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*City Law School Research Paper 2020/06*

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The City Law School

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# Fundamental rights in the institutional architecture of EU trade agreements: a tale of omissions

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Isabella Mancini\*

## Abstract

This paper explores the institutional dimension of the implementation of the new generation EU Free Trade Agreements (FTAs) from a fundamental rights perspective. The creation of an institutional architecture of EU FTAs is what makes them operational. It enables the other dimensions to become “alive” and not to remain words within a text. Given the plethora of entities created by the new generation of EU FTAs, this paper investigates the extent to which the institutional architecture of EU FTAs is adequate to protect and promote fundamental rights. This investigation shows that, despite significant novelties, several limitations remain. Gaps in the mandate and deficiencies in the decision-making processes lead to foresee little consideration of fundamental rights at the implementation stage.

**Keywords:** Institutional architecture, Institutional design, Fundamental Rights, EU FTAs, Domestic Advisory Groups

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## Introduction

The creation of an institutional framework for the implementation of EU Free Trade Agreements (FTAs) is what makes them operational. It enables the other dimensions to become “alive” and not to remain words within a text. The institutional governance of the new generation of EU FTAs has been said to have “widened and deepened”.<sup>1</sup> New entities created by EU FTAs have been delegated substantive decision-making powers, and their influence expanded into policy areas traditionally the prerogative of States. What kind of institutions these are, how they work and their implications for the protection of fundamental rights, are all questions that have been largely neglected by the literature on EU external trade.<sup>2</sup> Institutions have been the focus of literature on international relations, sociology and organisational studies, while legal accounts have been limited to legalisation, compliance and enforcement issues. This paper wants to provide a different account: it conducts an analysis of the legal framework of the institutional architecture of EU FTAs and engages in normative explorations of its relationship with fundamental rights.

Institutions are interpreted here broadly as encompassing bodies set up by rules which will form expectations with an impact on human behaviour and political action.<sup>3</sup> Institutions are considered to produce “living agreements” that can endure and give rise to a new legal order, by way of legal outputs and exchanges arising from institutionalised practices and cooperation.<sup>4</sup> Following this understanding, the paper considers the significance of the plethora of new entities created by the new generation EU FTAs. From a fundamental rights perspective, their significance lies on two extremities. On the one hand, the literature attaches a series of advantages to institutions: from assuaging uncertainty and concerns of delegation of authority;<sup>5</sup> to prompting positive practices of transparency<sup>6</sup> and enabling forums for sharing information and linking issues together.<sup>7</sup> On the other hand, the literature on democratisation beyond the State typically stresses legitimacy deficits of institutions operating beyond the State. In the context of trade, research has shown that concerns over fundamental rights may be kept at bay.<sup>8</sup> In light of these trade-offs, the paper asks: *to what extent is the institutional architecture for the implementation of EU FTAs adequate to protect fundamental rights?*

<sup>1</sup> Lore Van Den Putte and Jan Orbie, ‘EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 263, 269.

<sup>2</sup> Some exceptions include i.a. *ibid*, Wolfgang Weiss, ‘Delegation to treaty bodies in EU agreements: constitutional constraints and proposals for strengthening the European Parliament’ (2018) 14 *European Constitutional Law Review* 532; and Emanuel Castellarin, ‘The joint committees established by free trade agreements and their impact on EU law’, in Isabelle Bosse-Platière and Cécile Rapoport, *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Edward Elgar 2019).

<sup>3</sup> Simon Bulmer, ‘New institutionalism and the governance of the Single European Market’ (1998) 5 *Journal of European Public Policy* 365, 368.

<sup>4</sup> Marija Bartl, ‘Making transnational markets: the institutional politics behind the TTIP’ (2016) *Amsterdam Law School Research Paper No. 2016-64*, 2.

<sup>5</sup> Michael Zürn, ‘The politicization of world politics and its effects: Eight propositions’ (2014) 6 *European Political Science Review* 47.

<sup>6</sup> Vigiļenca Abazi, ‘Transparency in the Institutionalisation of Transatlantic Relations: Dynamics of Official Secrets and Access to Information in Security and Trade’ in Elaine Fahey (ed), *Institutionalisation Beyond the Nation State: Transatlantic Relations:*

To answer this question, the following sub-questions are addressed: does this institutional architecture take into account fundamental rights? How does it differ across trade partners? What are its limitations? What could be improved to make it better equipped to deal with fundamental rights? According to Keohane, strengthening institutions so that they reflect legitimate social purposes is a major challenge for our time<sup>9</sup> and “an adequate judgment of their worth depends on an estimate of the contribution they are likely to make, in the future, to the solution of problems that cannot yet be precisely defined.”<sup>10</sup> This paper explores the contribution of the EU institutional architecture of the new generation of EU FTAs to fundamental rights. It first relies on theoretical insights to explain how institutions matter for fundamental rights (Section 2). Taking as case studies the EU trade initiatives with Canada (CETA), the US (TTIP), Singapore (ESUFTA) and Japan (EUJEP),<sup>11</sup> the chapter sheds light on major shortcomings in the mandate of treaty bodies and in internal processes of decision-making from a fundamental rights perspective (Section 3). Finally, whilst not longing for the perfect model, this paper advances a series of considerations for an institutional architecture of EU FTAs that would adequately protect fundamental rights (Section 4).

## 2. Between Old and New Treaty Bodies of EU FTAs

The institutional architecture of EU FTAs includes, above all, the treaty bodies set out under the specific institutional chapters; but also other entities envisaged in the FTA, yet *outside* the institutional chapters. All the FTAs under investigation feature institutional chapters: they create and elaborate on the duties of a *Joint Committee* and also establish *Specialised committees*. The institutional chapters also often envisage the setting up of *working groups* and *contact points*, which are not examined here. With the only exception of TTIP,<sup>12</sup> institutional chapters do not include recently-introduced entities that institutionalise civil society in the institutional architecture of EU FTAs: the *Civil Society Forum* and the *Domestic Advisory Groups*. These are part of the chapters on trade and sustainable development (TSD).<sup>13</sup> In this overview, EUSFTA emerges as the most atypical FTA: it does not establish a *Specialised committee* on TSD, but a *Board*; nor does it foresee the creation of a committee on regulatory

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*Data, Privacy and Trade Law* (Springer 2018).

<sup>7</sup> Andrew Moravcsik, ‘Robert Keohane: Political Theorist’ in Helen Milner and Andrew Moravcsik (eds), *Power, Interdependence, and Nonstate Actors in World Politics* (Princeton University Press 2009) 254.

<sup>8</sup> Marcilio Toscano Franca-Filho and others, ‘Protection of Fundamental Rights in Latin American FTAs and MERCOSUR: An Exploratory Agenda’ (2014) 20 *European Law Journal* 811, 822-823.

<sup>9</sup> Robert O Keohane, ‘Twenty Years of Institutional Liberalism’ (2012) 26 *International Relations* 125.

<sup>10</sup> Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 247.

<sup>11</sup> The paper is part of a PhD research and relies on the same case studies: these are Post-Lisbon new generation trade agreements that the EU has negotiated with advanced economies in North America and Asia.

<sup>12</sup> European Union’s proposal for a legal text on Institutional, General and Final Provisions in TTIP, tabled for discussion with the US in the negotiating round of 11-15 July 2016 and made public on 14 July 2016 (hereafter TTIP).

<sup>13</sup> CETA is only a partial exception to that, in that the provisions on the domestic advisory groups are to be found under the chapter on trade and labour and the chapter on trade and environment.

cooperation, chiefly because there is no chapter on that. EUSFTA is also the only agreement not envisaging a Civil Society Forum.

Treaty bodies	CETA	TTIP	EUSFTA	EUJEPa
<b>Joint Committee</b>	✓	✓	✓	✓
<b>Specialised committees</b>	✓	✓	✓	✓
TSD Committee	✓	✓	✓	✓
...	...	...	...	...
<b>Working groups</b>	x	✓	x	✓
<b>Contact points</b>	✓	✓	x	✓
<b>Domestic Advisory Groups</b>	✓	✓	✓	✓
<b>Civil Society Forum</b>	✓	✓	x	✓

Table No.1: Overview of the institutional architecture per trade agreement.<sup>14</sup>

### *Joint Committees and Specialised Committees*

Joint and Specialised committees are a typical feature of EU international agreements. It is not surprising, therefore, that all the EU FTAs under investigation envisage the creation of a Joint Committee and a number of Specialised Committees.<sup>15</sup> The Joint Committees are executive bodies formed by representatives of the EU and of the trade partner.<sup>16</sup> They are co-chaired by the EU Commissioner for Trade and the partner's Minister for Trade.<sup>17</sup> Their main function is to supervise and facilitate the implementation and operation of the entire agreement.<sup>18</sup> Above all, they are the main decisional bodies within the institutional architecture of EU FTAs. The Specialised Committees are responsible for monitoring the implementation of specific individual chapters. Just like the Joint Committees, they are intergovernmental

<sup>14</sup> Source: compilation of the author based on treaty provisions. Joint Committees: Art.26.1 CETA; Art.X.1 TTIP; Art.16.1 EUSFTA (this is in fact a "Trade Committee". A Joint Committee is established under the PCA, 16.1(5) FTA referring to Art.41 PCA); Art.22.1 EUJEPa. Specialised Committees: Art.26.2 CETA; Art.X.3 TTIP; Art.16.2 EUSFTA; Art.22.3 EUJEPa; TSD Committees: Art.26.2.1(g) CETA; Art.X.3(c) TTIP (yet missing elaboration in the specific TSD chapter); Art.12.15 EUSFTA (Board on TSD); Art.23.3(1)(h) EUJEPa. Working Groups: Art.X.3 TTIP; Art.22.4 EUJEPa. For CETA, a slight exception is Art.5.14(4) The Joint Management Committee [for Sanitary and Phytosanitary Measures] may establish working groups comprising expert level representatives of the Parties, to address specific SPS issues. Contact Points: Art.26.5 CETA; Art.X.5 TTIP; Art.22.6 EUJEPa. Domestic Advisory Groups: Articles 23.8(4) 24.13(5) CETA; Art.X.7 TTIP; Art.12.15(5) EUSFTA; Art.16.15 EUJEPa. Civil Society Forum: Art.22.5 CETA; Art.X.8 TTIP; Art.16.16 EUJEPa.

