The European Parliament as a Defender of EU Values in EU-Japan Agreements: What Role for Soft Law and Hard Law Powers?

Abstract

This article investigates to what extent the European Parliament (hereafter the Parliament) acted as an advocate for EU values in the development of EU-Japan relations, through which legal tools, if *hard law* or *soft law* powers, and with what legal outcomes. Japan is an interesting, yet underexplored, case study for assessing the external reliance of EU values. It is a key *transversal* partner for the EU with 3, potentially 4, agreements concluded across trade, security and political cooperation sectors (the 2009 MLA agreement, the 2018 Strategic Partnership Agreement and Economic Partnership agreement and a PNR exchange agreement currently being negotiated), but which presents important values differences with the EU, e.g., on death penalty and data protection. Our findings show that, with Japan, the Parliament has stepped away from its traditional role as a human rights defender, by sticking to soft law powers as its privileged tool, limiting its interventions, and ultimately refraining from insisting trade be linked to human rights commitments. Such a cautious approach, we argue, is the result of a deliberate choice to keep negotiations with Japan in an economic prism, and to invest negotiation energy in more salient negotiations occurring at the time in which the EU-Japan agreement was negotiated, e.g SWIFT and Brexit TCA. The overall judgement on the Parliament's approach is, however, a nuanced one. Its reliance on soft law powers might be a wise one for the time being and might encourage other actors to litigate on points which were compromised on, given that its previous use of hard law powers with the US and Canada PNR agreements somehow backfired. Moreover, the sole presence of hard law powers can, and has influenced other actors to adjust their positions during the negotiations to pre-empt the use of the Parliament's veto powers.

Keywords: European Parliament; Soft law; Trade; Security; EU values; Japan

Introduction

The Treaty on the European Union requires the European Union (EU) to uphold and promote its values in its external action (art.3(5) TEU); to be guided by the principles which have inspired its creation including rule of law and respect of human rights, and to establish relations with third countries that share these values (art.21 TEU). To implement this constitutional mandate the EU has, among others, routinely linked the objectives of human rights and values promotion to its trade, neighbourhood policy and accession policy; and it has established ad hoc human rights dialogues with several partners.[1] Moreover, the respect for EU human rights standards has consistently been an issue of contention when establishing security cooperation with third states.[2] The European Parliament (hereafter the Parliament) has in several instances been an active institution in externally upholding and promoting EU values, through intervention during negotiations, and occasionally also going as far as denying its consent to the conclusion of EU international agreements.[3] Against this background, this paper investigates to what extent the Parliament has maintained its role as an advocate for EU values in the development of EU relations with Japan.

Japan represents a critical case study to assess the resilience of EU values externally. On the one hand, it is a global power, generally aligned with EU multilateral values, which has therefore growingly become a strategic partner for the EU across multiple sectors. EU-Japan institutional ties arguably date back to the 1970s[4] and further developed during the 1990s through an informal de-regulatory dialogue,[5] and a tradition

[1] L. Bartels, "Human Rights Conditionality in the EU's International Agreements" (Oxford: Oxford University Press, 2005), and more recently, see also on unilateral trade instruments, M. Cremona, "Values in EU Foreign Policy" in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011) 275, 295, 296, and 300-303; See also A. Williams, "Enlargement of the Union and human rights conditionality: a policy of distinction?" (2000) 25 E.L. Rev. 601.

[2] This is particularly the case in transatlantic relations: E. Fahey, 'The evolution of transatlantic legal integration. Truly, madly, deeply? EU-US Justice and Home Affairs' in A. Ripoll Servent and F. Trauner, *The Routledge Handbook of Justice and Home Affairs Research* (London: Routledge, 2018).

[3] E.g. Its rejection of the Anti-Counterfeiting Trade Agreement (ACTA) or the EU-US TFTP 'Swift' Agreement: C. Eckes, "How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures" (2014) 12 (4) I-Con International Journal of Constitutional Law 904.

[4] T. Tanaka, "EU-Japan Relations" in T. Christiansen, K. Jorgense, E. Kirchner and P. Murray (eds), *The Palgrave Handbook of EU-Asia Relations* (London: Palgrave Macmillan, 2013);

[5] P.J. Cardwell, "The EU-Japan Relationship: From Mutual Ignorance to a Meaningful Partnership?" (2004) 2 (2) Journal of European Affairs 11-16.

of yearly summits focussing on political and security cooperation.[6] In the 2000s, EU-Japan relations gained further legalisation with binding agreements being concluded, going beyond the previous soft law commitments.[7] In 2009, the EU-Japan Mutual Legal Assistance Agreement (MLA), allowing exchange of evidence in criminal justice, was adopted.[8] By 2018, an Economic Partnership Agreement (EPA) and a Strategic Partnership Agreement (SPA) were signed, entering into force on 1 February 2019.[9] The MLA agreement is a "hard law" agreement, and so is the EPA which is a standard "hard law" EU free trade agreement, meaning it is enacted pursuant to Article 218 TFEU procedures and a standardised institutional framework for engagement. The SPA is a "soft law" framework, promoting political and sectoral cooperation and joint actions in more than 40 areas of common interest, but with a high degree of precision, which institutionalises political/policy dialogue securing the long-term mutual commitments, regardless of domestic politics.[10] It is, however, formally only "soft law" because it is law-making departing from Article 218 TFEU stricto sensu, i.e. not intended to have legal effect per se. Prior to the entry into force of the EPA agreement, and arguably to smoothen trade between the two partners on the basis of the newly concluded treaties, on 23 January 2019 the European Commission published its decision to recognise Japan as offering adequate protection for personal data.[11] Japan also issued an adequacy decision under the Act on the Protection of Personal Information (APPI),[12] making this the first mutual adequacy decision between the EU and a third state after the introduction of the General Data Protection Regulation (GDPR).[13] And lastly,

[6] D. Vanoverbeke et al, *Developing EU–Japan Relations in a Changing Regional Context* (London: Routledge, 2017), E. Kirchner and H. Dorussen, *EU-Japan Security Cooperation* (London: Routledge, 2018).

[7] On legalisation and its components (precision, delegation and obligation), see J. Goldstein et al, "Introduction: Legalisation and Word Politics" (2001) 55(3) International organisations 385; See also, Fabien Terpan, "Soft Law in the European Union - The Changing Nature of EU Law" (2015) 21(1) European Law Journal 68, 72-73; The first phase of EU-Japan regulations was dominated by soft law commitments, which had a high degree of precision – e.g. falling short of an actual trade agreement; See "An Action Plan for EU – Japan Cooperation European Union – Japan Summit Brussels 2001" (8 December 2001).

[8] Agreement between the European Union and Japan on mutual legal assistance in criminal matters [2010] OJ L 39/20.

[9] Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part (EU-Japan SPA) [2018] OJ L216/4; Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA) [2018] OJ L330/3.

[10] See fn.8, above, on precision and soft law. For a critical view on soft international agreements see also specifically Ramses A. Wessel, "Normative transformations in EU external relations: the phenomenon of 'soft' international agreements" (2020) 44(1) West European Politics 72.

[11] Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the protection of Personal Information (The Japan Decision) [2019] OJ L76/1.

[12] Act on the Protection of Personal Information (APPI) Act No 57 of 30 May 2003 (Amended APPI). The Japanese adequacy decision reference is Personal Information Protection Commission Notification No. 1. https://www.ppc.go.jp/files/pdf/200201_h31iinkaikokuji01.pdf.

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

on 18th February 2020 the Council authorised opening of negotiations for an EU-Japan PNR Agreement.[14] Briefly, while the EU has other key trade partners[15] or security partners[16], Japan stands out for having established close cooperation with the EU transversally, across trade, security and political cooperation sectors, through three - potentially four, if the PNR agreement is concluded - far reaching hard law, or highly legalised soft law, agreements.

On the other hand, important differences on key fundamental rights issues still exist between Japan and the EU.[17] For instance, Japan is among the countries which retain the death penalty both in law and in practice, while the EU has made opposition to the death penalty a key trait of its normative identity.[18] Moreover, Japanese legal standards on fair trial rights,[19] gender equality, labour rights, [20] and data protection,[21] have been considered falling short of European ones. Among these, differences in data protection standards are particularly problematic considering the importance of the issue for the EU, where data protection is emerging as a key EU law right, [22] which Petkova defines as a sort of the EU's 'first amendment'. [23] These divergences raise the question as to how deep a partnership can be established if there is not full alignment on values. This, therefore, makes EU-Japan relations an excellent test ground for the resilience of EU values when establishing deep cooperation with a key global player.

