprecedented access to the Chinese market for European investors, enabling our businesses to grow and create jobs. It will also commit China to ambitious principles on sustainability, transparency and non-discrimination. The agreement will rebalance our economic relationship with China”.<sup>90</sup> From an economic and commercial point of view, this agreement is a great step for the actual European Market with a big commitment regarding manufacturing, but also in regard to some markets that have a lot to offer in the future such as cloud services or international maritime transport services. China has clearly engaged itself to open its market to the EU indefinitely. In that sense, China has also committed to improve its human rights related issues by, for instance, respecting its international obligations with the implementation of International Labour Organization Conventions (ILO).

Following the principles of conditionality supposedly followed by the EU (see Chapter II), the agreement described a “State to State Dispute Settlement Mechanism” in Section V. The goal of that provision is an “effective, efficient and transparent mechanism for avoiding and settling disputes between the Parties in relation to violation complaints”.<sup>91</sup> This mechanism is not a clear human rights clause, but this is the closest thing to it because it deals with the management of disputes rising out of the CIA. Like the TSC, the SSDS comprises a consultation phase followed by an arbitration of an independent panel. Moreover, third parties are also allowed to make written submissions to the same panel (*amicus curiae*).<sup>92</sup> This mechanism aims at contributing to the promotion of human rights because it can bring binding decisions and sanctions for non-compliance. The issue with that mechanism is that after the arbitration made by experts that deliver non-binding reports and recommendations, it is stated that States “may agree” on the terms of compliance and remedial measures. Consequently, the question of the enforcement of the outcome has to be highlighted.<sup>93</sup> Civil society is concerned by this mechanism that they consider too weak to ensure the compliance of China with human rights. Indeed, they think that the EU-China CIA falls behind the standards of previous FTAs in terms of human rights protection. Therefore, on 13th January 2021, a group of Civil

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<sup>90</sup> European Commission, Press release - EU and China reach agreement in principle on investment, 30 December 2020 [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2541](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541) Accessed 14 May 2021

<sup>91</sup> “EU-China Comprehensive Agreement on Investment The Agreement in ”, p4, 30 December 2020 [EU Commission - COM Document]. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2541](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541) Accessed 14 May 2021

<sup>92</sup> Vanessa Tsang, The EU-China Comprehensive Agreement on Investments – Promoting Sustainable Business and Human Rights through Investment Arbitration, February 25, 2021 in Blog by clairesheridan <<http://blogs2.law.columbia.edu/aria/the-eu-china-comprehensive-agreement-on-investments-promoting-sustainable-business-and-human-rights-through-investment-arbitration/>> Accessed 31 May, 2021

<sup>93</sup> Lorenzo Cotula, (2021). EU–China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section. *Business and Human Rights Journal*, 1-8. <doi:10.1017/bhj.2021.16> Accessed 31 May, 2021.

society organizations published a Joint Appeal to the European Institutions calling for the inclusion of enforceable human rights clauses in the EU-China Comprehensive Agreement on Investment (CAI). With this letter, they shared their “serious concerns” regarding the omission of that human rights clause from the discussion of agreement. Scholars also argue that this agreement needs substantial reform on the human rights issue.<sup>94</sup> However, despite the will of both parties to strengthen their investment relations, the human rights clause issue seems to be a big obstacle. Indeed, if the EU had put that clause into the agreement, it would have been perceived by China as a sort of political meddling in domestic affairs.<sup>95</sup> Not surprisingly, the negotiation of the PCA that contained that clause failed in 2015. In 2021 the Chinese government reacted to the Parliament's vote by saying to “immediately stop interfering in China’s internal affairs (and) abandon its confrontational approach”.<sup>96</sup> The same problem happened during the EU-Singapore FTA negotiation concerning the legitimacy of Europe to impose its view on death penalty to the ASEAN countries. In that context, a Singaporean negotiator stated “the human rights clause was a problem”, and that “the EU has this idea that their way in regards to human rights is the best way, but this is not always the case”<sup>97</sup> Therefore, there is a clear problem between the expectation of the treaties that states that the CAI must be concluded “in the context of the principles and objectives of the Union’s external action”<sup>98</sup> and the practice that cannot impose any efficient system of conditionality to preserve any human rights violation. Consequently, what are the possibilities for the EU to enforce human rights in that agreement?