<sup>15</sup> EUSFTA in fact establishes a Trade Committee, which is nonetheless comparable to the Joint Committees of the other FTAs. A Joint Committee is envisaged under its political counterpart, the EU-Singapore Partnership and Cooperation Agreement (PCA).

<sup>16</sup> Art.26.1(1) CETA, Art.X.1(1) TTIP, Art.16.1(1) EUSFTA, Art.22.1(1) EUJEPa.

<sup>17</sup> Art.26.1(1) CETA, Art.X.1(a) TTIP, Art.16.1(2) EUSFTA, Art.22.1(3) EUJEPa.

<sup>18</sup> See e.g. Art.26.3 CETA; Art.22.1(4) and 22.1(5) EUJEPa; Art.16.1(3)(a) EUSFTA. In TTIP, the Joint Committee would have also had specific duties in relation to regulatory cooperation.

executive bodies composed of representatives of the Parties.<sup>19</sup> They can be expected to work towards the achievement of the objectives of the chapters under their responsibility, where their functions are also specified. Whilst mainly reporting to the Joint Committee, and proposing draft decisions to it, the texts of EUSFTA, CETA and EUJEPa lead to believe that they can also take decisions themselves.<sup>20</sup>

<b>Joint Committees</b>	<b>CETA</b>	<b>TTIP</b>	<b>EUSFTA</b>	<b>EUJEPa</b>
Establish and dissolve specialised committees	✓	✓	✓	✓
Delegate/allocate responsibilities to specialised committees	✓	✓	✓	✓
Adopt decisions	✓	✓	✓	✓
Adopt interpretations of the provisions of this Agreement	✓	✓	✓	✓
Resolve disputes regarding the interpretation of the agreement	✓	✓	✓	✓
Consider/adopt/recommend amendments	✓	✓	✓	✓
Make recommendations on regulatory cooperation, including to the Transatlantic Regulators' Forum	✗	✓	✗	✗

Table No.2: Selected decision-making powers of the Joint Committee per trade agreement.<sup>21</sup>

<b>Specialised Committees</b>	<b>CETA</b>	<b>TTIP</b>	<b>EUSFTA</b>	<b>EUJEPa</b>
Take decisions	✓	✗	✓	✓
Propose draft decisions for adoption by the Joint Committee	✓	✗	✗	✓
Inform the Joint Committee of their schedules and agenda	✓	✓	✓	✓
Report to the Joint Committee on results and conclusions from each meeting	✓	✓	✗	✓

Table No.3: Selected decision-making powers of Specialised Committees and their relationship with the Joint Committee.<sup>22</sup>

<sup>19</sup> See i.a. Art.26.2(4) and Art.22.4(1) CETA; Art. 16.2(3), Art.2.15(1), Art.5.15 EUSFTA; Art.22.3(3)(b) EUJEPa.

<sup>20</sup> See Art.26.2(4) CETA and Art.22.3(5) EUJEPa. As regards TTIP, nothing is mentioned about the possibility for specialised committees to adopt decisions. It could be inferred that decision-making would remain a prerogative of the Joint Committee, without yet excluding the possibility for it to allocate new tasks and powers to the specialised committees. The wording in EUSFTA is unclear as to whether the specialised committees can take decisions themselves, or if it is the Parties who take decisions *in* the specialised committees, see Art.16.4(1) EUSFTA. Yet a series of other provisions lead to believe that specialised committees such as Committee on Trade in Goods would have similar powers.

<sup>21</sup> Source: compilation of the author based on treaty provisions. On TTIP, the power to dissolve only relates to the Specialised Committees that would be established by the Joint Committee and not the FTA per se.

<sup>22</sup> Source: compilation of the author based on treaty provisions.



### *The DAGs and the Civil Society Forum*

The new generation EU FTAs for the first time encompass a prominent civil society dimension in their institutional structure. The newly-created bodies for civil society reflect a renewed effort to involve it beyond the negotiation stage. Two main bodies stand out which increasingly institutionalise the participation of civil society at the implementation level: the Domestic Advisory Groups (DAGs), one to be created domestically by each trade partner; and the Civil Society Forum (CSF), working at the bilateral level.

The DAGs are a unique and novel feature of the Post-Lisbon trade agreements. All the FTAs under investigation mandate each Party to convene or establish their own new domestic advisory group, or to consult an already existing one.<sup>23</sup> At the moment of writing, the EU and the respective trade partners have established the DAGs for CETA and EUJEPA, but not for EUSFTA.<sup>24</sup> The DAGs consist of a small number of civil society representatives and permanent observers.<sup>25</sup> With the exception of EUJEPA, all the other FTAs stipulate that there shall be a “balanced representation” including business, social and environmental stakeholders.<sup>26</sup> The *EU* DAGs comprise members representing three groups: representatives of the employers, of the workers, and the so-called “third interests”.<sup>27</sup> Regarding the selection process, it is the Commission that publishes the call for expression of interest and takes the final decision on the basis of a number of criteria.<sup>28</sup>

While the EU DAGs are administered by the European Economic and Social Committee and to work independently from the Commission, the Rules of Procedure of the EU DAGs of both CETA and EUJEPA provide that the EU Commission is to be systematically invited to participate in the EU DAGs meetings.<sup>29</sup> Regarding the DAGs of *trade partners*, Canada has decided to have one DAG for labour, and one DAG on environment. Unlike for the Canadian DAG on environment,<sup>30</sup> at the time of writing there is no record of the establishment of the DAG for labour. It is uncertain whom it encompasses, beyond those that were mentioned at the Civil Society Forum on 12 September 2018<sup>31</sup> and at the CSF in November 2019.<sup>32</sup> Japan has followed Canada’s approach in having two different DAGs. The DAG for labour comprises the Labour Policy Council,<sup>33</sup> which is an advisory body of the Ministry of Health, Labour and Welfare: albeit composed of representatives of the workers, of the employers and of public interest, its members are appointed by the Ministry.<sup>34</sup>

<sup>23</sup> In general, provisions on the DAGs are to be found in the TSD chapters, under the heading of institutional mechanisms. EUSFTA and EUJEPA reflect this practice, whereas CETA is slightly different, due to the Canadian preference to have two separate DAGs: one for the chapter on Trade and Labour and one for the chapter on Trade and the Environment, and which are thus established therein. TTIP would have differed more significantly, inasmuch as it would have established the DAGs under the overarching institutional chapter. This way, it would have recognised them a constitutive part of the institutional architecture of the Agreement. As shown below, this would have also been reflected in the scope of their mandate. See Articles 23.8(4) and 24.13(5) CETA - Institutional mechanisms; Art.X.7 TTIP - Domestic Advisory Groups; Art.12.15 EUSFTA - Institutional Set up; Art.16.15 EUJEPA - Domestic advisory group.

<sup>24</sup> The statement of the non-establishment of the DAGs for EUSFTA is based on the answers received by Europe Direct by email.

In the absence of DAG-to-DAG meetings, the CSF is what brings together the DAGs from each Party, and in most cases also other members of civil society not belonging to the DAGs. Among the FTAs investigated, EUSFTA is the only agreement not envisaging the creation of a joint dialogue of civil society.<sup>35</sup> CETA, TTIP and EUJEPa all stipulate that the CSF comprises both the DAGs of each Party and other representatives of civil society, following a criterion of “balanced representation.”<sup>36</sup> The purpose of the CSF appears to be limited to providing a platform for deliberative discussion. They may nonetheless submit views and opinions to the Joint and Specialised Committees. Unlike the Joint and Specialised committees, the DAGs and the CSF are not decisional bodies and their role remains advisory and consultative. While they may not be understood as institutions in legal terms, this paper adopts an historical institutionalist perspective which has quite an encompassing interpretation of institutions. The next section turns to the theoretical insights that inform this approach and how the institutional architecture of EU FTAs matters for fundamental rights.

<sup>25</sup> 18 members for the EU DAG for CETA and 12 members for the EU DAG for EUJEPa. See respective rules of procedure, RoP 2.1 EU DAG for CETA and RoP 2.1 EU DAG for EUJEPa, available at <[https://www.eesc.europa.eu/sites/default/files/files/final\\_rules\\_of\\_procedure\\_-\\_eu\\_dag\\_for\\_japan.pdf](https://www.eesc.europa.eu/sites/default/files/files/final_rules_of_procedure_-_eu_dag_for_japan.pdf)> and <[https://www.eesc.europa.eu/sites/default/files/files/en\\_rules\\_of\\_procedure\\_for\\_eu\\_dag\\_for\\_ceta\\_0.pdf](https://www.eesc.europa.eu/sites/default/files/files/en_rules_of_procedure_for_eu_dag_for_ceta_0.pdf)>.

<sup>26</sup> Art.23.8(4) and 24.13(5) CETA; Art.X.7 TTIP; Art.12.15 EUSFTA. The Rules of Procedure of the EU DAG for EUJEPa prescribes this balanced representation.

<sup>27</sup> When referring to “civil society actors” of the DAGs and CFS, the paper implies these categories. When referring to civil society actors for fundamental rights, it is implied that the focus is on those civil society actors that can be expected to advocate for fundamental rights, including for instance trade unions. The accountability of civil society actors goes beyond the scope of this paper.

<sup>28</sup> The EU DAGs for CETA and EUJEPa were created following a call of interest to become a DAG member. The calls specify that, in order to become a DAG member, a candidate would have to: be non-for profit; be registered in the EU transparency register and in the civil society database of the Directorate General for Trade; be effectively established in the EU; and have specific expertise or competence on areas covered by the sustainable development chapters. The EU DAG thereof established now encompasses members of the European Economic and Social Committee (EESC) and members of both business and civil society. Call for expression of interest for the CETA EU DAGs is available here <[https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156606.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156606.pdf)> and the one for the EUJEPa EU DAGs here <[https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc\\_158364.pdf](https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158364.pdf)>.

<sup>29</sup> RoP 11.1 EU DAG on CETA; RoP 11.1 EU DAG on EUJEPa. This is not the case for the EP, which shall be updated on the DAG work programme. See RoP 11.3 EU DAG on CETA; RoP 11.3 EU DAG on EUJEPa.

