

ADDRESSING THE CIVIL SOCIETY BLIND SPOT IN EUROPEAN CHINA POLICY

FROM THE OVERSEAS NGO LAW TO THE EU-CHINA COMPREHENSIVE AGREEMENT ON INVESTMENT

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Key Messages:

- ▶ Defending the right of non-profit organisations to operate transnationally should be a matter of principle for the EU.
- ▶ Civil society actors are both essential channels of international engagement and sources of expertise and first-hand knowledge.
- ▶ The EU-China Comprehensive Agreement on Investment exemplifies the current neglect for civil society in the EU's China policy.
- ▶ The EU and member states need to find ways of better supporting civil society organisations without instrumentalising them.

Background: Civil Society Exchanges in EU-China Relations

- ▶ Non-official channels crucial in China's opening-up process
- ▶ European civil society support in China for development, self-organisation, environmental awareness, etc.
- ▶ European civil society presence key to understanding China and its complexities!

- ▶ Crackdown on activism and advocacy intensified since 2013
- ▶ 2016 Overseas NGO Law ~ securitisation of civil society governance
- ▶ Chinese NGOs going out...

The EU-China Comprehensive Agreement on Investment (CAI)

- ▶ Agreed in principle in December 2020
- ▶ Focus on offensive European business interests
- ▶ Branded by [DG Trade \(30/12/2020\)](#) as ensuring “fair treatment for EU companies so they can compete on a better level playing field in China”
- ▶ Suspended after EU-China sanctions row and European Parliament opposition



Source: [Council of the EU](#), September 2020

The Chinese CAI Annex Preserves and Enshrines China's Right to Discriminate Against Foreign Non-Profit Organisations.

Without Prejudice

Annex II Entry 9 – Non-Profit Organizations

Sector:	Non-Profit Organizations
Obligations	National Treatment (Article 4)
Concerned:	Senior Management and Board of Directors (Article 6)
Description:	<p>China reserves the right to adopt or maintain the following measures:</p> <p>Unless approved by the Chinese government: foreign investors and covered investments may not invest in non-profit organizations within the territory of China; non-profit organizations established outside of China may not set up representative offices or branches in China. To conduct activities temporarily in China, foreign non-profit organizations shall cooperate with domestic entities, and the term for such temporary activities shall not exceed one year. The senior executives of non-profit organizations which have been approved to be established within the territory of China shall be Chinese citizens.</p>

- ▶ Schedules of commitments published in March 2021
- ▶ Negative list approach
- ▶ Exclusion of non-profit organisations from “national treatment” and senior management safeguards