Moreover, from an institutional perspective, the EU-Japan MLA agreement is the first MLA agreement concluded in the post-Lisbon framework, which expanded Parliament's consent and information powers also to this area;[24] and the EPA and SPA are the second large post-Lisbon trade agreements which equally

[14] Council of the European Union, "Council Decision authorising the opening of negotiations with Japan for an agreement between the European Union and Japan on the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and serious transnational crime" (2020) 5378/20.
[15] The EU has concluded over 50 trade agreements including with Asian economies such as South Korea and Vietnam, and recently the UK. The list of EU Trade Agreements and full references can be found here: https://ec.europa.eu/info/food-farming-fisheries/plants-and-plant-products/plant-products/wine/bilateral-and-free-trade-agreements_en [Accessed 30 September 2021].
[16] E.g. with the US: See E. Fahey, "Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program" (2013) 32 Yearbook of European Law 1.
[17] T. Suami, "Rule of law and human rights in the context of the EU-Japan relationship: are both the EU and Japan really sharing the same values?" in D. Vanoverbeke et al (eds), *The Changing Role of Law in Japan* (Cheltenham: Edward Elgar Publishing, 2014).
[18] See below Section II.
[19] On fair trial rights see A. Weyembergh and I. Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest - A case study on the EU Japan Mutual Legal Assistance Agreement" (2020) 11(4) New Journal of European Criminal Law 440, 456 et ff.
[20] See below Section II.
[21] See below Section III.
[22] See below Section III.
[23] B. Petkova, "Privacy as Europe's first Amendment" (2019) 25 European Law Journal 140.
[24] See next Section.

required the Parliament's consent. The ongoing negotiations for the PNR agreement are also naturally taking place in the post-Lisbon institutional framework. This makes the EU negotiations with Japan on these agreements an interesting case study to assess whether the new role of the Parliament as a veto-holder has influenced its behaviour and the behaviour of other institutions during the negotiations. A key question is how does the Parliament use its newer powers in an era after its litigation of international agreements, e.g. with Canada and the US, initially resulted in a 'worse' agreement?[25] While certain literature exists on the Parliament's role and action post-Lisbon in negotiations with other partners, including the US,[26] South Korea,[27] Canada[28] or Singapore,[29] its role in the EU-Japan negotiations is underexplored, in particular as to trade *and* justice and security matters, i.e., transversally.[30] The article aims to fill to this gap in legal scholarship.

When investigating the Parliament's position during the negotiations with Japan, the article looks both at the content of the policy priorities put forth by the Parliament during the negotiations, and at the tools the Parliament used to advance its position. It distinguishes between soft law powers and hard law powers depending on what is the impact of the exercise of said power, namely if it has a legal effect or not. While this distinction is further explained in the next section, an example of use of soft law powers is the adoption of a soft law resolution, while an example of hard law powers is vetoing the adoption of an agreement. The article relies on the assumption that relying on hard law powers, as opposed to soft law powers, to advance a specific policy priority is telling of a higher importance attribute to the said objective. The article argues that the Parliament does not seem to have prioritized a normative, values-based agenda in the negotiations with Japan. This is in contrast with the traditional image of the Parliament as a human rights defender,

[25] On this see further Section III under ' The Role for the Parliament in the EU-Japan PNR negotiations'

[26] A. Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon" (2014) 21(4) Journal of European Public Policy 568; R. Passos, "The External Powers of the European Parliament" in P. Eeckhout and M. Lopez Escudero (eds), *The European Union's External Action in Times of Crisis* (London: Hart Publishing, 2016).

[27] L. Van Den Putte, F. De Ville and J. Orbie, "The European Parliament as an international Actor in Trade" in S. Stavridis and D. Irrera (eds), *The European Parliament and its International Relations* (London: Routledge, 2015).

[28] McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA".

[29] McKenzie and Meissner, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes".

[30] See the mentions in Van Den Putte, De Ville and Orbie, "The European Parliament as an international Actor in Trade", which only focuses on the Trade negotiations, and Weyembergh and Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest", which focuses on the MLA negotiations and which Section II expands.

which it had built for itself, and which is documented in literature.[31] It further confirms recent studies which have started to chart an emerging approach of the Parliament which is more pragmatic and less values-oriented, in trade negotiations with Asian partners.[32] The overall assessment is nonetheless nuanced, in that it considers how the Parliament's limited direct engagement with human rights aspects might not necessarily lead to significant neglect of EU values in the deepening of EU-Japan relations.

Methodologically, the research relied on a hybrid methodology, which combined a review of literature on the role for the Parliament as a negotiator, a review of primary sources in the form of parliamentary documents, and three original expert interviews. [33] The choice in favour of expert interviews is justified in light of the possibility they give to gain access to knowledge from authoritative sources, which was not recorded in official documents. The interviewees have been selected on the basis of their unparalled insight knowledge given their key role in the negotiations of the EU external agreements discussed in the paper. They include the Head of the Division of Fundamental Rights and Criminal Justice at the Council of the European Union, between 1996 and 2009, who was the initial promoter and a key negotiator of the EU Japan Mutual Legal Assistance (MLA) agreement;[34] an Administrator at the Council of the Council of the European Union, in the area of Criminal Justice, Data Protection and Fundamental Rights, between 2002 and 2015, while the EU Japan MLA Agreement was being negotiated, which was also involved in the negotiation of the EU US MLA and extradition agreements[35] allowing comparison between the two negotiations; and a Member of the European Parliament (MEP) between 1999 and 2020 who was Chair of the EU-Japan and EU-South Korea *ad hoc* data adequacy European Parliament (EP) delegation.[36]

The article is structured as follows. The next section provides the analytical framework and the broader context for the analysis. It maps the different, hard law and soft law powers the Parliament has in the post-

[31] See the next section.
[32] L. McKenzie and K. Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55(4) Journal of Common Market Studies 832; L. McKenzie and K. Meissner, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes" (2019) 26(9) Journal of European Public Policy 1273.
[33] M. Meuser, & U Nagel, The expert interview and changes in knowledge production, in A. Bogner, B. Littig, & W. Menz (Eds.), *Interviewing experts* (Palgrave Macmillan UK 2009) 17.
[34] Hans Nielson, interview conducted in person on the 19 of October 2016. The text is in file with the authors.
[35] Guy Stessen, interview conducted via phone on Friday July 2019. The text is in file with the authors.
[36] Claude Moraes, questionnaire, and reply received, via email on 16th July 2021. The text is in file with the authors.

Lisbon scenario and provides a general overview on how the Parliament has so far used them to ensure that EU values are upheld and promoted in EU international agreements. The following sections respectively analyse to what extent the Parliament has relied on different types of powers during the negotiations with Japan to promote the EU abolitionist mission (Section II), and to ensure that EU data protection standards are respected in EU Japan cooperation (Section III), investigating the rationales and outcomes of the Parliament's action. The focus on death penalty and data protection is justified considering the differences existing on both aspects between the EU and Japan, and the importance of both issues for the EU as further discussed in the respective sections. This is followed by Conclusions in a fourth section.

I. The Deepening and Widening Role of the European Parliament in EU International Relations: EU-Japan in Context

Before the Treaty of Lisbon, the European Parliament could mainly rely on "soft law powers" in the context of EU external action, namely it could act which however did not directly have legally binding consequences for other actors. It could release a resolution or issue an opinion stating its position on the content of the agreements being negotiated by the Commission on a Council mandate, or launch a study,[37] and a single MEP could raise questions to the Commission during Parliamentary debates. Its "hard law powers", namely powers whose activation could have led to legal consequences,[38] were to request the Court of Justices' Opinion on the text of the agreement,[39] and to litigate the agreements before the Court of Justice ex post, [40] which in both cases could have led to the annulment of the agreement. It also had a right to veto the adoption of international agreements but only in a limited number of cases.[41]

[37] McKenzie and Meissner refer to these as Parliament's formal rights; see McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA", p.843.
[38] Our definition and the distinction between hard law and soft law powers is loosely modelled over Terpan's definition of Soft law and hard law, see Terpan, "Soft Law in the European Union - The Changing Nature of EU Law" (2015) 21 European Law Journal 68; See also Ripoll Servent who speaks of Parliament's formal and informal powers, Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon".
[39] Art.218(11) TFEU.
[40] Arts 263(1) and (2) TFEU.
[41] Association agreements, agreements establishing a specific institutional framework by organising cooperation procedures; agreements having notable budgetary implications; and agreements entailing amendment of an act adopted under the co-decision procedure (see former art.300(3) TEC).

Post-Lisbon, the Parliament has gained more soft law powers in external action: it has been granted wide information rights during the negotiation phase,[42] which have been given constitutional significance by the CJEU in response to key cases brought by the Parliament;[43] and hard law powers. Its veto powers have been extended to all policy areas where co-decision apply, thus including, among others trade and JHA matters, making consent now the rule.[44] Such an increase in hard law powers has also had an impact on the "implications" of the Parliament's exercise of its soft law powers. An Inter-Institutional Agreement was signed requiring the other Institutions to take "due account" of the Parliament's comments during negotiations.[45] Moreover, in practice, the existence of Parliament's veto powers cast a shadow also on the negotiation phase.[46] The Commission and the Council have become more attentive to the negotiations directives and conditions the Parliament expressed throughout the negotiations through its soft law powers, so to prevent the Parliament to ultimately exercise its hard law, veto powers.[47] In some cases even just the reputation of the Parliament as a human rights defender, combined with the presence of the veto, has led the Council to adjust its negotiation position accordingly, without the Parliament having expressed its position on the specific agreement.[48] This shows an even more far-reaching indirect impact of the Parliament hard law veto powers during the negotiation phase. For completeness' sake, one should note that the Parliament has no formal involvement in the Commission's adoption of the Adequacy Decision, while however retaining and exercising its soft law powers, namely the right to adopt resolutions on this decision, and its hard law power to litigate the decision it afterwards.[49]

[42] Art.218(10) TFEU; see C. Eckes, *EU Powers under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford: Oxford University Press, 2019); Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon".
[43] See Parliament v Council (Case C-658/11) EU:C:2014:2025; Parliament v Council (Case C-263/14) EU:C:2016:435; C. Eckes, "How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures" (2014) 12 (4) International Journal of Constitutional Law 904.
[44] Art.218(6)(a)(v) TFEU.
[45] Pursuant to the Inter-Institutional Framework Agreement, the Commission shall take due account of the Parliament's comments throughout the negotiations; See Framework Agreement on Relations between the European Parliament and Commission [2010] OJ L304/47, Annex III.
[46] Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon", p.571.
[47] Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon".
[48] See below next Section.
[49] See below Section III.