<sup>30</sup> See Government of Canada, ‘Canadians appointed to environment international advisory committees’, available at <<https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/canadian-appointed-advisory-committees.html>>

<sup>31</sup> Namely Jocelyne Dubois (Director, International Department, Canadian Labour Congress, the largest trade union in Canada), and Derrick Hynes (President and CEO of FETCO, Federally Regulated Employers – Transportation and Communications), see recording of the CETA 1st Civil Society Forum Meeting (12.09.2018), available at <<https://webcast.ec.europa.eu/ceta-1st-civil-society-forum-meeting>>.

<sup>32</sup> Among which Kelly Pike (Assistant Professor at the University of York, Canada), see Video recording of the Forum provided by email and made available for one week by Andreas Tibbles, Trade Policy Officer, Trade Agreements Secretariat (TCT) Global Affairs Canada.

<sup>33</sup> See presentation by Eve Päärenson (EESC EU-Japan Follow-Up Committee), ‘EU-Japan EPA and the role foreseen for civil society’, available at <[http://www.office.kobe-u.ac.jp/ipep/materials/EuropeanCenterSymposium2019/1-1-4\\_Ms.EvePaarendson.pdf](http://www.office.kobe-u.ac.jp/ipep/materials/EuropeanCenterSymposium2019/1-1-4_Ms.EvePaarendson.pdf)>

<sup>34</sup> See website of the Ministry of Health, Labour and Welfare (google translated) <[https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou\\_roudou/roudouzenpan/roudouseisaku/index.html](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudouzenpan/roudouseisaku/index.html)>.

<sup>35</sup> As for the other FTAs, provisions on a CSF are to be found in the TSD chapters (see Art.22.5 CETA; Art.X.8 TTIP; Art.16.16 EUJEPa), with the exception of TTIP which establishes it under the institutional chapter (Art.X.8 TTIP Institutional Proposal).

<sup>36</sup> Art.22.5(2) CETA; Art.X.8(2) TTIP; Art.16.16(2) EUJEPa. This is also repeated in the Rules of Procedures of the EU DAGs for CETA and EUJEPa.

### 3. The Relevance of Institutions to Fundamental Rights: A Theoretical Framework

This paper is interested in understanding the contribution that treaty bodies could make to fundamental rights. In this sense, the focus is not on what shapes institutions, but rather on what institutions can shape in their turn, once they are created.<sup>37</sup> Given the nature of the inquiry, this paper relies on theoretical insights of historical institutionalism, according to which *institutions matter* for they affect *outcomes*. Historical institutionalism provides a fitting theoretical framework because of its attribution of varying policy outcomes to different institutional arrangements.<sup>38</sup> Above all, an historical institutional perspective extends the range of institutions that are important to explaining outcomes.<sup>39</sup> Its application to the present analysis allows to study treaty bodies of EU FTAs that other theories may either overlook or discard as non-institutions.

Treaty bodies defy classic taxonomies and definitions of institutions provided by IR scholars or social sciences:<sup>40</sup> they are not international institutions proper,<sup>41</sup> nor are they informal rules and organised practices impacting behaviour, as assumed by sociology<sup>42</sup> and political organisation theories.<sup>43</sup> In a spectrum ranging from formal international institutions to informal rules, the treaty bodies of EU FTAs sit somewhere in the middle: they are formal bodies of rules which set up the stage for cooperation and exchanges, forming expectations with an impact on human behaviour and political action. By holding that formal institutions are not the only ones to matter, historical institutionalism allows a wider interpretation of what constitutes an institution and justifies the study of less formalised arenas.<sup>44</sup> In this sense, it comes at hand for an analysis of treaty bodies that may not be understood as institutions proper. The treaty bodies of the new generation EU FTAs are considered here as *institutions* and *to matter for fundamental rights*.

In order to understand how institutions matter for fundamental rights, the analysis centres on the *institutional design* of EU treaty bodies. For the purpose of this paper, institutional design is defined as comprising the rules that stipulate how the treaty bodies of EU FTAs are to

<sup>37</sup> The “why” question is what rational choice institutionalists are interested in. Rational choice institutionalism focuses on the forces that shape institutions, understood as the outcome of agents’ strategies; institutions are the result of deliberate choices to defend specific interests. See Henry Farrell, ‘The Shared Challenges of Institutional Theories: Rational Choice, Historical Institutionalism, and Sociological Institutionalism’ in Johannes Glückler and others (eds), *Knowledge and Institutions* (Springer 2018) 24.

<sup>38</sup> Bulmer (n 3) 372, Farrell (n 37).

<sup>39</sup> Henry Farrell and Abraham Newman, ‘Making global markets: Historical institutionalism in international political economy’ (2010) 17 *Review of International Political Economy* 609, 629.

<sup>40</sup> See Hans Keman, ‘Approaches to the Analysis of Institutions’, in Bernard Steunenberg and Frans van Vught (eds), *Political Institutions and Public Policy* (Springer 1997).

<sup>41</sup> Robert O Keohane and others, *After the Cold War, International Institutions and State Strategies in Europe, 1989-1991* (Harvard University Press 1993); Robert O Keohane, ‘International Institutions: Can Interdependence Work?’ (1998) 110 *Foreign Policy* 82.

<sup>42</sup> Sabine Saurugger and Frédéric Mérand, ‘Does European Integration Theory Need Sociology?’ (2010) 8 *Comparative European Politics* 1; Keman (n 40) 3.

<sup>43</sup> Johan P Olsen, *Governing through Institution Building: Institutional Theory and Recent European Experiments in Democratic Organization* (OUP 2010) 36.

<sup>44</sup> Bulmer (n 3) 369.

operate in practice.<sup>45</sup> Institutional and IR theories tell us that institutional design matters.<sup>46</sup> While functionalist and power-based scholars emphasise *why* an institution features a certain institutional design,<sup>47</sup> historical institutionalism employs a micro-level focus: it suggests to leverage the explanatory power of intermediating factors that may lead to a certain policy outcome.<sup>48</sup> As it is too early to observe this empirically in the context of EU FTAs, rules of institutional design are informative of the chances for fundamental rights to be taken into consideration and protected at the implementation stage. They provide the basis to understand how far the treaty bodies of EU FTAs may (or may not) deal with fundamental rights when exercising their mandate. As a result, the institutional design is not regarded as a dependent variable, nor is it taken for granted.<sup>49</sup> Instead, it is called into question and examined in its potential implications for fundamental rights.<sup>50</sup>

In order to examine how treaty bodies of EU FTAs, and more specifically their institutional design, can matter for fundamental rights, the analysis relies on some of the elements that, according to historical institutionalism, influence and help understand policy outcomes. For historical institutionalism, policy outcomes are influenced by how institutional designs shape the preferences of the members of an institution and their behaviour and practices, including how they interact with each other.<sup>51</sup> Underlying the relevance of these elements is the tenet whereby institutional designs create *path-dependencies* which will influence the course of policy and practices.<sup>52</sup> Historical institutionalism predicts that most of the time, institutions will not perform efficiently, for they are bound by rules established in earlier times, and from which it is difficult to depart. The resulting policy outcomes may downgrade their usefulness or sideline new demands in their respect.<sup>53</sup> For fundamental rights this could mean, inter alia, that mechanisms for their monitoring and protection would be constrained by existing

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<sup>45</sup> Among issues of institutional design are i.a. whether the rules are informal or legalised, whether the commitments are permanent or time-bound, and whether decision-making is participatory or centralised. See Randall W Stone, 'Institutions, Power, and Interdependence', in Milner and Moravcsik (n 7) 41; Helen Milner, 'Power, Interdependence and Nonstate Actors in World Politics: Research Frontiers', in Milner and Moravcsik (n 44) 20; Bartl (n 4).

<sup>46</sup> Barbara Koremenos and others, *The Rational Design of International Institutions* (CUP 2009) 762; Ronald B Mitchell, 'The Influence of International Institutions: Institutional Design, Compliance, Effectiveness and Endogeneity', in Milner and Moravcsik (n 5) 66; Randall Stone, 'Institutions, Power, and Interdependence', in Milner (n 45) 43.

<sup>47</sup> As pointed out by Charles Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters* (OUP 2020) 56.

<sup>48</sup> Bulmer (n 3) 376.

<sup>49</sup> Stone (n 45) 43; Olsen (n 43); Mitchell (n 46) 81.

<sup>50</sup> What this paper is not concerned with is the effectiveness of institutions, if understood in the sense that treaty bodies should achieve the purpose for which they were created (see e.g. Timothy J McKeown, 'The Big Influence of Big Allies: Transgovernmental Relations as a Tool of Statecraft' in Milner and Moravcsik (n 7); Stephen Woolcock, 'EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims' (2014) 20 *European Law Journal* 718, 726). One angle would be to consider potential for compliance with the TSD chapter, which is yet not the aim of this paper. This paper is also not concerned with the incentives for such compliance, nor for creating treaty bodies (see e.g. Koremenos and others (n 46)), since the latter are taken as the independent variables for the implications on fundamental rights.

<sup>51</sup> Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 *Annual Review of Political Science* 369.

<sup>52</sup> Bulmer (n 3) 372.

<sup>53</sup> *Ibid.*

practices, or even by omissions (and the scope for fundamental rights in EU FTAs is very limited).<sup>54</sup>

With this in mind, the first element discussed here concerns *preferences*. Historical institutionalism maintains that institutions shape how their members will set their preferences over time.<sup>55</sup> Preferences will be part of a limited menu of options provided by the creators of the institutions.<sup>56</sup> For the present analysis, what is relevant is the extent to which the preferences of treaty bodies of EU FTAs encompass objectives of fundamental rights. The objectives that these treaty bodies have been set up to achieve will determine how the members will understand their role and what they will decide or discuss upon.<sup>57</sup> In this regard, the *scope of the mandate* is taken as an element to be examined. Importantly, it has an impact on agenda-setting and outcome.<sup>58</sup> The breadth and degree of clarity of the scope will determine how much discretion the members of a body will have as to the agenda items to be discussed. The mandate can matter for fundamental rights to the extent that it may expect institutions to monitor the impact of the trade agreement, or of a certain decision or policy, on fundamental rights, as well as to provide concrete proposals on fundamental rights. In addition, institutional designs that included commitments for institutions to respect fundamental rights and to endorse procedural good governance principles could arguably lead to more socially legitimate outcomes.<sup>59</sup>

The second element considered here concerns *internal processes*. Historical institutionalism holds that institutional arrangements structure internal processes of decision-making and other organisational features, which in turn influence and help explain the policy outcome.<sup>60</sup> In these processes, institutional design will reflect and reproduce particular patterns of power distribution, in what is termed the 'distributional effect' of institutions.<sup>61</sup> As Wendt has pointed out, choices about institutional design are choices about who is empowered, or not, to make decisions.<sup>62</sup> In this context, historical institutionalism holds that *interactions* within and between institutions matter.<sup>63</sup> Hence it is important to examine the way decision-making processes are designed and what kind of interactions they envisage.<sup>64</sup> For fundamental rights, the relevance lies in the extent to which internal processes provide for participation and institutional space

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<sup>54</sup> See Isabella Mancini, 'Fundamental Rights in the EU's External Trade Relations: From Promotion 'Through' Trade Agreements to Protection 'in' Trade Agreements' in Eva Kassoti and Ramses A Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER PAPERS 2020/1).