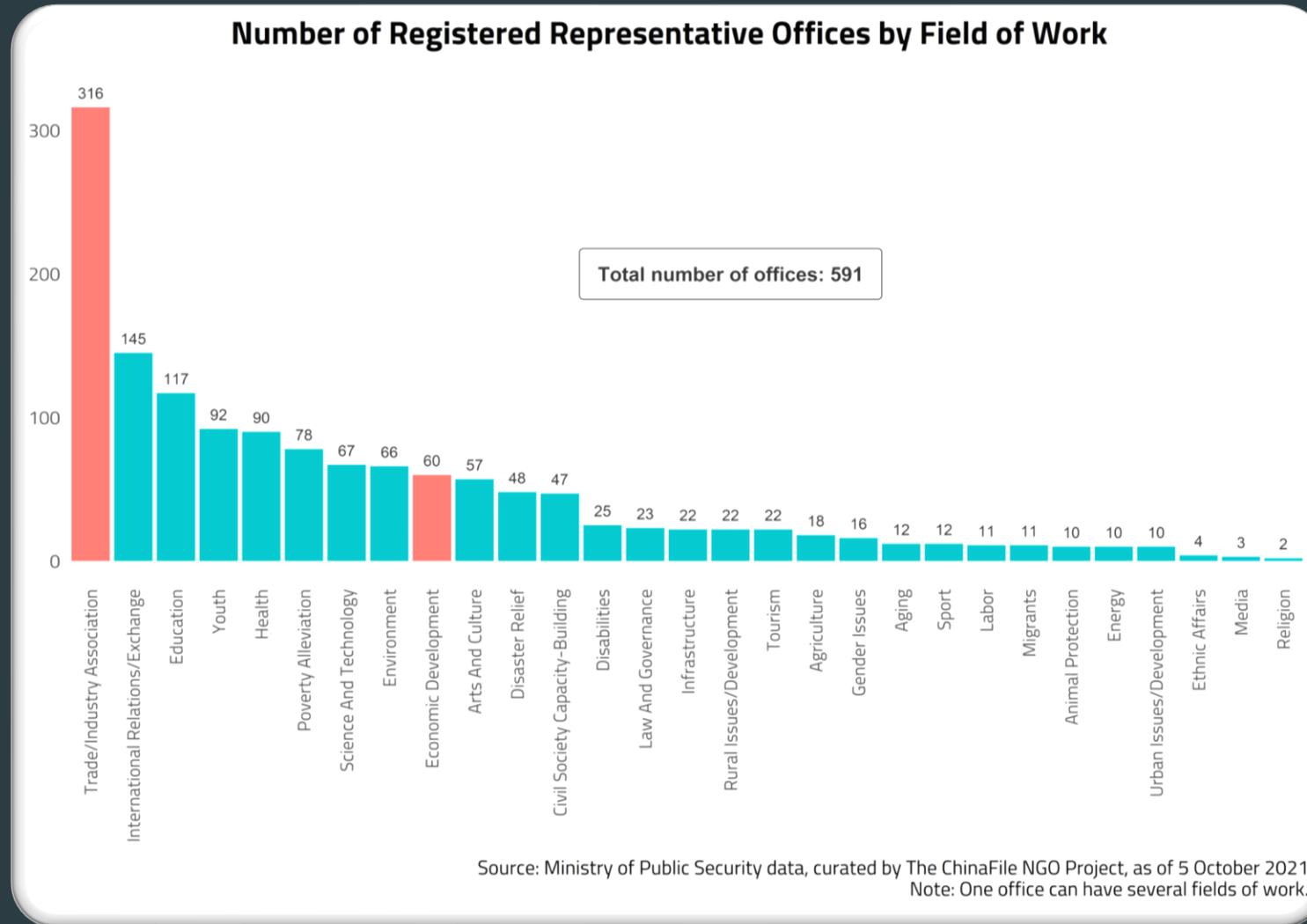
Source: [European Commission Directorate-General for Trade](#), March 2021

“ [CAI] is an investment agreement and, as all trade and investment agreements of the EU, can only apply to commercial companies and economic actors. ”

Vertretung der Europäischen Kommission in Deutschland (2021): Politische Stiftungen, NGOs und Wirtschaftsverbände bleiben von EU-China-Investitionsabkommen unberührt, Second Version, dated 19 May, [available online](#) (Translation from German B.L.)

- Official European responses downplay or negate the CAI's relevance for non-profit actors.

Most “NGO” Activities in China are Registered in Trade and Economic Fields.



As it Stands, the CAI Amounts to a *De Facto* Acceptance of Civil Society Restrictions by the EU.

- ▶ China's Annex II Entry 9 closely echoes the 2016 Overseas NGO Law.
- ▶ Chinese government clearly concerned about CAI applicability to NGOs, foundations, and business chambers.
- ▶ Schedules of commitment not simply a “unilateral document” as Commission claims...

“In theory the EU only confirms China's right to regulate in those sectors [covered by Annex II]...but the real issue is: For what kind of behaviour can I get blessing in international agreements? That is why the CAI annex is such a devastating signal.”

Interview with representative of a German business association

The CAI Negotiation Process Exemplifies the Inadequacy of Civil Society Input Mechanisms in EU Foreign and Trade Policy.