The Parliament itself is perceived to constantly relying on both its soft law and hard law powers trying to enhance them to achieve parity with other institutional actors. As for *hard law* powers, the Parliament has historically mostly not litigated its powers, with individual MEPs taking litigation as to PNR agreements with third countries,[50] with the important exception of asking the CJEU for its Opinion on the EU Canada PNR agreement, and the EU accession to the Istanbul Convention.[51] The Parliament has also so far used its veto powers wisely, with 3 vetoes being cast across 241 agreements adopted post-Lisbon,[52] but showing a clear determination to safeguard EU data protection standards in transatlantic data transfers,[53] as well as its own information rights.[54] These initiatives have, among others, cemented the reputation of the Parliament as a defender of EU values, and safeguard or guardian of EU human rights standards in EU external action.[55] An emphasis on the promotion of a values-based, human rights focused, agenda can also be appreciated when looking at the Parliament use of its *soft law* powers, in those cases where it did not wish, or considered it necessary, to rely on hard law powers. Examples are the negotiations of the Free Trade Agreement with Colombia and Peru,[56] the Framework Agreement and the Free Trade Agreement with South Korea,[57] and the FTA with Canada,[58] where the Parliament secured the inclusion of a human rights conditionality clause linking the trade agreements and the political cooperation frameworks, making EU trade conditional on responsiveness and receptiveness to EU values. However, surprisingly the Parliament took a much less active role as a human rights advocate in the negotiations with Singapore, despite important values

[50] In 't Veld v Council (Case T-529/09) EU:T:2012:215; E. Fahey, "Of 'one shotters' and 'repeat-hitters' - a retrospective on the role of the European Parliament in the EU-US PNR litigation" in F. Nicola and B. Davies, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017).

[51] See e.g. Court of Justice of the European Union, Opinion 1/15 of the Court (Grand Chamber) EU:C:2017:592; and Opinion 1/19 of the Court (Grand Chamber) EU:C:2021:198.

[52] Passos, "The External Powers of the European Parliament", p.86.

[53] The first veto was to the EU-US Swift agreement on grounds that the text of the agreement in its original form would allow transfers of data on breach of EU privacy standards as enshrined in EU primary and secondary law.

[54] The second veto was to the Anti-Counterfeiting Trade Agreement (ACTA), which was motivated on both the risk for the use of personal data or the right of the defence, and by the fact that the agreement had been negotiated behind closed doors and the Parliament had not been sufficiently informed; The third veto concerned the second protocol attached to the Fisheries Agreement with Morocco, and was motivated by economic, environmental and political reasons; See Passos, "The External Powers of the European Parliament", p.92.

[55] Meissner and McKenzie, "The Paradox of Human Rights Conditionality in EU Trade Policy: When Strategic Interests Drive Policy Outcomes" and the literature there mentioned.

[56] Passos, "The External Powers of the European Parliament", p.102; McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA", p.837.

[57] McKenzie and Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA,' p. 836. See Art.1 of Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [2013] OJ L 20/2; See also M. Elsig and C. Dupont, "European Union meets South Korea: bureaucratic interests, exporter discrimination and the negotiations of trade agreements" (2012) 50 Journal of Common Market Studies 492.

[58] Meissner and McKenzie, "The Paradox of Human Rights Conditionality in EU Trade Policy: When Strategic Interests Drive Policy Outcomes".

differences, not lastly the presence of death penalty in Singapore.[59] A conditionality clause was included linking the trade and political cooperation agreements, but its force was significantly weakened by a side letter, requested by Singaporean authorities, stating no partner saw at the time of signature any reason, considered the state of domestic law and application, to activate the conditionality clause.[60] McKenzie and Meissner highlight the inconsistency of the Parliament position with Singapore, with the more 'hard-line' one adopted with Canada, where it insisted on the inclusion of a conditionality clause, considering Canadian legislation and fundamental rights standards are much more aligned with EU ones.[61] They explain this different standard in light of the "salience" factor, which they have theorised is a possible driver for the Parliament's action as a negotiator. They argue the Parliament decided to pick a strategic battle with CETA.[62] It insisted on an essential elements' clause being inserted in the legally binding trade agreement, because it was a battle which could be easily traced back to its intervention, also in the eyes of the public considering the high salience of the agreement, thus cementing its position as a human rights advocate. In light of this, it decided to invest negotiation energy in this direction. This was not the case with Singapore. The negotiations were less in the public eye, thus less salient, and importantly were taking place at the same time of the more controversial negotiations for the Anti-Counterfeiting Trade Agreement, where the Parliament had invested more institutional capacity.

It is against this background that the position of the Parliament in the EU-Japan negotiations is investigated, looking at how the Parliament has used its soft law and hard law powers, and whether it upheld its reputation as an advocate for human rights and EU values, with respect to the death penalty and EU data protection standards. As will be shown the "salience factor" provides a helpful analytical tool to interpret the Parliament's position during the negotiations with Japan.

[59] McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA", p.840.
[60] McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA", p.841.
[61] Meissner and McKenzie, "The Paradox of Human Rights Conditionality in EU Trade Policy: When Strategic Interests Drive Policy Outcomes".
[62] McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA".

II. The Parliament and the Death Penalty in EU-Japan Cooperation

The EU has long manifested its opposition to death penalty and embarked in a mission to abolish it, first internally and secondly in third countries,[63] including Japan,[64] through a wide range of tools, or initiatives in the context of bilateral trade, security and accession negotiations.[65] And among other institutions, the Parliament has increasingly made its opposition to the death penalty more high profile and clear,[66] also calling specific countries to enter a moratorium, [67] Japan being among them.[68] In light of this, one might expect that cooperation, especially in the criminal justice field, with Japan, which retains death penalty, could prove a challenge for the EU normative identity; and that the Parliament would play an active role in defending such identity.

In the next sub-sections we investigate to what extent the Parliaments' principled position on the death penalty, reflecting such EU broader committment, has had an impact on its position during the negotiations with Japan. We enquire, among other aspects, if the Parliament has considerd the death penalty in Japan as a hurdle to tightening cooperation, and what has been the impact of its advocacy, if at all, in (a) the

[63] See, among others, Objective No 13 in Council of the European Union, *EU Action Plan on Human Rights and Democracy 2015 – 2019* (Publications Office of the European Union 2015) and I. Manners, "Normative Power Europe: A Contradiction in Terms?" (2002) 40(2) Journal of Common Market Studies 235.

[64] P. Bacon, M. Reiterer and D. Vanoverbeke, "Recent Developments on the Death Penalty in Japan: Public Opinion and the Lay Judge System" [2017] European Yearbook of Human Rights 103, 104, ff.

[65] Cremona, "Values in EU Foreign Policy".

[66] See among others, European Parliament's Resolutions: "Resolution of 18 June 1998 on the question of the death penalty and the establishment of a universal moratorium on executions" (1998) B4-0595, 0615, 0621, 0642, 0658 and 0665/98; "Resolution of 6 May 1999 on the issue of the death penalty and a universal moratorium on capital punishment" (1999) B4-0461, 0473, 0475, 0480, 0496 and 0502/99; "Resolution of 23 October 2003 on the initiative in favour of a universal moratorium on the death penalty in the context of the UN" (2003) P5_TA(2003)0461; "Resolution of 1 February 2007 on the initiative in favour of a universal moratorium on the death penalty" (2007) P6_TA(2007)2018; "Resolution of 26 April 2007 on the initiative for a universal moratorium on the death penalty" (2007) P6_TA(2007)0166; "Resolution of 27 September 2007 on a universal moratorium on the death penalty" (2007) P6_TA(2007)0418; "Resolution of 7 October 2010 on the World day against the death penalty" (2010) P7_TA(2010)0351; "Resolution of 8 October 2015 on the death penalty" (2015) P8_TA(2015)0348; "Resolution of 12 December 2018 on the annual report on human rights and democracy in the world 2017 and the European Union's policy on the matter (2018/2098(INI))" (2018) P8_TA(2018)0515.