<sup>55</sup> Mark Dawson, 'Fundamental Rights in European Union Policy-making: The Effects and Advantages of Institutional Diversity' (2020) 20 *Human Rights Law Review* 50, 54.

<sup>56</sup> *Ibid.*

<sup>57</sup> Bartl (n 4).

<sup>58</sup> Koremenos and others (n 46) 770.

<sup>59</sup> Olsen (n 43).

<sup>60</sup> Bulmer (n 3) 374.

<sup>61</sup> Thelen (n 51) 394 quoting Ikenberry 1994; Pierson 1997.

<sup>62</sup> Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design' in Koremenos and others, 275. See also Thelen (n 51).

<sup>63</sup> Dawson (n 55).

<sup>64</sup> *Ibid.*

to non-state actors and parliaments: not only to voice concerns related to fundamental rights, but also to interact with decisional bodies, if not to take part in the decision-making process themselves. This would also contribute to the politicisation of institutions, which can enhance the quality of decision-making<sup>65</sup> and make it difficult to overlook rights-based concerns.<sup>66</sup> As part of the examination of interactions, elements to consider include monitoring and accountability mechanisms: these are necessary so that preferences over fundamental rights do not remain abstract but are duly followed up and given reasons for not to.<sup>67</sup>

The next section turns to explore these elements in the context of the new generation EU FTAs. It highlights omissions with respect to fundamental rights, above all in the preferences that the institutional design provides for the treaty bodies; as well as limitations in internal processes which cannot account for an institutional environment that can adequately safeguard fundamental rights. The layering and copy-pasting of treaty bodies across different FTAs, with slight differences as to civil society participation, concur with path-dependency predictions and outcomes that may easily ignore fundamental rights consideration and impacts.

## 4. The Inadequacy of the Institutional Architecture of EU FTAs for Fundamental Rights

### 4.1. Fundamental Rights Gaps in the Mandate of Treaty Bodies

A comparison of the mandates of treaty bodies reveals that only labour rights would benefit from an institutional structure, which envisages monitoring compliance with them. As far as Joint Committees are concerned, their main function is to supervise and facilitate the implementation and operation of the agreement.<sup>68</sup> The scope of the activities of a Joint Committee can be said to encompass all the chapters of an FTA.<sup>69</sup> Even though the latter include the newly-introduced chapter on Trade and Sustainable Development (TSD), it is easier to imagine that the Specialised Committee on TSD will be the main body dealing with it. Beyond the substantive chapters to be monitored, the operation of the Joint Committees is not subject to principles or objectives of fundamental rights; nor do the institutional chapters feature overarching objectives encompassing fundamental rights. By contrast, for instance, Chapter 4 has shown that the chapters on regulatory cooperation in both TTIP and EUJEPa refer to the promotion of a transparent regulatory environment and good regulatory practices

<sup>65</sup> Michael Zurn and others, 'The politicization of world politics and its effects: Eight propositions' (2014) 6 European Political Science Review 47.

<sup>66</sup> Dawson (n 55) 51.

<sup>67</sup> Gráinne De Búrca, 'Developing Democracy Beyond the State' (2008) 46 Columbia Journal of Transnational Law 101.

<sup>68</sup> Only EUJEPa specifies the aim of ensuring that the Agreement "operates properly and effectively" as a basis for the allocation of powers to the Joint Committee, see Art.22.1(4) and 22.1(5) EUJEPa. Compare with Art.16.1(3)(a) EUSFTA "The Trade Committee shall ensure that this Agreement operates properly".

<sup>69</sup> See e.g. Art.26.3 CETA. In TTIP, the Joint Committee would have also had specific duties in relation to regulatory cooperation.

as some of the objectives that regulatory cooperation mechanisms should pursue and incorporate, and which could arguably contribute to an outcome that does not jeopardise fundamental rights.<sup>70</sup> Given the institutional provisions of the FTAs, however, the objectives of the Joint Committees appear to remain substantive and relating to the achievement of an effective operation of the entire FTA.

As to the Specialised Committees, they are similarly expected to work towards the effective implementation of the chapters under their responsibility. Significantly, for the first time, the new generation EU FTAs comprise Specialised Committees on TSD: these are executive bodies whose main role is to oversee the implementation of the TSD chapter, which also implies ensuring compliance with the commitments undertaken. Only CETA and EUJEPa have a fully-fledged Committee on TSD.<sup>71</sup> The EU proposal for the institutional chapter of TTIP refers to the establishment of a TSD Committee, which is yet not elaborated in the EU textual proposal for the TSD chapter.<sup>72</sup> As far as EUSFTA is concerned, the Parties are required to establish a *Board* on TSD, but besides the task of overseeing the implementation of the chapter, no further powers are specified;<sup>73</sup> above all, there are no records of its establishment. By contrast, both CETA and EUJEPa provide that the TSD Committee will monitor the implementation of the TSD chapter and add to this in different ways.

CETA contains extensive provisions on the interaction between the TSD Committee and civil society, to which the chapter will turn later. While CETA provides that its Specialised committees - which includes the TSD Committee - can propose draft decisions to the Joint Committee, the specific articles on the TSD Committee do not repeat this.<sup>74</sup> EUJEPa, by contrast, assigns a wider range of powers to the TSD Committee, which include: the possibility to make recommendations to the Joint Committee;<sup>75</sup> to pursue cooperation between its work and the activities of the ILO;<sup>76</sup> and to seek solutions to resolve differences between the Parties regarding the interpretation or application of the chapter.<sup>77</sup> Notwithstanding the slight variations, the fact remains that the TSD Committees remain limited in what they are

<sup>70</sup> Art.18.1(1) EUJEPa and Art.x.1(1)(c) TTIP- EU proposal for Chapter: Regulatory Cooperation (21 March 2016).

<sup>71</sup> For CETA it includes the TSD chapter and also the chapters on Trade and Labour and Trade and Environment. See Art.22.4 CETA. See, respectively, Articles 23.8(2) CETA for Trade and Labour and 24.13(3) CETA for Trade and Environment.

<sup>72</sup> See EU textual proposal for the TSD Chapter at <[https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153923.pdf](https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf)>. An EU position paper gives some guidance as to how this TSD Committee would have functioned: without calling it as such, the paper refers to a "government-to-government joint body" for the oversight and monitoring of TSD chapter implementation; this body would have also promoted "activities to further implement its shared objectives", including via "decisions and recommendations". EU Position Paper on Trade and sustainable Development Chapter/Labour and Environment: EU Paper outlining key issues and elements for provisions in the TTIP, available at <[https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153024.pdf](https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf)>.

<sup>73</sup> Art.12.15(3) EUSFTA. The only requirement prescribes that the meetings of the Board shall include a session with stakeholders, making sure to have a balanced representation of relevant interests. See Art.12.15(4) EUSFTA and Art.12.15(4) EUSFTA.

<sup>74</sup> Nonetheless, and unlike EUJEPa, CETA provides that the TSD Committee reviews the impact of the agreement on sustainable development (see Art.22.4(1) CETA). This is presented as an activity falling under its function to monitor the implementation of the agreement and it could be expected that the TSD Committee under EUJEPa would have the same task.

<sup>75</sup> Art.16.13(2)(a) EUJEPa.

<sup>76</sup> Art.16.13(4) EUJEPa.

<sup>77</sup> Art.16.13(2)(e) EUJEPa.

essentially expected to do: monitor the effective implementation of the TSD Chapter. Since this is where the labour rights provisions can be found, and given the TSD Committees have to ensure that these commitments are abided by, their mandate can be said to encompass fundamental rights. Labour rights yet are only a fraction of a broader range of fundamental rights. EU FTAs do not contain chapters for data privacy rights, and no Specialised committee exists to monitor the implementation of the relevant provisions. Fundamental rights that do not enjoy a place within the FTA do not enjoy a treaty body, chiefly because there would be no provision to monitor.

Importantly, however, CETA suggests that the TSD Committee may review the impact of the Agreement on sustainable development.<sup>78</sup> EUJEPA includes a self-standing provision to a similar effect, albeit not addressed to the TSD Committee specifically, but to the Parties and the institutions set up by the Agreement.<sup>79</sup> In both cases, such an assessment could include potential impacts on labour rights. Importantly, whereas the task of monitoring the TSD chapter would imply to ensure *compliance* with labour rights commitments, here the reference is made to the *impact* that the whole agreement may have on sustainable development. Different chapters in the FTAs might indeed have an impact on labour and other fundamental rights.<sup>80</sup> Assessing the impact of an FTA on sustainable development, however, does not imply assessing the impact of an FTA on a wide range of fundamental rights that might be affected. While some argue that judicial review in these cases might lag behind in providing an effective tool,<sup>81</sup> the Ombudsman recently made clear that the human rights impacts of an agreement also apply *during its implementation*, “in light of the human rights obligations set out in the Charter and in international human rights law”.<sup>82</sup> What is now a quick reference in the text of CETA to engage in such review should become the object of an express duty of the TSD Committees. Arguably, the TSD Committees could benefit from suggestions by civil society actors, which may have familiarity with local fundamental problems, and which in the institutional architecture of EU FTAs are assigned a body and a role.