This particular trade agreement faces a strong opposition of the European Parliament even if, to enter into force, the European Parliament has to give a favorable opinion via a vote. This *ex-ante* control by the Parliament is a “procedural control” but this may turn out to be the best one. Indeed, this is the role of the whole Parliament to vote on whether to give its consent to the agreement or not: this is a

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<sup>94</sup> Mark Konstantinidis, “The EU-China Comprehensive Agreement on Investment: a tale of sound and fury” Blog of the European Journal of International Law, February 9, 2021. <<https://www.ejiltalk.org/the-eu-china-comprehensive-agreement-on-investment-a-tale-of-sound-and-fury/>> Accessed 15 May 2021

<sup>95</sup> Jacques Pelkmans, Weinian Hu and Federica Mustilli, “Tomorrow's Silk Road: Assessing an EU-China Free Trade Agreement” (Brussels: Centre for European Policy Studies, 2018)p.250.. [https://www.wti.org/media/filer\\_public/92/59/92591824-dce9-4077-9d3d-8a6112a9a23d/euchina\\_fta\\_final.pdf](https://www.wti.org/media/filer_public/92/59/92591824-dce9-4077-9d3d-8a6112a9a23d/euchina_fta_final.pdf) Accessed 13 May 2021

<sup>96</sup> Euronews, “Brussel Bureau, MEPs vote to freeze controversial EU-China investment deal”, 21/05/2021..<https://www.euronews.com/embed/1518540> Accessed 9 May 2021

<sup>97</sup> Lachlan McKenzie and Katharina L. Meissner, “Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU–Singapore FTA” JCMS 2017 Volume 55. Number 4. pp. 832–849, 2016 ; from an Interview: Singaporean Mission to the European Union, Brussels, Belgium (January 30, 2014).

<sup>98</sup> European Union, “Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union”, Official Journal of the European Union C326, 26 October 2012, art. 207 (1) TFEU.

“Yes/No vote”.<sup>99</sup> Recently, on May 21st, the Parliament adopted a resolution concerning the freeze of the EU-China ratification of the agreement concluded in principle only. Indeed, the Parliament called on the “suspension of the CAI ratification”.<sup>100</sup>

By blocking the vote of the CIA, the EP could force both the EU and China to rethink the agreement in order to incorporate a better mechanism of protection of human rights. Therefore, the EP, with this procedural *ex-ante* control, may have the power to enforce human rights via trade relations with third countries that is maybe more effective than any other mechanism described in that thesis (such as the human rights clause or the HRIA/SIA). As previously described, critics said that the EU had not really often activated the human rights clause. Moreover, if activated, its application was not homogeneous with all the trade partners. However, in most trade agreements previously voted by the EP, a human rights principle based on conditionality was present, even if non-often activated.

We can note that the EU-China agreement may operate a shift in the trade EU relation with third countries. Now, maybe the EU wants to think more practically, and prefers to impose its condition before the conclusion of the treaty than to activate the human rights clause because the EU knows that it will be complicated to do so in practice.

In that very specific situation, the EU was even stricter by imposing sanctions against China last March. Indeed, the EU accused the Chinese government to be “responsible for serious human rights violations including the large-scale arbitrary detentions and degrading treatment of Uyghurs and people from other Muslim ethnic minorities”<sup>101</sup>. This was the first human rights sanction against China since the 1989 Tiananmen Square massacre. This sanction is not directly related to the EU-China CIA but may be seen as a step further to compensate for the lack of mechanism protecting the human rights included in that agreement.

Therefore, the EP and civil society play a very important role in the negotiation of the EU-China CIA by blocking the negotiation and ensuring that more important mechanisms were there to secure human rights and by giving sanctions where alleged violations of human rights were found.

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<sup>99</sup> EU Commission, DG trade - Negotiating EU trade agreements - p.6. §25 [EU Commission - COM Document].