[67] See below on the Parliament's position on the US; See also respectively as to Indonesia, Kuwait, Bahrain, and recently Saudi Arabia: European Parliament, "Death penalty in Indonesia (debate)" (30 April 2015) at: https://www.europarl.europa.eu/doceo/document/CRE-8-2015-04-30-ITM-015_EN.html?redirect [Accessed 30 September 2021]; European Parliament, "Resolution of 16 February 2017 on executions in Kuwait and Bahrain" (2017) (2017/2564(RSP)); European Parliament, "Resolution of 11 March 2021 on the human rights situation in the Kingdom of Bahrain, in particular the cases of death row inmates and human rights defenders" (2021) (2021/2578(RSP)); European Parliament, "Motion for a resolution with request for inclusion in the agenda for a debate on cases of breaches of human rights, democracy and the rule of law on the death penalty in Saudi Arabia, notably the cases of Mustafa Hashem alDarwish and Abdullah al-Howaiti" (2021) (2021/2787(RSP)).

[68] European Parliament's Resolutions: "Resolution of 13 June 2002, on the abolition of capital punishment in Japan, South Korea and Taiwan" (2002) P5_TA(2002)0332; "Resolution of 16 February 2012 on the death penalty in Japan" (2012) P7_TA(2012)0065.

negotiations and the text of the EU Japan MLA Agreement, and (b) the EU-Japan SPA and EPA Agreements.

The Death Penalty clause in the MLA Agreement and the indirect role of the European Parliament[69]

Despite the idea for an EU-Japan MLA Agreement having already been launched in 2002,[70] the negotiations for the agreement were only authorised in February 2009,[71] and were very rapidly carried out, with the agreement concluded on 30 November 2009.[72] The Parliament was not involved at all in these negotiations as it enjoyed no information rights at the time. But it also did not exercise any of its soft law powers, such as issuing any resolution or opinion on the agreement. This is notwithstanding the fact that international agreements in criminal justice can be sensitive from a fundamental rights perspective, and that the Parliament had been vocal on this point during the negotiations for an MLA and extradition agreement with the US.[73]

EU Member States have a fundamental rights obligation not to extradite individuals to countries where they could be subject to death penalty.[74] Any extradition agreement concluded by an EU Member State or the EU itself must thus contain a clause allowing to refuse extradition in these cases. There is no similar international law obligation to refuse evidence to foreign authorities in cases in which this could lead to

[69] The analysis in this part is partially drawn from Weyembergh and Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest".
[70] Interview with Hans G Nilsson, Head of the Division of Fundamental Rights and Criminal Justice at the Council of the European Union, between 1996 and 2009, while the EU Japan MLA Agreement was being negotiated.
[71] See Commission, "2927th Council meeting Justice and Home Affairs Brussels, 26 and 27 February 2009' (Press Release, 26 February 2009) http://europa.eu/rapid/press-release_PRES-09-51_en.htm [Accessed 30 September 2021].
[72] Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, 2010/88/PESC/JHI [2010] OJ L 39/19.
[73] On this see infra in this section.
[74] The first case of the European Courts of Human Rights in this respect is Soering v United Kingdom, of 7 July 1989, Application no. 14038/88, which established that States could not extradite individuals if they were going to be subject to the death row phenomenon which considered inhuman and degrading treatment. More recent cases where it was established that extraditing individuals who risks beig subject to death penalty, if no adequate assurance are provided that capital punishment won't be executed amount to a violation of Art. 2 include A.L. (X.W.) v. RUSSIA, of 29 October 2015, (Application no. 44095/14). All EU Member States have ratified Protocol n 13 to the European Convention on Human Rights on the abolition of Death Penalty (ETS 187), and are bound by the EU Charter of Fundamental rights which Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391, which prohibits death penalty (Art. 2).

capital executions.[75] However, to deny mutual legal assistance would allow the EU to uphold its values in international cooperation, while also promoting them. Raising the question of the death penalty during the negotiations of an MLA Agreement would reassert the EU's opposition to capital punishment.[76] And by refusing assistance in death penalty cases, EU Member States would deliberately create hurdles to judicial cooperation, thus 'raising the price' for the third state to keep death penalty in force. [77] Depite not having a formal role in the negotiations with the US, which also took place before Lisbon, the Parliament had adopted a resolution requesting the inclusion of such death-penalty based grounds for refusal in both the EU-US, MLA and extradition agreements, [78] expressively linking this to the broader EU normative abolitionist mission. [79] The inactivity of the Parliament during the EU-Japan MLA negotiations is thus surprising. We suggest the "salience factor" Mckenzie and Meisner theorised to explain the Parliament's behaviour in other negotiations might provide a fitting explanation for the Parliament's inaction in this context. The EU-Japan agreement was being negotiated at the same time of the first Swift Agreement, which was much more salient for the public, and in which the European Parliament invested more institutional capacity, eventually rejecting it in February 2010.[80]

Nonetheless, since the signature of the EU-Japan agreement took place at the very end of 2009, it became inceasingly clear that the conclusion of the agreement would have had to take place in the new year, 2010, thus within the Lisbon Framework, which implied the need for the Parliament's consent. The mere possibility that the Parliament might resort to its hard law, veto, powers influenced the negotiatiors

[75] See M. Ochi, "Supplementing the Pitfalls of Japan-EU MLA Agreement on Death Penalty" in I. Wieczorek, A. Weyembergh and S. Matsuawa (eds), *EU Japan cooperation in criminal justice matters: challenges and perspectives* (London: Routledge, 2022). But see *contra* Malkami, B. Malkani, "The Obligation to Refrain From Assisting the Use of the Death Penalty" (2003) 62(3) International Comparative Law Quarterly 523, 554.
[76] E. Vandebroek and F. Verbruggen, "The EU and Death penalty Abolition: The Limited Prospects of Judicial Cooperation in Criminal Matters as an External Policy Tool" (2013) 4(4) New Journal of European Criminal Law 481, 485.
[77] See the examples involving the United Kingdom and Antigua, and Thailand in Malkani, "The Obligation to Refrain from Assisting the Use of the Death Penalty".
[78] Pt.F of European Parliament, "Resolution of 13 December 2001 on EU judicial cooperation with the United States in combating terrorism" (2001).
[79] See explanatory statement to the European Parliament, "Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters (05308/2010 – C7 0029/2010 – 2009/0188(NLE))" (2010) A7-0209/2010.
[80] On EU Parliament in Swift see generally Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon".

positions. The Council demanded the inclusion of a death penalty ground for refusal in the EU-Japan MLA agreement. But the request met negative reactions during parliamentary debates and discussions within the Japanese National Safety Commission, which perceived this clause as implying an inequality of arms between the EU and Japan, granting the first an additional ground for refusal.[81] To overcome this obstacle, one interviewee[82] opined, the Council relied on a "tied hands" strategy[83] arguing before the Japanese delegation that the insertion of a death penalty clause was necessary as the Parliament would have not ratified the MLA agreement if it had not included such a clause. Admittedly, the Parliament had not expressed itself on this specific point during the negotiations with Japan. However - the Coucil delegation argued - the Parliament had been vocal on the matter of death penalty during the negotiation with the US which had taken place six years before. Indeed, as mentioned above the Parliament's resolutions adopted during the EU-US MLA negotiations show strong opposition to capital punishment and demand the inclusion of a death penalty based ground for refusal.[84] It was therefore likely - the Council continued - that, despite not having made its position explicit during the EU-Japan negotiations, the Parliament still considered the presence of a death-penalty clause a deal-breaker for the ratification of the EU-Japan MLA agreement.

Importantly, at the time when the EU-US MLA agreement was been negotiated the Parliament did not enjoy veto powers. Therefore the US negotiation team could disregard the Parliament's position, and indeed the EU did not manage to secure the inclusion of a death penalty clause in the EU-US MLA agreement. As mentioned, the Parliament's consent was conversely needed for the conclusion of the agreement with Japan. If one followed the Council prediction as to the Parliament's maintaining a similar position on death penalty also with Japan, the possibility of non-conclusion of the agreement was thus a concrete one for Japanese

[81] Minutes of the 174th Foreign Affairs Committee of the House of Representative, No 8 of Friday, 26 March 2010. Original in Japanese (in file with the authors), read in unofficial translation.
[82] Interview with Guy Stessen, Administrator at the Council of the European Union, in the area of Criminal Justice, Data Protection and Fundamental Rights, between 2002 and 2015, while the Agreement was being negotiated.
[83] For further clarifications on the 'tied hand strategy' See Ripoll Servent, "The role of the European Parliament in international negotiations after Lisbon", p.572.
[84] G Stessens, 'The EU-US Agreement on Extradition and on Mutual Legal Assistance: How to Bridge Different Approaches', in G De Kerchove and A Weyembergh (eds), Securite et justice: enjeu de la politique exterieure de l'Union europeenne (Editions de l'ULB, Bruxelles 2003) 263, 267.

authorities, which then obliged. [85] We suggest that one of the reason why the Council's strategy worked, and that Japanese authorities did not want to take the risk of not including the clause and have the Parliament not ratifying the agreement, and finally conceded on this point are twofold. On the one hand, the Japanese delegation might have anticipated that the clause would have not often been very often relied upon in practice.[86] On the other, they perceived the cost of non-agreement as too high. Had the agreement with the EU not been concluded, Japan had no bilateral agreement with any EU Member State to fall back on if this multilateral one was not to be concluded.[87]

In conclusion, this first case study firstly illustrates the Parliament's lack of *direct* engagement through any of its soft law or hard law powers with the negotiations with Japan despite issues of high importance for the EU, such as death penalty, being at stake. We interpreted such inaction in light of the "salience factor". Secondly, somewhat paradoxically, it is an illustration of the *indirect* impact of the mere existence of its hard law powers on other actors' negotiation positions. In this case, the Council successfully managed to rely, not even on the Parliament's explicit position on the agreement, but simply on its reputation to persuade the Japanese delegation. This is interesting to compare with the outcome of the EU-US MLA negotiations, where the Parliament enjoyed and heavily relied on its soft law powers to make its position on the death penalty clear. However, since it did not enjoy any hard law, veto powers, its reliance on soft law powers, namely the adoption of resolutions, was less impactful, and its position was eventually disregarded.