While the preferences of the DAGs and of the CSF may depart from those of the Parties’, their role is mainly consultative and circumscribed to the oversight of the TSD chapter. The DAGs are expected to facilitate, monitor and provide views and advice on the implementation of the

<sup>78</sup> Art.22.4(1) CETA.

<sup>79</sup> Art.16.11 EUJEPA, “the Parties recognise the importance of reviewing, monitoring and assessing, jointly or individually, the impact of the implementation of this Agreement on sustainable development through their respective processes and institutions, as well as those set up under this Agreement.”

<sup>80</sup> Tonia Novitz, ‘Labour Standards and Trade: Need We Choose Between ‘Human Rights’ and ‘Sustainable Development’?’ in Henner Gott (ed), *Labour standards in International Economic Law* (Springer 2018); Isabella Mancini, ‘Deepening Trade and Fundamental Rights? Harnessing Data Protection Rights in the Regulatory Cooperation Chapters of EU Trade Agreements’, in Wolfgang Weiss and Cornelia Furculita (eds), *Global Politics and EU Trade Policy Facing the Challenges to a Multilateral Approach* (Springer 2020).

<sup>81</sup> Marise Cremona and Joanne Scott, Introduction, in Cremona and Scott, *EU Law Beyond Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 19.

<sup>82</sup> Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement.



TSD Chapter.<sup>83</sup> The role of the CSFs is to “conduct a dialogue”. The subject matter for this dialogue encompasses: the TSD chapter in EUJEPa; “sustainable development aspects of this Agreement” in CETA; and “the implementation and application of this Agreement” in TTIP.<sup>84</sup> The texts of the FTAs suggest that the new bodies institutionalising civil society participation are not expected to monitor the impact of the FTAs on fundamental rights; nor to deliberate on them. The DAGs and the CSF are treaty bodies that are detailed in the TSD chapter, and which are required to facilitate and monitor its implementation. Yet, as discussed, fundamental rights typically remain limited to labour standards. Accordingly, the DAGs and the CSF will not monitor, for instance, data privacy rights in the context of e-commerce. Historical institutionalism suggests that the narrow scope of their mandate will have consequences on the agenda of their meetings, not least on what these bodies understand to be their role.

The EU’s TTIP proposal is the only one, among the other FTAs, that would have extended the scope of the mandate of the DAGs and of the CSF to respectively oversight and conduct a dialogue on the implementation of the *entire agreement*.<sup>85</sup> Similarly, EU civil society actors have recently demanded to enlarge the scope of the mandate to the whole agreement.<sup>86</sup> Yet the *widening* of the scope does not necessarily correspond to a mandate that would come to aid to fundamental rights. This would be the case where civil society were asked to appreciate and monitor the *impact* of the FTA on fundamental rights, including impacts deriving from different chapters of the FTA. The demands to broaden the scope of the mandate were not motivated by this interpretation, nor have they this effect. On the motivation, demands for expanding the mandate find their origin in the will, by the business component of the EU DAGs, to be granted a role in the implementation of FTA chapters other than the one on TSD. In this regard, some civil society actors condemn the lack of a clear scope of action of the DAGs, as everything could be on their agenda.<sup>87</sup> A wider agenda might indeed take away room for discussion on matters related to e.g. trade and labour, since other economic matters pertaining to the FTA could be prioritised.

Regarding the implications, facilitating and monitoring the *implementation of the agreement* does not mean *monitoring its impact* on something else (as could be fundamental rights); or facilitating the realisation of something falling outside its scope. As discussed, this is

<sup>83</sup> The proposal of TTIP differs from the other FTAs in that it would have extended scope of their oversight to the entire agreement. Art.X.7(1) EU TTIP proposal for Institutional, General and Final Provisions. See discussion later.

<sup>84</sup> Art.23.8(4) CETA; Art.X.7(1) TTIP; Art.12.15(5) EUSFTA; Art.16.15(1) EUJEPa.

<sup>85</sup> Art.X.7(1) EU TTIP proposal for Institutional, General and Final Provisions.

<sup>86</sup> See Opinion of the European Economic and Social Committee, ‘The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements’ (adopted 15 January 2019), available at <<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements>>; Non-paper of the Commission services, ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’ (26 February 2018), available at <[https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156618.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf)> (hereafter: European Commission, ‘Non-paper’).

<sup>87</sup> Informal interview with civil society representatives.

problematic in the *quasi*-absence of fundamental rights in FTAs, as there would be very little to monitor in their respect. The European Commission understands civil society mechanisms as means for continuous analysis of the “effectiveness” of the TSD chapters.<sup>88</sup> While crucial, such an understanding omits and prevents examinations of intrinsic linkages between other sections of the FTAs and fundamental rights. It also excludes ex-post evaluations of the negative impacts predicted in the ex-ante sustainability impact assessments. The methodology of the ex-post impact assessments of EU FTAs corroborates this observation.<sup>89</sup> While stakeholders may be consulted, the DAGs and the CSF have no formal role in *ex-post* monitoring processes. In any case, they are not required, as per their role, to check that implementation of an FTA respects fundamental rights. Their duty is to ensure that the commitments of the Parties under the agreement are fulfilled.

As the DAGs and the CSF are not required to monitor the impact on fundamental rights, deliberation on these issues also risks remaining on the margins. If treaty bodies can be understood as endeavours of institutionalisation in the sense of formalising and stabilising practices and cooperation, then the DAGs and the CSF represent unique institutionalised channels for regular meetings. Periodic interaction and horizontal exchanges between EU and partner countries’ civil society are likely to benefit information-sharing and can be conducive to policy learning and innovation.<sup>90</sup> The experience with CETA so far shows that the CSF can work as a platform for dialogue on cooperation on labour standards with third FTA partners; and also as a springboard for joint initiatives, such as joint workshops with civil society on collective bargaining.<sup>91</sup> The agenda of the EU-Canada CSF was also open to “any other issues”, albeit limited to the field of TSD. Particularly at this stage, civil society actors should prompt discourses on the relationship between trade and fundamental rights, how this relationship should be understood and the way forward. What matters eventually, will be that the DAGs and the CSF manage to put these issues on the agenda.

#### 4.2. Decision-making Processes that can Sideline Fundamental Rights

In the implementation phase of FTAs, the Joint Committees, and in some cases the specialised committees, are the main bodies that can take decisions, with no oversight

<sup>88</sup> European Commission, ‘Non-paper’ (n 86). The Commission services consider it key to continue to engage with Member States, the European Parliament, interested stakeholders and the public to continuously analyse the effectiveness of the implementation of the TSD chapters (e.g. through review clauses; annual FTA implementation reports; ex-post impact assessments).

<sup>89</sup> See Elisabeth B Bonanomi, ‘Measuring Human Rights Impacts of Trade Agreements-Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology’ (2017) 9 *Journal of Human Rights Practice* 481.

<sup>90</sup> Evgeny Postnikov and Ida Bastiaens, ‘Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements’ (2014) 21 *Journal of European Public Policy* 923.

<sup>91</sup> European Commission, ‘Joint Report’ (2019) (Comprehensive Economic and Trade Agreement: Meeting of the Civil Society Forum, 12 November 2019, Ottawa), available at <[https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158679.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158679.pdf)>.

mechanisms being applied to them. Significantly, Joint Committees can take decisions that will be binding on the under international law on the Parties, as well as under EU law on the EU and its Member States.<sup>92</sup> The powers of the Joint Committees appear to go beyond the mere executive implementation of obligations within the scope of the FTAs.<sup>93</sup> Their decision-making powers encompass an indefinite range of issues with potential implications on fundamental rights.<sup>94</sup> As more *political* functions are being attached to *executive* treaty bodies,<sup>95</sup> the internal process of decision-making requires political oversight by parliaments and civil society. It has been argued that insofar as authorities that operate beyond the State are vested with more political functions, a pressing need of legitimation necessarily arises.<sup>96</sup> The examination of the rules for processes of decision-making, including how actors are to interact with each other, reveal that issues of fundamental rights can be easily side-lined.

#### 4.2.1. The Discretionary Interaction with Civil Society

Interaction with DAGs and the CSF is not compulsory and appears to remain a remote possibility. Civil society actors do not take part in the meetings of the Joint Committees; their function appears to remain representative and consultative. When looking at the texts of the FTAs, no provisions expressly provide that the Joint Committees are required to let civil society actors join their meetings. In some of the institutional chapters, the Parties *recall* the importance of considering the views of the public, as a way to “draw on a broad range of perspectives” in the implementation stage.<sup>97</sup> However, when it comes to the functioning of the Joint Committee more specifically, the institutionalisation of interactions with the public is nearly absent.

<sup>92</sup> Decisions become binding under international law by virtue of their adoption by the Joint Committee, as the EU can enter into international commitments following the simplified procedures of Articles 218(7) and 218(9) TFEU: in the case of CETA, the Council decided that the former was indeed the procedure to follow for the adoption of the decisions by the CETA Joint Committee. For a thorough explanation, see Wolfgang Weiss, 'Delegation to treaty bodies in EU agreements: constitutional constraints and proposals for strengthening the European Parliament' (2018) 14 European Constitutional Law Review 532. Decisions are binding under EU law as a result of Art.216(2) TFEU, read in conjunction with case law that stipulates that treaty committees' decisions constitute international agreements and form part of EU law (Case 30/88, Hellenic Republic v Commission of the European Communities ECLI:EU:C:1989:422; C-192/89, Sevince v Staatssecretaris van Justitie ECLI:EU:C:1990:322). See Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013); Ramses Wessel and Steven Blockmans, 'The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union' in Piet Eckhout and Manuel López Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016).

<sup>93</sup> Weiss (n 1) 536.

<sup>94</sup> *Ibid.*

<sup>95</sup> Wolfgang Weiss, 'Implementing CETA in the EU: Challenges for democracy and executive-legislative institutional balance due to the limited role of the European Parliament in the treaty bodies' decision-making' (paper presented at CETA Implications Conference CETA Implementation and Implications Project (CIIP), 27-28 September 2019, University Hall, Dalhousie University) (hereafter Weiss, 'Implementing CETA') 7.