<sup>100</sup> EP Resolution 2021/2644(RSP) - Resolution on Chinese counter sanctions on EU entities and MEPs and MP [EU Document].

<sup>101</sup> Chair's statement of 23 March 2021 on EU sanctions on human rights violations; Counter-sanctions by the PRC. [EU Document]. <https://www.europarl.europa.eu/delegations/en/chair-s-statement-of-23-march-2021-on-eu/product-details/20210324DPU29209> Accessed 25 March

On a more negative point, we can legitimately ask ourselves if the EU needed to wait for such an important violation of human rights to act. Indeed, scholars and the EP see that incident as breaching the 1948 Genocide Convention, which is extremely serious.<sup>102</sup>

Moreover, the very recent official suspension of the agreement in principle of the CIA adopted by the EP is following the counter sanction that China gave to the EU. In that sense, it is legitimate to wonder why the EP had to wait for counter sanctions from China to officially share this human rights concern.

### **4.3 The SIA of the EU-China CIA**

Following the SIA methodology described in the previous chapter, the EU-China CIA followed an impact assessment. The assessment was led at the same time as the ongoing negotiations and was publicly published in 2017. The final report gives us the purpose of this SIA by stating that it aims “to assess how the investment provisions under negotiation could affect economic, social, human right and environmental issues in the EU and China and to make recommendations to maximise the benefits of the agreement and prevent or minimise potential negative impacts.”<sup>103</sup> The final report gives us an overview of how the assessment will be conducted : “(i) economic, social, human rights and environmental impacts; and (ii) stakeholder consultations for information gathering and dissemination”. For the purpose of this part, we will focus on the human rights impact assessment only that corresponds to part five of the SIA final report. This SIA has been concluded by following the described methodology in the SIA handbook of 2016 (see chapter II). In that assessment we can see a clear incentive to dedicate a part to the human rights assessment. However, there is some incoherence that makes this assessment not really effective.

In order to study those issues, we will follow the final report plan; consequently, we will look at the screening, then we will look at the establishment of a scenario and finally we will study the potential impacts of the agreement on human rights. For format reasons, we will focus on the most relevant points.

First of all, in the screening part, the final report chose to ignore some basic human rights such as the right to life. Indeed, it states that “Human rights such as right to life, liberty and security, etc. are deemed not to be significantly impacted, directly or indirectly, by the current scope of the investment

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<sup>102</sup> Dr. Azeem Ibrahim, Newlines Institute for Strategy and Policy, *The Uyghur Genocide: An Examination of China’s Breaches of the 1948 Genocide Convention*, March 2021. <https://newlinesinstitute.org/wp-content/uploads/Chinas-Breaches-of-the-GC3.pdf> Accessed 17 May 2021.

<sup>103</sup> Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People's Republic of China, November 2017, p 17 [EU Commission - COM Document].

agreement and have therefore not been included in the said table”<sup>104</sup>. The prioritization of human rights is not well justified and quite hard to understand. Indeed, in previous negotiations of EU trade agreement with third countries, the EU encountered some problems concerning the rights to life and the death penalty in trade partners. Indeed, the Council holds that the “abolition of death penalty, the situation of vulnerable minorities and the rights of women and girls need special attention.”<sup>105</sup> In 2020 in China, 42 criminal offenses were eligible for death penalty.<sup>106</sup> Therefore it is hard to understand why such an important human right is not taken into account whereas in some other trade agreement negotiations, like for the EU-Singapore FTA, this right was deeply discussed.<sup>107</sup> One may argue that this right is not directly impacted by the conclusion of a trade agreement and it would be right. However, the SIA does not need only to investigate the direct circumstances but also the indirect ones such as the freedom of expression which was assessed in the EU-China SIA. Therefore, the screening that aims “to narrow down the measures which need to be assessed”<sup>108</sup> is understandable. However, a better transparency would be preferable in order to understand that choice.