[85] Weyembergh and Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest", p.454.
[86] This is because, among other reasons, cases where death penalty might be imposed are unlikely to have transnational implications and require foreign assistance in gathering evidence; See Weyembergh and Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest", p.462.
[87] As an a contrario confirmation, the opposite was true in the case of the EU-US negotiations, considering several EU Member States already had bilateral agreement in place with the EU, which gave the US more negotiation room; See Weyembergh and Wieczorek, "Norm Diffusion as a tool to uphold and promote EU values and interest", p.455.

The Role for the Parliament on EPA and SPA negotiations and the death penalty

The Parliament was significantly more involved in the negotiations and conclusion of the EU Japan EPA and SPA, relying on its soft law powers, but not necessarily to the aim of promoting the EU abolitionist mission. Neither did it use its hard law, especially its veto, powers to foster the EU normative agenda.

Parliamentary debates on both agreements started in 2011 during which the Parliament stressed the need to be fully consulted when a mandate to negotiate is issued and be kept fully informed during the negotiations.[88] The Parliament then issued three resolutions setting its negotiations priorities for the EU-Japan EPA negotiations,[89] and one for EU-Japan SPA negotiations, [90] commissioned six studies on EU-Japan relations,[91] before giving its consent for the conclusion of the SPA and EPA Agreements.[92] In its resolutions the Parliament insisted again on the importance of its role, lamenting limited involvement in the EPA negotiations, and calling for full Parliamentary oversight in the implementation of the agreements.[93] In all resolutions both on the EPA and the SPA, the Parliament often reiterated the presence of "shared values" between the EU and Japan and spoke of the EU and Japan as "like-minded partners" as a sort of

[88] See MEP Leichtfied and MEP Casary, Questions in European Parliament, "Oral answers to Question for oral answer O-000088/2011/rev.1 to the Commission".
[89] European Parliament's Resolutions: "Resolution of 11 May 2011 on EU-Japan Trade relations" (2011) P7_TA(2011)0225; "Resolution of 13 June 2012 on EU trade negotiations with Japan (2012/2651(RSP))" (2012) P7_TA(2012)0246; "Resolution of 25 October 2012 on EU trade negotiations with Japan" (2012/2711(RSP)).
[90] European Parliament, "Resolution of 17 April 2014 containing the European Parliament's recommendation to the Council, the Commission and the European External Action Service on the negotiations of the EU-Japan Strategic Partnership agreement (2014/2021(INI))" (2014) P7_TA(2014)0455.
[91] See also European Parliamentary Research Service, "Japan and prospects for closer EU ties" (October 2017) PE 608.739; European Parliamentary Research Service, "The EU-Japan Strategic Partnership Agreement (SPA): A framework to promote shared values" (January 2019) PE 630.323; European Parliamentary Research Service, "EU-Japan trade agreement: a driver for closer cooperation beyond trade" (July 2018) PE 625.118; European Parliamentary Research Service, "Bilateral trade deal with Japan – largest to date for EU" (February 2019) PE 633.164; European Parliament, Policy Department for External Relations, "The EU – Japan Economic Partnership Agreement" (September 2018) PE 603.880; European Parliament, Policy Department for External Relations, "EU-Japan cooperation on global and regional security - a litmus test for the EU's role as a global player?" (June 2018) PE 570.492.
[92] European Parliament's Legislative Resolutions: "Legislative resolution of 12 December 2018 on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part (08462/2018 – C8-0417/2018 – 2018/0122(NLE))" (2018) P8_TA(2018)0506; "Legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (07964/2018 – C8-0382/2018 – 2018/0091(NLE))" (2018) P8_TA(2018)0504.
[93] See Pt.3 of European Parliament, "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part (08462/2018 –C8-0417/2018 –2018/0122M(NLE))" (Plenary sitting) (2018) A8-0385/2018; Pts E and 20 of European Parliament, "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership" (07964/2018 –C8-0382/2018 – 2018/0091M(NLE))" (2018) A8-0367/201.

mantra justifying the conclusion of such large-scale trade and political cooperation agreements.[94] Yet, at several points, it also stressed how Japanese law and practice diverged from EU ones. Both the resolutions on the SPA[95] and EPA,[96] consistently raise the question of the social and environmental impact of the agreement, and the connected labour standards, including calls for Japan to ratify the relevant ILO conventions.[97] Conversely, the issue of death penalty, and the need for Japan to enter into a moratorium is only raised in the resolutions concerning the SPA.[98] This is understandable considering that trade has a more direct impact on labour standards and environment. Fundamental rights and values aspects are traditionally dealt by the negotiations of the broader political framework agreements accompanying the trade deals. Still, the Parliament has not refrained from connecting trade objectives to other not strictly related normative objectives underpinned by EU values, such as gender equality,[99] and animal welfare, including the reduction of whaling,[100] which begs the question of the exclusion of death penalty from its resolutions on the EPA. But more importantly, normally the talks on fundamental rights and values are

[94] See MEP Ouland intervention in European Parliament, "Oral answers to Question for oral answer O-000088/2011/rev.1 to the Commission (Subject: EU-Japan trade relations)" and European Parliament, "Debates -Negotiation of the EU-Japan strategic partnership agreement"; Pt.p of "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part" reaffirms the presence of EU's and Japan's shared values; Pt.A of "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership" also speaks of the EU and Japan sharing fundamental values.

[95] See European Parliament, "Question for oral answer O-000088/2011/rev.1 to the Commission (Subject: EU-Japan trade relations)", and especially the interventions of MEP Taylor, and Leichtfried; "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part" at pts 20, 22, 23, 24 mentions environmental goals.

[96] See European Parliament's Resolutions: Pt.8 of "Resolution of 11 May 2011", as to "cooperation on tackling broad environmental challenges" in specific; Pt.14 of "Resolution of 25 October 2012", as to the need for "[a] robust and ambitious sustainable development chapter with core labour standards, including the four ILO priority conventions for industrialised countries; this chapter should also include the establishment of a civil society forum that monitors and comments on its implementation and the effective implementation of multilateral agreements on the environment, animal welfare and the conservation of biological diversity"; Pts 1, 9, 12, 13 and 20 of "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".

[97] Pt.7 of European Parliament, "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part"; Pt.12 of European Parliament, "Resolution of 25 October 2012".

[98] Pt.q of European Parliament, "Resolution of 17 April 2014"; Pt.9 of European Parliament, "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part".

[99] The question of gender equality features high in the discussions on the SPA (Resolution SPA 2014 defines Gender Equality a crucial element of democracy (pt.s), and the need to ensure women rights is recalled in the 2018 Report for Resolution on the conclusion of the SPA (pt.8)), yet also the 2018 EPA Report calls on both parties to strongly reinforce commitments on gender and trade in the context of this agreement, including the right to equal pay. See respectively: European Parliament' Documents: Pt.s of "Resolution of 17 April 2014"; Pt.8 of "Report of 23 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part"; Pt.9 of "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".

[100] Pts 14 and 16 of European Parliament, "Resolution of 25 October 2012" note the serious divergences between the EU and Japan on issues related to the management of whaling mentions resolution on whaling and speaks of animal welfare and the conservation of biological diversity.

confined to the political cooperation agreements but which then include a "conditionality" or "essential element" clause linking the political cooperation agreements and the trade deals.[101] A violation of any element listed as essential would imply a suspension of both the political cooperation and the trade agreement. This is the template one finds, among others in the EU-Canada agreements,[102] or the EU-South Korea Agreements,[103] and albeit watered down, also with Singapore.[104] However, no such a linkage can be found between the EU Japan EPA and SPA. The essential element clause is only included in the latter agreement with no reference to it in the EPA.[105] Consistently with its insistence on abolition only in the context of the SPA negotiations, the Parliament did not find such lack of anchorage of trade objectives to broader EU normative mission problematic and gave its consent to the conclusion of the EPA and SPA.