<sup>96</sup> Pieter De Wilde and Michael Zürn, 'Can the politicization of European integration be reversed?' (2012) 50 *Journal of Common Market Studies* 137; Zürn and others, 'International authority and its politicization' (2012) 4 *International Theory* 69.

<sup>97</sup> Art.X.1(8) TTIP and Art.16.6 EUSFTA. TTIP also adds that this is relevant in the context of the domestic advisory groups and the Civil Society Forum, see Art.X.1(8) TTIP.

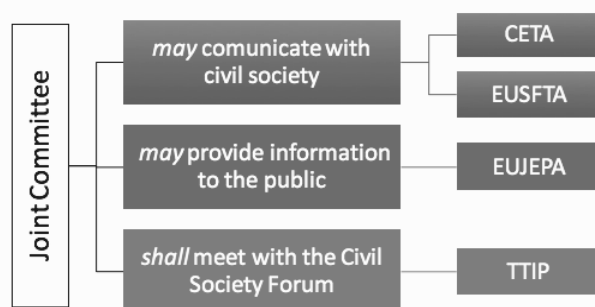


Image No.1: Interactions of the Joint Committee with non-state actors per FTA.<sup>98</sup>

CETA and EUSFTA stipulate that the Joint Committee *may* communicate with all interested parties, including the private sector and civil society organisations.<sup>99</sup> In EUJEPA, the Joint Committee *may* provide information to the public, which yet suggests a debriefing opportunity, rather than an actual communication or exchange.<sup>100</sup> Only TTIP clearly mandates that the Joint Committee meet with the Civil Society Forum.<sup>101</sup> The participants of the first meeting of the CETA Joint Committee were limited to the Canadian Minister for Trade, the EU Commissioner for Trade, delegations, the contact points and representatives from the EU MS and Canadian Provinces and Territories.<sup>102</sup> The agenda of the meeting omitted any interaction or ex-post debrief session with civil society. The same occurred at the first meeting of the Joint Committee under EUJEPA.<sup>103</sup> As to EUSFTA, no meetings appear to have taken place so far.<sup>104</sup>

A slightly different picture emerges for the Specialised Committees. Regarding the TSD Committees, CETA is replete with provisions for exchanges with civil society. The CETA TSD Committee is expected to “promote transparency and public participation” and to publish any decision or report it produces;<sup>105</sup> to hold a session with the public to discuss the implementation of the chapter;<sup>106</sup> and to present updates on implementation to the Civil Society Forum, including annual reports as to its follow-ups on these communications.<sup>107</sup> EUJEPA provides that one of the functions of the TSD Committee is to interact with civil society but does not elaborate further on this.<sup>108</sup> In EUJEPA, it is up to the Parties to give information on the implementation of the TSD chapter to the Joint Dialogue with civil society.<sup>109</sup> Beyond

<sup>98</sup> Source: compilation of the author based on treaty provisions.

<sup>99</sup> Art.26.1(5)(b) CETA and Art.16.1(4)(b) EUSFTA.

<sup>100</sup> Art.22.1(5)(c) EUJEPA.

<sup>101</sup> Art.X.1(9) TTIP.

<sup>102</sup> See European Commission, ‘Report’ (Comprehensive Economic and Trade Agreement (CETA): Meeting of the Joint Committee, 26 September 2018, Montreal (Canada), available at <[https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc\\_157470.pdf](https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157470.pdf)>

<sup>103</sup> See European Commission, ‘Agenda’ (Meeting of Japan-EU EPA Joint Committee, 10 April 2019, Tokyo), available at <[https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc\\_157971.pdf](https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157971.pdf)>.

<sup>104</sup> No documents are available, see <[https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/index\\_en.htm](https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/index_en.htm)>.

<sup>105</sup> Art.22.4(4)(a) CETA.

<sup>106</sup> Art.22.4(3) CETA.

<sup>107</sup> Art.22.4(4)(b) CETA.

<sup>108</sup> Art.16.13(2)(c) EUJEPA.

<sup>109</sup> Art.16.16(4) EUJEPA.

the TSD Committees, an additional comparison can be made with the specialised committees for Regulatory Cooperation. In the relevant chapter, CETA allows civil society to *provide input*, but not to *join* the meetings of the Regulatory Cooperation Forum. Nonetheless, the meeting in December 2018 ended with a “stakeholders debrief session” which “registered stakeholders” could attend.<sup>110</sup> By contrast, no such debrief session was foreseen or took place at the first meeting of the EUJEPA Regulatory Cooperation Committee.<sup>111</sup>

The existence of requirements to interact with civil society yet is not the same as making those actors observers or true participants of the meetings. CETA lacks provisions to that effect. Still, at the end of its meetings, the CETA TSD Committee has so far carried “meeting reviews” with civil society representatives belonging to the DAGs.<sup>112</sup> The review includes a debrief session, where the TSD Committee informs the DAGs of its discussions;<sup>113</sup> views are then exchanged with the DAGs chairs, which allows them to provide feedback to the TSD Committee’s work plan, to present their Joint Statement, and to inform the TSD Committee on the discussions at the Civil Society Forum.<sup>114</sup> Conversely, once again, the first meeting of the EUJEPA TSD Committee held no dedicated sessions with civil society.<sup>115</sup> What emerges from this picture is that the disparity across trade agreements in what they provide as to external participation is also reflected in the role of civil society in the implementation process. Still, CETA is an exemplary case of effort and best practices going beyond what is provided under the agreement itself. The late politicisation of its negotiation has prompted huge interest by many civil society actors in scrutinising its implementation. Civil society actors seem to have welcomed the transparency practices by the CETA specialised committees.<sup>116</sup> Considering that such best practices have not triggered in the context of EUJEPA, it could be questioned how these informal practices left to the discretion of the Parties compare with what could be a legally-embedded and more meaningful participation in the actual meetings. Such

<sup>110</sup> European Commission, ‘Agenda’ (1st Meeting of the CETA Regulatory Cooperation Forum, 14 December 2018) 4, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>>. See also European Commission, ‘CETA Regulatory Cooperation Forum – Stakeholder Debrief Meeting’ (4 February 2020), available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>>.

<sup>111</sup> European Commission, ‘Agenda’ (EU-Japan Economic Partnership Agreement (EPA): First Meeting of the Committee on Regulatory Cooperation, 20 January 2020, Video Conference), available at <[https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158579.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158579.pdf)>.

<sup>112</sup> European Commission, ‘Agenda’ (Meeting of Committee on Trade and Sustainable Development, 13 September 2018 Brussels), available at <[https://trade.ec.europa.eu/doclib/docs/2018/august/tradoc\\_157266.pdf](https://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157266.pdf)>; and European Commission, ‘Agenda’ (Meeting of Committee on Trade and Sustainable Development, 13 November 2019, Ottawa), available at <[https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc\\_158424.11.19%20\(for%20publication\).pdf](https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc_158424.11.19%20(for%20publication).pdf)>.

<sup>113</sup> Ibid.

<sup>114</sup> European Commission, ‘Joint Report’ (Comprehensive Economic and Trade Agreement (CETA): Meeting of the Committee on Trade and Sustainable Development, 13 November 2019, Ottawa), available at <[https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158604.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158604.pdf)>.

<sup>115</sup> European Commission, ‘Agenda’ (EU-Japan Economic Partnership Agreement (EPA): First Meeting of the Committee on Trade and Sustainable Development, 29-30 January 2020, Tokyo), available at <[https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158594.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158594.pdf)>.

<sup>116</sup> The EU Commission has gradually come to recognise the advantages of interacting with civil society actors, as those who have knowledge and information on the ground, thus supporting a bottom-up approach to the implementation of EU FTAs. See European Commission, ‘Report’ (Comprehensive Economic and Trade Agreement (CETA): 1st Meeting of the CETA Regulatory Cooperation Forum, 14 December 2018, Brussels and by videoconference), available at <[https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc\\_157679.pdf](https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157679.pdf)>.

participation would not be meaningful in the absence of follow-up mechanisms. Yet in the FTAs at hand this is the case.

#### 4.2.2. Absence of Follow-up Mechanisms

Unlike the Joint and Specialised committees, the DAGs and the CSF do not have decision-making powers. They can nonetheless “submit views and recommendations” on their own initiative.<sup>117</sup> What is interesting for the present exploration is to examine how these views are followed up. The interactions with the Joint and Specialised committees would be futile if the views and recommendations of civil society actors were not followed up. Internal processes of decision-making could still sideline fundamental rights. In this context, accountability mechanisms are considered here to enhance the chances for the demands of the DAGs and CSF to find their way into the policy process, and the extent to which the executive bodies would feel obliged to take them into account.<sup>118</sup> Formal feedback mechanisms whereby the Joint and Specialised Committees had to explain which inputs were used and which were not would be an example.<sup>119</sup> Arguably, the shorter the reporting chain from one treaty body to another, the better for accountability and organisational efficiency. It will be shown that while FTAs might envisage a certain procedure, the actual practice has developed otherwise and inconsistently across trade partners. The resulting organisational confusion inevitably creates accountability concerns and risks creating dysfunctional path-dependencies.

The views of the DAGs and of the CSF are subject to different rules, which are to be found respectively in the Rules of Procedure and in the trade agreement. As for the DAGs, the Rules of Procedure of the EU DAGs for CETA and EUJEPA are similar: views can be expressed in recommendations and/or communications adopted by consensus;<sup>120</sup> these views then may be submitted to a series of bodies: from the TSD Committee, to the Parties to the Agreement, EU institutions, the trade-partner DAG and any other relevant body.<sup>121</sup> The DAGs can decide who the target for their recommendations will be. EUSFTA is the only agreement that expressly stipulates that the DAGs may submit their recommendations directly *to the Parties*.<sup>122</sup> It does not, however, establish a CSF. As for the CSF, different FTAs provide different modalities of interaction. The image below shows the interactions of the CSF, the TSD Committee and the Joint Committee as provided by the texts of the trade agreements. It highlights the extension

<sup>117</sup> Ibid. In EUJEPA, this is not expressly mentioned, but it can be expected that the DAGs would have similar opportunities to do so. To submit such recommendations, a DAG adopts declarations which have to be consented to and voted by its members.

<sup>118</sup> Lore Van Den Putte, ‘Involving Civil Society in Social Clauses and the Decent Work Agenda’ (2015) 6 Global Labour Journal 221, 225-226.