The proper goal of doing a SIA and especially to establish a baseline scenario is to do an overview on the current situation concerning human rights in China in order to permit an objective comparison of the two trade partners. Regarding the baseline scenario established in the EU-China SIA, we can highlight some issues. The overall overview of the general framework of China is positive with terms such as “significant changes”, “increase safeguards” and even the “growing importance the Chinese authorities place on the protection of human rights”<sup>109</sup>. The last paragraph of that part mitigates those positive changes by saying that “Despite these changes and progress made, serious human rights challenges still remain and have been recorded by human rights organizations. These include notably restrictions to freedom of expression, limitations in access to justice or discrimination against women, minorities or persons with disabilities.” The overall baseline scenario could be considered positive with some restrictions. However, how can we explain that three years after the conduction of that

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<sup>104</sup> Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People's Republic of China, November 2017 p.93 [EU Commission - COM Document].

<sup>105</sup> Council of the European Union, 2015a

<sup>106</sup> Yuan Yanchao, “How Many Crimes Are Punishable by Death in China ?”; China Law in One Minute, Monday 23 Nov 2020. <https://www.chinajusticeobserver.com/a/how-many-crimes-are-punishable-by-death-in-china> Accessed 23 May 2021.

<sup>107</sup> Lachlan Mckenzie and Katharina L. Meissner, “Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU–Singapore FTA” JCMS 2017 Volume 55. Number 4. pp. 832–849, 2016.

<sup>108</sup> European Commission – DG trade, “Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives” p.6. [EU Commission - COM Document].

[https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf) Accessed April 13, 2021.

<sup>109</sup> Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People's Republic of China, November 2017 p.100 [EU Commission - COM Document].

study, the EU imposes sanction on China for serious human rights violations including “the large-scale arbitrary detentions and degrading treatment of Uyghurs and people from other Muslim ethnic minorities”<sup>110</sup> which have been lasting for several years now.

Two options are possible, first the SIA did not mention that issue because the experts were not aware of the problem. In that case, the assessment was badly conducted because this breach of international law did not start in 2017. Another option is that the problem was known by the experts but was not mentioned in the SIA, therefore there is a serious problem of transparency. Hence the Better Regulation Guideline was not respected because it asked for a “transparent and of high-quality analysis”. Consequently, we can say that the baseline scenario did not fulfill its goal of providing a relevant overview of the human rights in China.

Finally, the SIA provides us with a potential impact on specific human rights. In that part, the handbook gives guidance by saying that the SIA should “identify the specific human rights most likely to be affected by particular measures included in the agreement under negotiation”; therefore, we legitimately aim at having positive and negative impacts. However, we have to underline that there are very few negative aspects stated in the SIA EU-China SIA. For instance, the Right to an adequate standard of living and the right to health should be, according to that SIA, positively impacted because the presence of foreign investors would contribute to economic growth. This may be true however, the presence of foreign investors may also have a negative impact on small scale farmers and thus, deteriorating the standard of living of several Chinese citizens as it was the case for other trade agreements such as the EU-ACP EPAs ones. This problem is the same as the incomplete assessment described in that thesis for the EU-Georgia DCFTA (see chapter 2).

#### **4.4 Conclusion**

The EU-China case study allows us, with a very recent case, to understand the real life requirements that the EU has to meet to enforce human rights through its trade policy. First, the need for an effective mechanism that is able to protect human rights (human rights clause or an efficient SSDS). Secondly, the need for an adequate and realistic SIA. In the EU-China CIA we have seen that those expectations were far to be met because of the lack of enforcement that section V proposes and because of the methodology issues concerning the timing, the substance and the transparency of that assessment.

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<sup>110</sup> Chair's statement of 23 March 2021 on EU sanctions on human rights violations; Counter-sanctions by the PRC. [EU Document]. <https://www.europarl.europa.eu/delegations/en/chair-s-statement-of-23-march-2021-on-eu/product-details/20210324DFU29209> Accessed 25 March

However, we have to say that the very new resolutions of the EP gives hope for the future for a better enforcement of human rights. In my view, it would be preferable to have a more effective *ex ante* control by the EP to make sure that the human rights requirements are met before, instead of entering an agreement, and hoping that the human rights situation will improve under threat of possible suspension or sanction by the contracting party. In that sense, the EU-China CIA may illustrate that shift in process.