Several elements needs to be considered when investigating the reasons for the Parliament's failure to insist on, and achieve, stronger conditionality with Japan, especially to further the EU abolitionist mission. Firstly, one interviewee indicated that the European Parliament Japan delegation made a deliberate choice in favour of a pragmatic approach to the EPA and SPA negotiations, also as to the death penalty issue including on data- on which more will be said below. The Parliament did not seek to become entangled in values-based discussions "knowing that no real alignment [would happen] because of constitutional, political historical and 'cultural' differences".[106] The choice was made in the context of a general very favourable approach of the European Parliament and of both the Japanese and the EU delegation more in general, which was completely "different to the approach as to the US agreements of the period and the Brexit adequacy agreement, where the issues had obviously become very politicised and incredibly high profile". [107]

[101] 'Conditionality clauses' and 'essential elements clauses' are used interchangeably here. See the terminology used in European Parliament Research Service, "Human Rights in EU Trade Agreements" (2019) https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf [Accessed 30 September 2021].
[102] See art.28(7) of Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L 329/45.
[103] See arts 45 and 46 and the attached declaration of Framework Agreement between the European Union and its Member States on the one part, and the Republic of Korea, on the other part (EU—Korea Framework Agreement) [2013] OJ L20/2, as well as art.15.14(2) of Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, which links the two agreements.
[104] Supra n 59.
[105] See art.43(6) of EU-Japan EPA.
[106] Interview with Claude Moraes.
[107] Interview with Claude Moraes.

Secondly, we suggest that the 'salience factor' could also be a fitting explanation also for the Parliament's attenuated position on death penalty and conditionality in the EPA. The EU-Japan EPA and SPA negotiations while certainly more high profile than the EU-Japan MLA negotiations. Yet they were partially overlapping with the Brexit negotiations which naturally consumed a lot of institutional capacity and were more salient.[108] Moreover, the UK were announcing the possibility of doing a deal with Japan after Brexit, which, an interviewee indicated, put pressure on firstly completing the EU Japan EPA negotiations, keeping the whole negotiations in an economic prism.[109]

Lastly, the position of the negotiating partner, Japan, arguably played an important role in this respect. Naturally, the more disagreement there is among negotiating partners on the conditionality question. the harder it is to incorporate relevant clauses in the text.[110] South Korea, for instance, retains death penalty, but a de facto moratorium exists in the country. During the negotiations of a trade deal with the EU, it was thus not radically opposed to conditionality, and it easily agreed to the inclusion of an essential element clause applying to the trade agreement too.[111] Non-inclusion of a conditionality clause conversely represented a red line for Japan delegation. Bacon and Nakamura note how initially an "essential elements" clause had been inserted in the draft, hard law, EPA.[112] However, Japan reportedly requested the elimination of this clause for fear that their retention of the death penalty, and especially an increase in executions, might have counted as a breach of the clause and thus have legal consequences.[113] The preferred option was to have the clause only in the, soft law, SPA agreement, which meant that violation of the SPA essential elements would have not have had legal consequences, but would have to be dealt with via diplomatic routes.

[108] Interview with Claude Moraes.
[109] Interview with Claude Moraes.
[110] McKenzie and Meissner, "Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA", p.836.
[111] Ibidem. On South Korea's position on death penalty during the negotiations see Y.J. Jung and M.G. Koo, "Linking the Death Penalty to Trade: Bureaucratic Politics among European Institutions" (2018) 30(3) East and West Studies 69.
[112] P. Bacon and H. Nakamura, "Diffusing the Abolitionist Norm in Japan: EU 'Death Penalty Diplomacy' and the Gap between Rhetoric and Reality in EU–Japan Relations" (2021) Journal of Common Market Studies 1, 7.
[113] P. Bacon and H. Nakamura, "Diffusing the Abolitionist Norm in Japan: EU 'Death Penalty Diplomacy' and the Gap between Rhetoric and Reality in EU–Japan Relations". This position was different from the one Japanese negotiations authorities held in the context of the MLA agreement death penalty clause which, as mentioned, they might have not considered having a role in practice, see for further explanations the literature in n 87.

What this case study shows is an active Parliament heavily relying on its soft law powers, but which does not put the EU abolitionist mission at the top of its priorities, and accordingly does not use its hard law, i.e. veto, powers to this aim. It should be added nonetheless that the EU has invested in other strategies to further its abolitionist mission in Japan, including what Bacon and Nakamura call a diffuse strategy, for instance by financing local abolitionist campaigns.[114] The lack of insistence on conditionality as a norm promotion strategy by the Parliament could thus also just be a choice about *how* to better reach a normative objective.

The EPA and SPA negotiations were however also challenging for the EU from another normative perspective, namely data protection, to which the next section turns.

III. The European Parliament and Data Protection Rights in EU-Japan Cooperation

During the EPA negotiations data arose as a controversial issue.[115] Japan repeatedly expressed its interest in free data flows.[116] Particularly during the trade talks of the working group on business environment, Japan wanted to have clarified expressions such as the EU-suggested "cross border transfers of information";[117] and to include provisions in the EPA that would ensure the free flow of data and that would prohibit localisation requirements.[118] Yet the EU initially refused to have substantive data issues being included in the FTA.[119] Digital trade (e-commerce) provisions were eventually included, but only as one of six section in Chapter 8 on services, investment and commerce. Moreover, a so-called "*rendez vous"*

[114] Bacon and Nakamura, "Diffusing the Abolitionist Norm in Japan: EU 'Death Penalty Diplomacy' and the Gap between Rhetoric and Reality in EU–Japan Relations".
[115] Elaine Fahey and Isabella Mancini, "The EU as an Intentional or Accidental Convergence Actor? Learning From the EU-Japan Data Adequacy Negotiations" (2020) 26(2) International Trade Law and Regulation 99,
[116] See Commission, "Report of the 15th EU-Japan FTA/EPA Negotiating Round' (2016) Tradoc 154368; Commission, 'Report of the 18th EU-Japan FTA/EPA Negotiating Round" (2017) Tradoc 155506; Fahey and Mancini, "The EU as an Intentional or Accidental Convergence Actor?".
[117] See Commission, "Report of the 15th EU-Japan FTA/EPA Negotiating Round", p.6.
[118] See Commission, "Report of the 18th EU-Japan FTA/EPA Negotiating Round", p.2-3.
[119] Commission, "Report of the 18th EU-Japan FTA/EPA Negotiating Round", p.2-3,

compromise clause was agreed in the EPA *not* to include a provision on the free flow of data but rather to later revisit cross-border data flows in three years. This highly controversial compromise "long-fingered" the emerging question of the EU's horizontal strategy and model clauses under development with respect to the GDPR and external relations.[120] It thus differs significantly from all other EU negotiations before and after the GDPR implementation as will be explained.

Against this background the following sections analyses the use the Parliament made of soft law and hard law powers as tool to safeguard data protection rights in (a) the EPA and SPA negotiations, (b), the data adequacy decision process which run in parallel, but also (c) the EU-Passenger Name Records (PNR hereafter) negotiations, which started after the EPA and SPA.

The EU-Japan EPA & SPA & data protection rights and the role of the EP

The Parliament does not emerge initially as a particularly involved actor on the question of data protection. And the sequencing of its engagement with data issues is notable where the place of data in the trade negotiations became overtaken by the adequacy decision process which the trade agreement pre-empted.[121] The earliest Parliament's resolutions on the EPA did not mention or reference privacy or data protection rights.[122] This changed dramatically as the adequacy agreement negotiations evolved. Towards the end of 2018, it passed a resolution referencing the adequacy negotiations and the challenges of the *rendez-vous* clause recalling the need for the Parliament's consent, also for future assessment as per the *rendez v*ous clause.[123] However, both resolutions giving consent to the conclusion of the EPA and SPA are short with almost no substantive comment, including on data.[124] The Parliament's limited use of its soft law powers, and of its veto, hard law, power in this context is surprising considering its role in other contexts in seeking

[120] On the horizontal strategy see fn 114, below.
[121] Fahey and Mancini, "The EU as an Intentional or Accidental Convergence Actor?".
[122] European Parliament, "Resolution of 11 May 2011"; "Resolution of 13 June 2012; and "Resolution of 25 October 2012" on EU trade negotiations with Japan.
[123] European Parliament, "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".
[124] European Parliament, "Legislative resolution of 12 December 2018" and "Legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".

successfully the Commission's generation of a so-called horizontal data strategy to deal better with the impact of the GDPR in external relations and *avoid* such *rendez vous* clauses.[125] In fact, the digital trade chapter and data protection rights agreed overall in the EPA are disappointing and less than representative of the EU's model horizontal clauses emerging.[126] The lack of a standalone chapter on digital trade already means there is overall less focus upon data, and sets the EU-Japan EPA apart from other trade agreements that would follow, e.g., the UK-EU Trade and Cooperation Agreement (TCA).[127] Moreover, the EPA includes at art.8.80 an article on regulatory dialogues in EU-Japan e-commerce cooperation, including in multilateral fora on a range of issues but it does notably not include cooperation on personal information protection at all. This is in contrast to the model horizontal clauses on digital trade developed by the European Commission around this time with a carve out for personal data in regulatory cooperation on digital trade which it sought.[128]

The Parliament was conversely much more active in its use of soft law powers, during the process of adoption of the Commission adequacy decision, which is however distinct and not legally linked to the EPA and SPA negotiations, and in the context of which it has no, hard law, veto powers.