<sup>119</sup> Ibid.

<sup>120</sup> See e.g. RoP 6.1 and 10.1 EU DAG for CETA; RoP 10.4 EU DAG for EUJEPA.

<sup>121</sup> RoP 10.1 EU DAG for CETA; RoP 10.1 EU DAG for EUJEPA. CETA also expressly mentions the Panel of Experts and the Civil Society Forum. Since both are bodies that are also created under EUJEPA, it may be expected that “any other relevant body” encompasses them as well.

<sup>122</sup> Art.12.15(5) EUSFTA.

of the reporting chain before the outcome of the CSF deliberations arrive at the main decision-makers, i.e. the Joint Committee and/or the Parties.

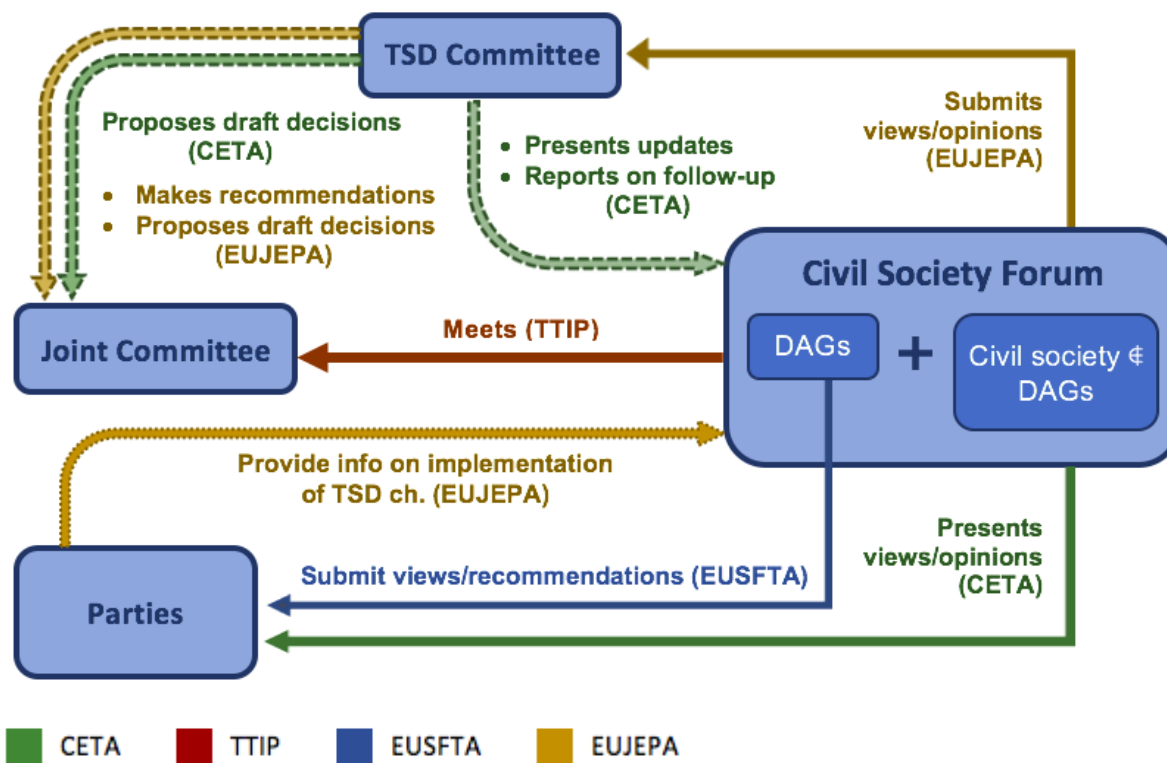


Image No.2: Interactions between different treaty bodies as per the text of the trade agreements.

The visualisation reveals that the shortest route for the CSF to the Parties is provided in CETA: here, the views of the DAGs and other civil society actors can be presented directly to the Parties.<sup>123</sup> Similarly, under TTIP, the CSF would have directly met with the Joint Committee.<sup>124</sup> EUJEPA creates the longest route: the CSF can submit opinions and views to the TSD Committee first,<sup>125</sup> which in turn may make recommendations or propose draft decisions to the Joint Committee.<sup>126</sup> These institutional designs can be compared with the EU AAs with Ukraine and Moldova: here, the Civil Society Platforms can submit recommendations directly to the Association Council, which is the corresponding body of the Joint Committee in FTAs.<sup>127</sup> However, looking at the operation of these treaty bodies on the ground, it emerges that the FTAs provide only a starting point for how different bodies may interact, leaving a wide margin of discretion as to *who* can report *what*, *to whom* and *when*.

In the context of CETA, representatives of the DAGs have so far taken part in the CSF and then reported to the TSD Committee the following day, during the last sessions of the TSD

<sup>123</sup> Art.22.4(4)(b) CETA.

<sup>124</sup> Which is co-chaired by a representative of DG Trade and the trade partner's Trade Minister. See Art.X.1(9) TTIP Institutional chapter.

<sup>125</sup> Art.16.16(4) EUJEPA.

<sup>126</sup> Articles 16.13(2)(a) and 22.3(5) EUJEPA.

<sup>127</sup> Art.443 EU-Moldova Association Agreement, between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.8.2014, 4.

committee meetings: they have informed the TSD committee of the CSF discussions, presented their joint statement, and given feedback. While this would suggest that the TSD Committee and the CSF as a whole have not interacted directly, in fact the TSD Committee has presided over the CSF, which means a chance for it to become acquainted with the views raised by civil society. The CSF in any case seems to work as a background platform where different issues are discussed, before these are presented to the TSD Committee by the DAGs Co-Chairs. Following the Rules of Procedure, the CETA Joint Committee will be informed by the Specialised committees on the conclusions of the meetings of the TSD Committees.<sup>128</sup> It can be hoped that the TSD Committee will also report on its discussions with the DAGs, and will thus inform the Joint Committee about civil society's opinions.

In the context of EUJEPA, the Joint Dialogue with Civil Society has followed a different path. The agenda of its first meeting envisaged that “participants of civil society” exchanged views *directly* with “representatives of the EU Commission and the Government of Japan.”<sup>129</sup> While it can be expected that civil society comprised the DAGs of each side,<sup>130</sup> it is not clear whether the representatives of the Parties were members of the TSD Committee, as provided by the text of EUJEPA. Beyond the Joint Dialogue with Civil Society, the first meeting of the EU-Japan TSD Committee did not include any exchange of views with the DAGs Co-chairs - unlike the practice developed for CETA.<sup>131</sup> However, both sides reassured that the views expressed by the DAGs on the implementation of the TSD chapter “would be duly received.”<sup>132</sup> The TSD Committee also decided on a number of issues related to the Joint Dialogue with Civil Society: among others, that the Dialogue would be organised by the TSD Committee and be held back-to-back with the TSD Committee; and that its minutes would be made publicly available.<sup>133</sup> As the minutes have not been published,<sup>134</sup> it is not possible to assess whether the views voiced at the Joint Dialogue have influenced the decisional bodies. Furthermore, unlike CETA, the specialised committees are not required to report to the Joint Committee on the conclusions of their meetings.<sup>135</sup> No follow-up requirements are demanded to the Joint Committee, nor to the TSD Committee.

<sup>128</sup> RoP 14 Council decision (EU) 2018/1062 of 16 July 2018 on the position to be adopted on behalf of the European Union within the CETA Joint Committee established by the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of the Rules of Procedure of the CETA Joint Committee and specialised committees, OJ L 190/13 (27.7.2018).

<sup>129</sup> European Commission, ‘Agenda’ (Trade And Sustainable Development Joint Dialogue with Civil Society, 31 January 2019), available at <[https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158578.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158578.pdf)>.

<sup>130</sup> See presentation by Eve Päärendson, EESC EU-Japan Follow-Up Committee, at <[http://www.office.kobe-u.ac.jp/ipiep/materials/EuropeanCenterSymposium2019/1-1-4\\_Ms.EvePaarendson.pdf](http://www.office.kobe-u.ac.jp/ipiep/materials/EuropeanCenterSymposium2019/1-1-4_Ms.EvePaarendson.pdf)>.

<sup>131</sup> See Joint Minutes of the 1st Meeting of the Committee on Trade and Sustainable Development under the Agreement between the European Union and Japan for an Economic Partnership (Tokyo, 29-30 January 2020), available at <[https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158664.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158664.pdf)>.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> See list of ‘EU-Japan Economic Partnership Agreement (EPA) - Meetings and documents’ currently available at <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2042>>.

<sup>135</sup> See RoP of the EU-Japan Joint Committee, Decision No 1/2019 of 10 April 2019 of the Joint Committee of the EU-Japan EPA [2019/1035] OJ L167/81 (24.6.2019); compare with RoP 14(3) of the EU-Canada Joint Committee (n 162).



CETA is the only FTA which expressly requires the TSD Committee to report back to the CSF on the follow-up to the views of civil society presented to the Parties.<sup>136</sup> This unique provision can be expected to enhance accountability and reason-giving processes. It must still be seen, however, how it will be used. So far, the Rules of Procedures of the Joint and Specialised committees are silent on the matter. Furthermore, as the recordings of the Forum discussions have not been made publicly available, but only its summaries,<sup>137</sup> it is not easy to assess the Joint Committee's measures vis-a-vis civil society's demands. Importantly, the TSD Committee itself could also propose draft decisions to the Joint Committee. This seems to have been the case for the three recommendations (on SMEs, climate and gender) that the Joint Committee adopted at its first meeting, and which the TSD Committee reports to have prepared in the framework of the work on TSD implementation.<sup>138</sup> Absent the report of the first EU-Canada CSF meeting, it is not possible to draw a causal relation between the Forum discussions and the above-mentioned recommendations. Some members of civil society in fact denounce the aleatory targeting of certain issues, which conceal and prevent progress on other more pressing ("the real") issues.<sup>139</sup> Eventually, the CETA TSD Committee remains free to set its own agenda and decide which recommendations it may make to the Joint Committee.<sup>140</sup>

Against this backdrop, it is argued here that the DAGs and the CSF are not the only organs that can influence the internal processes of decision-making. The European Parliament should be able to exercise political control and influence the agenda in a way that reflects citizens' concerns. Its involvement could ensure that the democratic quality of EU external trade does not stop at the negotiation and conclusion of FTAs, but continues throughout their implementation. As the next section shows, however, the EP does not enjoy a formal place within the institutional architecture, nor within the process of decision-making.