- ▶ EU policy of ‘keeping business and politics separated’
- ▶ DG Trade’s ‘Civil Society Dialogues’ are also dominated by business groups.
- ▶ No proactive outreach to non-profits with on-the-ground China expertise



“Who are those actors that are integrated in the negotiation processes, in civil society dialogues? As a small NGO with limited resources, we have the China expertise, but we do not have the means to proactively follow up on everything that is happening in Brussels.”

Interview with staff member of a European NGO

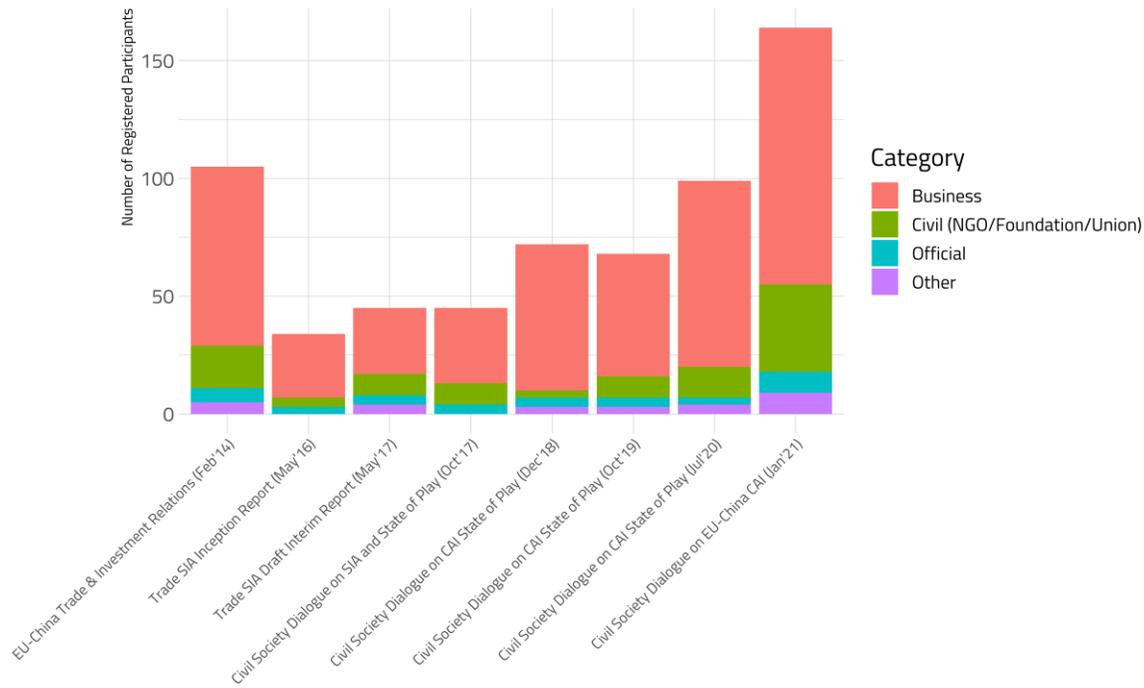
Selected Recommendations

- ▶ **DG TRADE:** Address the NGO issue in CAI revision negotiations and the envisioned investment protection negotiations.
- ▶ **DG TRADE:** Revise the Civil Society Dialogue format to focus on NGOs and increase responsiveness.
- ▶ **EUROPEAN COMMISSION/DG TRADE/EEAS:** End the silo approach to trade and investment negotiations.
- ▶ **EU AND MEMBER STATES:** Issue a principled statement on the importance of freedom of association and free flows of transnational civil society funding.
- ▶ **EUROPEAN PARLIAMENT AND COMMISSION:** Call for a revision of international investment arbitration mechanisms to make them accessible for non-profits.
- ▶ **EU INSTITUTIONS:** Strengthen civil society input mechanisms and improve outreach to country experts from civil society.
- ▶ **EU INSTITUTIONS:** Reconsider the design of EU funding instruments for civil society.

Additional Slides...

Business Groups Dominate DG Trade's "Civil Society Dialogues" on CAI.