The Role for the Parliament in the EU-Japan Adequacy decision

[125] Commission, "Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)" (2018) Tradoc 156884; European Parliament, "Resolution Towards a Digital Trade Strategy" (2017) 2017/2065(INI) – notably, the SPA was concluded on 14 July 2017, EPA – on 17 July 2018 and the EU-Japan Adequacy Decision – on 23 January 2019, close to the adoption of these key policies; Interviewees suggested the lack of political salience of the EPA for the Parliament: See Interview with Claude Moraes.
[126] M. Bartl and K. Irion, "The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun" (2017) Amsterdam Centre for Information Law Institute Working Paper.
[127] See Ch.2 of Title III of Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10.
[128] Art.8.80 of EU-Japan EPA; Cf. Commission, "Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)" art.X, at [3].

An adequacy decision is understood to be the EU's way of "protecting the rights of EU citizens by insisting upon a high standard of data protection in foreign countries where their data will be processed".[129] Currently, the EU has adequacy decisions with 13 countries and soon to be 14 with South Korea.[130] In theory, the criteria for how adequacy decisions are made are outlined in the GDPR. In practice, the legal standard has been significant evolved by the CJEU in *Schrems I* and *Schrems II*.[131] It is highly controversial how much the CJEU has "inserted" itself into this process after *Schrems I* and *II*, throwing many adequacy decisions up for review into uncertainty- and the place of other institutional actors seeking to be engaged on data issues, particularly the Parliament, remains less than clear cut. The EU-Japan Adequacy decision was the first adequacy decision since the entry into force of the GDPR[132] and a significant one. The EU maintained that this mutual adequacy arrangement - Japan having also issued a mirroring adequacy decision for the EU - would create the world's largest area of safe transfers of data based on a high level of protection for personal data.[133] The adequacy decision was important in ensuring that the EU's data protection rules under the GDPR would not disrupt the EU's services trade with Japan, kept intentionally separate from the trade agreement. However, the ease with which Japan received the decision relative to its capacity to satisfy a stricter view of equivalence has been criticised and Japanese data protection laws being considered lacking in several respects.

The European Data Protection Supervisor expressed concern as to the Commission overlooking how enforcement and redress work in practice, and not only existing on paper, in Japanese law.[134] Among others,

[129] See Commission, "Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection" https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en [Accessed 30 September 2021]; See Fahey and Mancini, "The EU as an Intentional or Accidental Convergence Actor?".

[130] A list of the countries with which the Commission has signed adequacy decisions is available here: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en [Accessed 30 September 2021]; See Commission, "Adequacy decisions".

[131] Maximillian Schrems v Data Protection Commissioner (Schrems I) (Case C-362/14) EU:C:2015:650; Facebook Ireland v Schrems (Schrems II) (Case C-311/18) EU:C:2020:559.

[132] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1.

[133] Commission, "The European Union and Japan Agreed to Create World's Largest Area of Safe Data Flows" (Press-Release) (Tokyo 17 July 2018).

[134] European Data Protection Board, "Opinion 28/2018 regarding the European Commission Draft Implementing Decision on the adequate protection of personal data in Japan" (5 December 2018) at [60]. See G. Greenleaf, "Japan's Proposed EU Adequacy Assessment: Substantive Issues and Procedural Hurdles" (2018) 154 Privacy Laws & Business International Report 3; G. Greenleaf, "Questioning 'Adequacy' (Pt I) – Japan" (2017) 150 Privacy Laws & Business International Report 6.

it was highlighted how non-compliance with the APPI results in significantly lower fines than relevant applicable EU fines, and a fine has never been issued thereunder.[135] And while EU citizens can submit a complaint about personal data to the controller,[136] it is extremely difficult for a non-Japanese speaker to access the Japanese redress system because the support is available in Japanese only.[137] More generally, despite how caselaw of the Japanese Supreme Court appeared to begin to align Japanese law closer to EU standards,[138] Japan increasingly faces the critique that it has signed up to many international standards on data, digital trade and data protection but is increasingly inconsistent in its commitment to values. It also subscribes to a heavily economic understanding of data protection which is fairly distant from the EU rights-based approach provided for in the GDPR.[139]

The Parliament emerged as a much more vociferous advocate of data protection rights during the EU-Japan Adequacy decision process rather than the trade and SPA negotiations. It was particularly vocal about the complexities and challenges of the Japanese legal order and rules adopted to satisfy essential equivalence.[140] In its 29 paragraph-resolution on the adequacy of personal data afforded by Japan adopted on 13 December 2018, the Parliament issued a wide-ranging critique of Japanese law and the adequacy process.[141] Telling is the use of highly critical language throughout (such as "urges" (para.13), "is concerned" (para.15), "notes with concern" (para.17), "takes note of […] issues of concern" (para.19), "regrets" (para.21), "is worried" (para.24) or "regrets" (para.25) on a vast array of rights, oversight, enforcement and standards questions). The Parliament overall stated that there was a high concern in terms of principles, safeguards and individual rights as well as oversight and enforcement after the adoption of the amended APPI but also relevant differences even after the Japanese Personal Information Protection Commission adopted the

[135] EDPB, Opinion 28/2018 at [131].
[136] Art.35 of APPI.
[137] EDPB, Opinion 28/2018 at [19]; G. Greenleaf, "Japan: EU adequacy discounted" (2018) 155 Privacy Laws & Business International Report 8.
[138] Fahey and Mancini, "The EU as an Intentional or Accidental Convergence Actor?"; F. Zufall, "Challenging the EU's Right to Be Forgotten: Society's Right to Know in Japan" (2019) 5 European Data Protection Law Review 17; IFLA, "The Right to be Forgotten in National and Regional Contexts" https://www.ifla.org/files/assets/clm/statements/rtbf_background.pdf [Accessed 30 September 2021]; K. Sato, 'Article 12 of the Constitution: Right to Know and Right to be Forgotten' 46(2) Nihon-kei Daironshu 165.
[139] C. Sullivan, "EU GDPR or APEC CBPR? A comparative analysis of the approach of the EU and APEC to cross border data transfers and protection of personal data in the IoT era" (2019) 35(4) Computer Law & Security Review 380.
[140] European Parliament, "Resolution of 13 December 2018 on the adequacy of the protection of personal data afforded by Japan".
[141] European Parliament, "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".

Supplementary rules. The Parliament appeared particularly 'worried' about indiscriminate mass surveillance under Japanese intelligence practices and its compatibility with the *Schrems I* and *II* decision, and argued that considering that Japan met the EU's criteria for adequacy of "essentially equivalence" with consent as an insufficient basis for onwards transfer, lacked sufficient justification [142] Briefly, the Parliament resolution on the adequacy decision is a stinging indictment on the state of Japanese law and makes a series of highly detailed and critical conclusions.[143] And what is notable is the legalisation of the resolution, seeking evidence, promoting convergence and seeking to align better with CJEU caselaw ongoing.[144]

However, for all of the breadth and force of these assertions, ultimately, the Parliament interventions on data appeared very late in the process. Concerns were expressed in only one paragraph as to the EPA decision- which it did not refuse to consent to via hard law powers- as opposed to a highly detailed catalogue of concerns subsequently raised in soft law resolutions on the adequacy decision.

Similarly to the death penalty, the Parliament's cautious approach on data can also be ascribed to the generally positive and pragmatic approach the Parliament showed towards Japan, and by the need to invest negotiation energy in other simultaneous more 'tense' negotiations such as with the US and the UK.[145] An interviewee indicated that '[t]he agreements with Japan were perceived having a low profile in terms of human rights and security compared to the US but a higher profile in terms of the positive economic partnership drive with Japan which throughout [I felt] was shared by most of the European Parliament".[146] Furthermore, we suggest that the reasons for the Parliament's different engagement on data protection in the trade talks and the adequacy decision might be said to be due to the timings of the two processes being

[142] European Parliament, "Resolution of 13 December 2018 on the adequacy of the protection of personal data afforded by Japan".
[143] European Parliament, "Report of 9 November 2018 containing a motion for a non-legislative resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership".
[144] See European Parliament, "Resolution of 13 December 2018 on the adequacy of the protection of personal data afforded by Japan": "26. Calls on the Commission to provide further evidence and explanation … to demonstrate that the Japanese data protection legal framework ensures an adequate level of protection that is essentially equivalent to that of the European data protection legal framework; 27. Believes that this adequacy decision can, furthermore, send out a strong signal to countries around the world that convergence with the EU's high data protection standards offers very tangible results; stresses, in this regard, the importance of this adequacy decision as a precedent for future partnerships with other countries that have adopted modern data protection laws; 28. Instructs its Committee on Civil Liberties, Justice and Home Affairs to continue to monitor developments in this field, including on cases brought before the Court of Justice, and to monitor the follow-up to the recommendations made in this resolution."
[145] Interview with Claude Moraes.
[146] Ibidem.

very close to one another. It appears as a continuum after which the Parliament becomes increasingly more engaged on data protection rights, yet through soft law and not yet intervening with significance through hard law e.g., by refusing to consent to the EPA. [147]