## CHAPTER V – CONCLUSION

By trying to integrate the principle of conditionality in its trade agreement more often via a so-called human rights clause and by conducting a sustainability impact assessment that has been able to develop in favor of human rights throughout the years, the EU has provided an answer to enforce and export the European values of human rights through its trade agreement with third countries. This enforcement has been possible with the transposition at the European level of international documents such as the UN-Guideline on HRIA but also thanks to the criticisms that were made by several actors such as scholars, stakeholders or even directly by the citizens (represented by their euro-deputy) in some cases such as the very new EU-China CIA.

Nonetheless, this thesis has demonstrated that the *de facto* practice of those very abstract and complex mechanisms could turn out to be very difficult when agreements are at stake for the very own interest of the European Union. Indeed, this issue clashes with the “tailor-made” approach that has been in particular defended by the Commission since 2011 and the publication of its Joint Communication: “Human Rights and Democracy at the Heart of EU External Action” considering for instance the different relations that member states could have with some trading partners that could give a reason not to apply those mechanisms homogeneously in third countries. However, the very new case of the EU-China seems to operate a shift in that practice. Indeed, even if there is a clear lack of mechanism to protect and to enforce human rights, we can note a practice that is more in favor of the protection of human rights to an extent that the EU froze the agreement and imposed sanctions to answer a human rights crisis that could have been deepened if the agreement had been entered into force. Yet, even if this incident gives hope for the future of the EU concerning its trade relation with third countries, we must not forget that some trade agreements still raise some issues concerning the enforcement of the adequate such as the *ex ante* and *ex post* mechanisms and more globally the enforcement of human rights.

More precisely, on the *ex ante* mechanism, an evolution was noted from the 2006 handbook methodology. Indeed the adoption of the Better Regulation Guideline and the second edition of the handbook, ten years after the first, gave more space to the consultation of the stakeholders for instance, an often made criticism. However, some essential problems remain such as the complexity to assess a complete human rights impact by taking into account an overall context and not just some direct related impacts. The objectivity of the assessment is also a problem; indeed, with that very ambitious goal, it is easier to focus on the positive, however, this may not be a reason to neglect some



negative and important issues. Finally, the limited resources relating to problems obliging the researchers to prioritize human rights poses a conflict between the essence of the HRIA imagined by the UN and the SIA conducted by the EU.

Afterward, on the *ex post* mechanism, the human rights clause that is based on conditionality has been developed in order to be a safeguard of the human rights values of the EU. Even though the requirement to ratify international conventions and to respect human rights seems to be important following the words of the clause, the practice seems to be far from that very strict perspective. Indeed, some issues have been raised such as the complex relations between some member states and some third countries, or the impact that such a termination of the agreement could have on the nationals of both member states. This leads us to the conclusion that the relevance of that very ambitious clause, if never used, can be put into question. Rather, to be useful, this clause should be applied more often or rethought if the EU doesn't want to have an impact that could undermine its economy or the economy of its trade partners while fighting for the respect of its human rights' value abroad. In my sense, considering that uncommon application in practice, this clause should be classified as a diplomatic instrument rather than a legal one.

This thesis has proposed to present the legal instrument the EU has in order to give a comprehensive and informed point of view on the enforcement of the human rights value through the trade policy with third countries. We have seen that this enforcement is theoretically possible but that there are a lot of contextual factors we have to take into account that can disrupt its right application. The case of the very new EU-China CIA has given us an overview of the new last commitments that the EU had concerning this question. This gives hope for the future because these changes come from the Europeans themselves. Even if the EU has always had a very complicated relationship with its citizens, the fact that the EP has officially made a clear decision concerning the future of an EU trade agreement shows that the EU is maybe not that disconnected from its citizens, especially concerning the enforcement of human rights worldwide.

Overall, this thesis had a very critical opinion on the question of the enforcement of human rights through the European trade policy. Indeed, in my view, the high expectations that the EU has committed to achieve have not been clearly achieved even if we have to note that the EU is on a positive path. Therefore, only a critical informed opinion could formulate recommendations that may help construct the future of Europe.

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