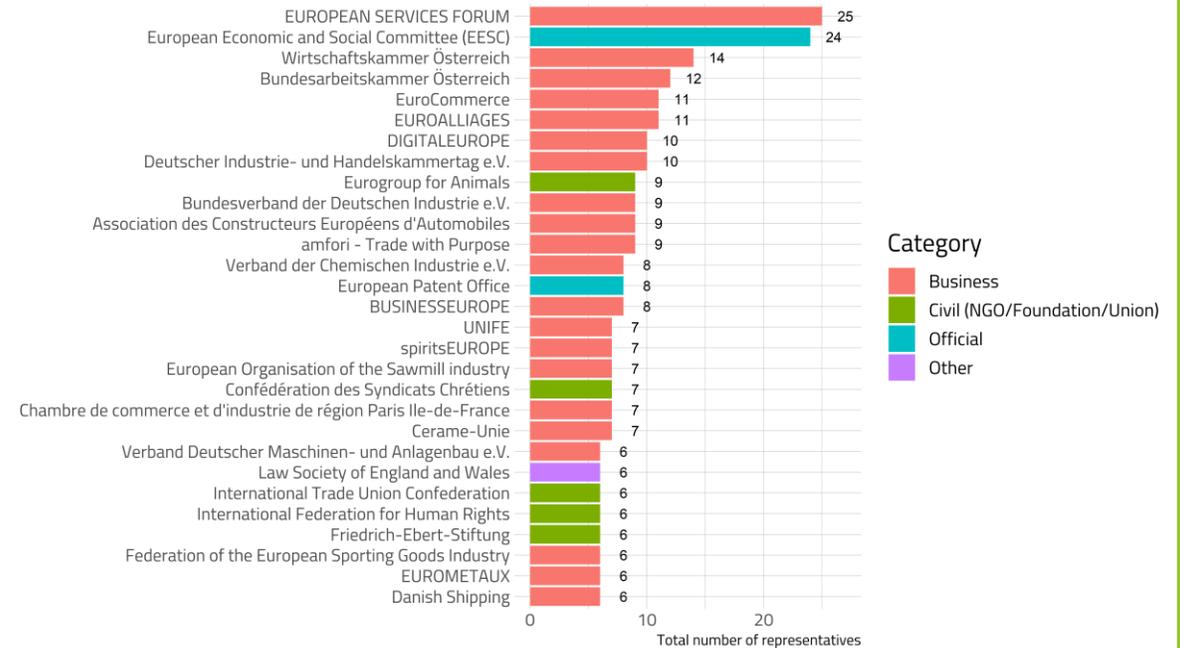
Participants in DG Trade Civil Society Meetings on CAI



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

Number of Total Representatives Sent to CAI Civil Society Dialogues

Organisations with >5 representatives in 8 meetings between February 2014 and January 2021



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

The Neglect for Transnational Non-Profit Investments is a More General Problem.

- ▶ Non-profit sector as a major economic force, suffering from “policy neglect” ([Anheier/Toepler 2019](#))
 - ▶ Transnational civil society funding globally under threat (“shrinking spaces”)
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- ▶ EU pledges to protect right to freedom of peaceful assembly and association (e.g. EU Action Plan on Human Rights and Democracy 2020-2024)
 - ▶ China has also subscribed to freedom of assembly principle (e.g. in ICESCR)
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- ▶ Non-profit entities covered by many trade and investment agreements today (including CAI!)
 - ▶ Explicit protection of foundations in United States BITs
 - ▶ Enforcement hampered by current global dispute settlement regime

CAI Revision?

- ▶ Entry 9 on “Non-Profit Organisations” should ideally be removed entirely from Annex II of the Chinese schedule of commitments.
- ▶ If this is not possible, the EU side should at least insist on a commitment that no additional restrictive measures will be introduced in the future, while publicly reiterating its disapproval of existing restrictions on the operations of European CSOs in China.
- ▶ The free operation of European business chambers and industry associations in partner countries should also be a priority in the envisioned follow-up negotiations on investment protection and investment dispute settlement, which DG Trade aims to complete “within 2 years of the signature of the CAI