The Role for the Parliament in the EU-Japan PNR negotiations

The EU and Japan have begun negotiations on a PNR, which is an increasingly thorny issue as a matter of EU law with respect to data protection rights and third countries. At this stage, only the Commission Proposal with annexed negotiations directives, [148] the Council decision authorising the negotiations,[149] and the Opinion of the Data Protection Supervisor,[150] have been published, while the Parliament has not published any document yet. Few observations can nonetheless be made, considering that PNR is an area where the Parliament has been most active in the past, also resorting to its hard law powers. As mentioned earlier, the Parliament litigated the first EU-US first PNR agreement, which the Court ended up annulling;[151] and it postponed the approval the adoption of the second EU-US agreement pressuring the Commission for a Global Strategy on external PNR with better redress and effective legal safeguards.[152] A revised Agreement with the US followed suit and a "Second Generation" PNR Agreement was agreed upon in 2011,[153] which is nonetheless a highly contested legal Agreement which demonstrates the challenges of mutual recognition in justice matters. And indeed, considering its outcome- a PNR Agreement 'worse' than

[147] Interview with Claude Moraes.
[148] Commission, "Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime", COM(2019) 420 final (27 September 2019); Commission, "Annex to the Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime", COM(2019) 420 final (27 September 2019).
[149] Council Decision authorising the opening of negotiations with Japan for an agreement between the European Union and Japan on the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and serious transnational crime, 5378/20 (4 February 2020). At the moment of writing only the Decision was publicly available, leaving out the Annex with the negotiating directives for the Commission.
[150] European Data Protection Supervisor, "Opinion 6/2019: EDPS Opinion on the negotiating mandate of an Agreement between the EU and Japan for the transfer and use of Passenger Name Record data" (25 October 2019).
[151] The CJEU held inter alia that ex art.95 EC (now art.114 TFEU), as the legal basis of the Council Decision read in conjunction with DPD, did not provide an adequate legal basis: See European Parliament v Council and Commission (Joined Cases C-317/04 and C-318/04) EU:C:2006:346.
[152] Commission, "Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries", COM(2010) 492 final.
[153] See Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security of 17 November 2011 [2012] OJ L 215/5; Commission, "New EU-US Agreements on PNR Improves Data Protection and Fights Crime and Terrorism' IP/11/1368" (Press Release) (17 November 2011) http://europa.eu/rapid/press-release_IP-11-1368_en.htm [Accessed 30 September 2021].

the previous one, some institutional actors have actually labelled the Parliament's EU-US PNR agreement litigation as its most "stupid" litigation ever.[154] The Parliament also sought an Opinion of the Court on the validity of the EU-Canada PNR Agreement, [155] which was also annulled by the Court in Opinion 1/15.[156] Such use of hard law powers by the Parliament signified an increasingly bold stance on data given its earlier disastrous litigation, somehow bolstered by a regime shift on data in the EU[157] and its own powers and rising reputation on data protection. Still, the Court's decision had the effect of creating much complexity for the Commission to have to renegotiate with a key trade partner, unresolved – complicated by PNR law being under further litigation at the time of writing.[158] There are therefore concerns as to the capacity of the EU to negotiate further agreements in accordance with the complex standards set in Opinion 1/15, jointly with those previously set in the *Schrems* II CJEU decision.[159]

The EU-Japan PNR agreement will be arguably legally and politically sensitive for the Parliament particularly in light of the complex Court of Justice's jurisprudence, and the previously adopted adequacy decision. While the latter is not a pre-requisite for the adoption of a PNR agreement, in its proposal for the agreement the Commission made explicit reference to the fact that Japanese data protection standards have already been assessed in the adequacy decision.[160] Basing the PNR negotiations on the adequacy assessment is however problematic, first in light of the much higher standard for PNR set by the Court, and also in light

[154] Fahey, "Of 'one shotters' and 'repeat-hitters' - a retrospective on the role of the European Parliament in the EU-US PNR litigation", p.528.
[155] European Parliament, "Resolution of 25 November 2014 on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data (2014/2966(RSP))" [2016] OJ C289/2.
[156] Opinion 1/15 of the Court.
[157] The EU recently developed its own internal EU PNR system via a Directive only emerging after significant institutional conflict as to the Parliament, Commission, Article 29 Working Party and the Council: Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132.
[158] See Commission, "EU-Canada PNR agreement: Commission statement on the Opinion of the European Court of Justice" (Press Release, 26 July 2017) https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_2105 [Accessed 30 September 2021]; Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime", COM (2017)605 final; See Case C-817/19 *Ligue de Droits*, ECLI:EU:C:2022:65.
[159] Opinion 1/15 of the Court; Schrems II (Case C-311/18).
[160] Commission, "Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime", p. 2-3.

of the criticism the EU Japan adequacy has received.[161] However, considering the weak outcomes of the EU-Canada PNR Agreement, subject to lengthy renegotiation, or the EU-US PNR Agreement, the subject of adverse renegotiated outcomes, it still remains to be seen whether the Parliament will go further and litigate yet another PNR agreement, should it not be satisfied with the outcome of the EU Japan agreement. Having the previous PNR litigation somewhat 'backfired,' the Parliament might more wisely advocate through its soft law powers. It could be argued that the Parliament has reached a high-water mark of potential as to the use of hard law powers to safeguard data protection rights issues when negotiating PNR agreements with developed economies. Can it realistically continue to litigate only PNR agreements? Instead, choosing soft law powers remains an easier and more valuable legal tool and, as an interviewee opined, can also be done by the Parliament to allow and encourage others to litigate in its stead.[162]

Conclusion

Japan is a complex partner for the EU. Being a global power, it has become a key EU partner with a significant degree of legalisation of cooperation across in multiple areas. Still, the important differences on values, especially on the death penalty and data protection standards create a challenge for the EU, which has a constitutional mandate to uphold and promote its values in its external relations. This article explored how the European Parliament, traditionally of significance as to the governance of values, has navigated the normative challenges the tightening of EU-Japan cooperation raised, the tools it relied on and the rationales of its action. Our case studies show that the Parliament has stepped away from its traditional role as defender of human rights, on death penalty and data protection domains in the context of EU-Japan transversal relations' deepening. Firstly, soft law powers remain the Parliament's main tool in this new transversal partnership. After its initial actions in using its art.218 TFEU based hard law powers right after Lisbon, with Japan the Parliament seems more comfortable with resolutions, soft law instruments.

[161] L. Drechsler, "The Adequacy Decision on Japan under the General Data Protection Regulation: what are the possible implications for law enforcement exchanges?" in I. Wieczorek, A. Weyembergh and S. Matsuawa (eds), *EU Japan cooperation in criminal justice matters: challenges and perspectives* (London: Routledge, 2022).
[162] Interview with Claude Moraes.

Secondly, there are still some blind spots in the Parliament's engagement with safeguard of EU values, namely the choices in terms of timing and selection of issues for the Parliament to focus on are less clear. The Parliament did not intervene during the negotiations of the MLA Agreement where the death penalty was a thorny issue, and it did not see a need to link the debates on death penalty to the trade talks, allowing the EU-Japan FTA to be the first EU Free Trade agreement not bound by an essential element clause. Finally, while in EPA negotiations and adequacy process, the Parliament arguably positioned itself as a rising player in data protection, it still came late to the discussion and deployed a large use of soft law powers only in the adequacy process where it does not enjoy hard law veto powers which can indirectly reinforce the impact of its resolutions.

The Parliament limited action on fundamental rights issues was explained firstly in light of the Parliament deliberately prioritising a more economic-oriented, less normative approach with Japan, especially in the context of the EPA and SPA negotiations, as confirmed by our interviewee who stressed the politics of the EPA differed substantially from other agreements.[163] This economic approach is consistent with that held with other partners in Asia, a region where the EU fears seeing its role as a global economy diminishing, such as Singapore, but also with Vietnam.[164] Secondly, we suggested that the Parliament's limited degree of engagement could be explained in light of the "salience factor" as theorised by Meissner and Mckenzie, namely the fact that the Parliament makes choices as to whether to allocate its institutional resources on the basis of the salience of the negotiations. EU-Japan negotiations on the MLA, the EPA and the SPA, occurred simultaneously to more salient negotiations, including Swift (for the MLA) and Brexit (for the EPA and SPA), where, as confirmed by the interviewees, most of the Parliament energy was deployed.

Our judgement on the Parliament's less engaged role on fundamental rights aspects is nonetheless a nuanced one. That is we do not derive from it that EU values are necessarily in an endangered position when negotiating and cooperating with Japan. Firstly, as explained with reference to the MLA Agreement, the mere presence of the hard law veto powers seems to influence the impact of the Parliament's resolutions,

[163] Interview with Claude Moraes.
[164] McKenzie and Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA', p. 835.

or even just of its reputation, confirming the typical role of the Parliament consent operating as a "threat" in the background, influencing the outcome of the negotiations, as in the MLA case. Secondly, the Parliament deciding to opt for a more cautious strategy, after a first round of forceful use of hard law powers with the US and Canada, which however led to somewhat ill-fated litigations, could be a wise choice, still yielding positive results. Further use of soft law could be engineered, as our interviewee indicated, to encourage others to litigate and use their legal powers of review. Naturally, much remains to be seen as to the future of the Parliament engagement on data issues, notably PNR, and whether use of hard law powers such as art.218(11) TFEU opinion powers will continue to be attractive to it, and of course if this more economic-oriented trend will continue with other Asian partners.