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<sup>136</sup> Art.22.4(4)(b) CETA.

<sup>137</sup> With the exception of the recording of the first meeting of the EU-Canada CSF on 12 September 2018 (see EU-Canada Civil Society Forum: Trade and Sustainable Development under CETA at <<http://trade.ec.europa.eu/doclib/events/index.cfm?id=1901>>) and the joint statements by the DAGs, see "Joint Statement of the Canadian and European Domestic Advisory Groups" mentioned at the Meeting of the Committee on Trade and Sustainable development (Ottawa, 13 November 2019), available at <[https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158604.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158604.pdf)>.

<sup>138</sup> See European Commission, 'Joint Report' (Meeting of the Committee on Trade and Sustainable Development, Brussels, 13 September 2018), available at <[https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157409.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157409.pdf)>.

<sup>139</sup> Informal interview with representative of civil society.

<sup>140</sup> RoP 8 of the CETA Joint Committee, to be read in conjunction with RoP 14(4).

### 4.2.3. The Relegation of the European Parliament

The European Parliament is absent from the bodies of the institutional architecture of EU FTAs. The EP is an already-existing institution and would not be the output of some provisions within the FTAs. Still, one would expect that, especially in light of its empowerment during the negotiation process, it was granted a place in the implementation stage as well. This expectation becomes stronger when considering the EU Association Agreements, which provide an insightful, existing alternative institutional design.<sup>141</sup> For example, the EU-Ukraine AA foresees a Parliamentary Association Committee, composed of members of the EP and of the Ukrainian Parliament.<sup>142</sup> Significantly, this body would have a series of powers: to request information on the AA implementation to the Association Council, the corresponding body of the Joint Committee in FTAs; to be informed of decisions and recommendations; to make recommendations itself directly to the Association Council; and to create Parliamentary Association sub-committees.<sup>143</sup>

Exceptionally, the EU proposal for the institutional chapter of TTIP would have emphasised the importance of the Transatlantic Legislators Dialogue (TLD). This *Dialogue* would have not constituted a *treaty body* proper of the agreement, yet it longed to “foster the parliamentary dimension” of the Agreement.<sup>144</sup> Although this is unique in the history of EU FTAs, and it may have well enhanced the involvement of the parliaments from both sides, there are no provisions providing an express role for the TLD in the work of the Joint or Specialised Committees. The place that the TLD would occupy in the operation of the Agreement thus remains unclear. By contrast, the TTIP proposal for regulatory cooperation of 2015 included a placeholder on the interaction of the RCB with legislative bodies.<sup>145</sup>

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<sup>141</sup> See i.a. Art.121 EU-Bosnia and Herzegovina AA (Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, OJ L 164, 30.6.2015, p.2); Art.440 EU-Moldova AA (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.8.2014, p.4); Art.467 EU-Ukraine AA (Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161/3, 29.5.2014).

<sup>142</sup> Art.467 EU-Ukraine AA.

<sup>143</sup> Art.468 EU-Ukraine AA.

<sup>144</sup> Art.X.6 TTIP.

<sup>145</sup> Art.14(6) TTIP proposal for regulatory Cooperation 2015.

Not only does the EP not enjoy a place within the institutional architecture. It is also relegated in decision-making processes. None of the FTAs gives parliaments a say in decision-making by the Joint Committee. Compared to civil society actors, the EP also enjoys a less privileged place in the meetings of the Joint Committee: while some FTAs provide that the Joint Committee *may* communicate with civil society, nothing is mentioned about parliaments.<sup>146</sup> As decision-making remains a prerogative of intergovernmental bodies, a clear imbalance emerges between the strong executive presence and the lack of parliamentary involvement. This may come as no surprise since external relations have historically pertained to the executive, and the implementation of trade agreements at the international level is not a task for parliaments.<sup>147</sup> However, this should not lead to the conclusion that parliaments can be excluded from this stage and in the decision-making processes that follow. Above all, a key role of parliaments is to scrutinise and control the work of the executive. Insofar as trade agreements deepen and politicise, the traditional domination of the executive becomes increasingly obsolete. Yet what we see in the implementation of EU FTAs is not a trend of more prominent role being granted to parliaments.

The lack of parliamentary scrutiny of decision-making by treaty bodies is blatant on the EU side. In most third Parties the parliaments eventually come into play for passing implementing legislation.<sup>148</sup> By contrast, the internal procedures at the EU level may easily sideline the EP. What follows explains how this can be so, by looking at the *ex ante* and *ex post* control mechanisms that the EP can exercise in the decision-making processes by treaty bodies: not only bilaterally (within the Joint Committee), but also domestically (at the EU level). The image below visualises the EP's limitations in monitoring the executive at the bilateral and domestic level, both before and after a Joint Committee takes a decision.

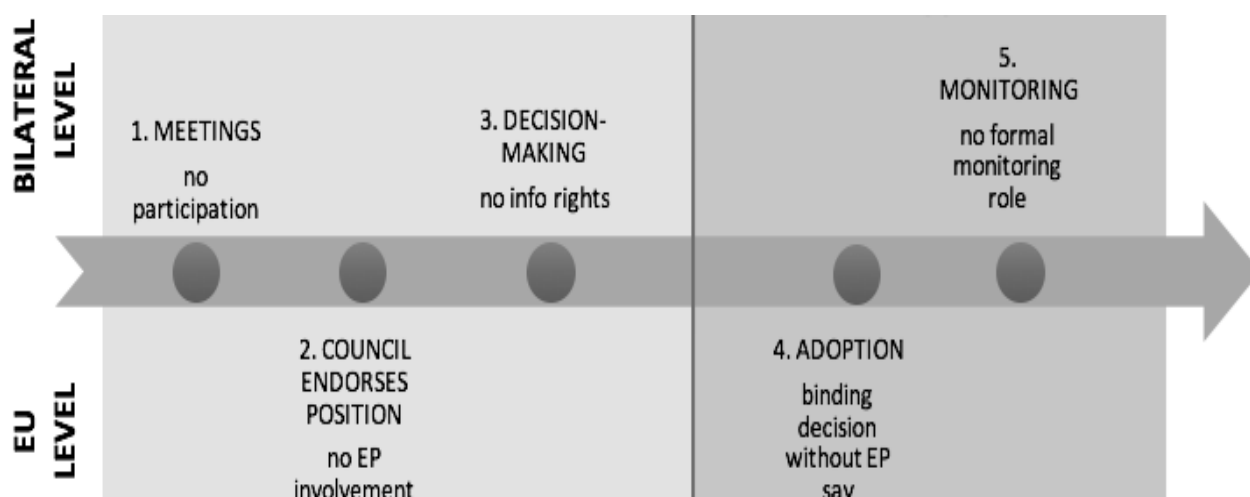


Image No.3: EP's limitations in decision-making.<sup>149</sup>

<sup>146</sup> Art.26.1(5)(b) CETA and Art.16.1(4)(b) EUSFTA.

<sup>147</sup> Weiss, 'Implementing CETA' (n 95) 5.

In the early life-cycle of a treaty body decision, the EP lacks *ex ante* scrutiny powers, both at the bilateral and EU level. *Bilaterally*, the EP does not take part in the meetings of the treaty bodies and has no right to be informed. The Framework Agreement between the EP and the Commission opens up the possibility for the EP to be invited to the meetings of bodies set up by *multilateral* agreements, which yet fails to capture *bilateral* FTAs.<sup>150</sup> At the meetings of the Joint or specialised committees, the representatives of the Parties may find agreement on a decision. Yet before a decision is adopted at the bilateral level, the Council has to endorse the position to be taken on behalf of the Union within the treaty body. This is the step *at the EU level* where the EP is not involved and cannot exercise *ex ante* control. Following the simplified procedure of Article 218(9) TFEU, when a treaty body is called upon to adopt “acts having legal effects”,<sup>151</sup> the Council shall rely on a proposal of the Commission to adopt a decision; this decision will represent the position to be taken by the EU negotiator within that treaty body.<sup>152</sup> Via another simplified procedure, set out in Article 218(7) TFEU, the Council may directly authorise the Commission to approve *amendments* to an FTA by a treaty body. Together, these articles have been said to constitute “special regimes” whereby EU secondary law is adopted within treaty bodies.<sup>153</sup>

Neither of these “special regimes” grant a say to the EP. Dawson has shown that the ordinary legislative procedure carries advantages for fundamental rights protection since it allows articulating fundamental rights arguments “that other forms of EU governance may not”.<sup>154</sup> By contrast, fundamental rights may be neglected when policies are managed *outside* this procedure, “through institutional forms that lack the checks and balances the ordinary legislative process entails.”<sup>155</sup> Given the EP’s lack of say in these special regimes, in its rules

<sup>148</sup> Bart Kerremans and others, ‘Parliamentary scrutiny of trade policies across the western world’ (2019) (Study requested by INTA Committee).

<sup>149</sup> Source: compilation of the author based on treaty provisions.

<sup>150</sup> Framework Agreement on relations between the European Parliament and the European Commission (OJ L304/47, 20.11.2010) 26.

<sup>151</sup> With the exception of “acts supplementing or amending the institutional framework of the agreement”, requiring ordinary legislative procedure. For a thorough discussion of Article 218(9) TFEU see Alan Dashwood, ‘EU Acts and Member State Acts in the Negotiation, Conclusion and Implementation of International Agreements’ in Marise Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (OUP 2018); and Joni Heliskoski, ‘The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU’ (2020) 57 *Common Market Law Review* 79.

<sup>152</sup> This procedural legal basis was employed recently for the decisions by the Joint Committee of CETA (see European Commission, ‘Proposal for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal’ COM(2019) 457 final, 2019/0217 (NLE), Brussels, 11.10.2019) and by a Working Group of the EU-South-Korea FTA, see Council Decision (EU) 2019/845 of 17 May 2019 on the position to be taken on behalf of the European Union, within the Working Group on Geographical Indications established by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the adoption of its rules of procedure (OJ L 138/84, 24.5.2019). For legal basis justification, see European Commission, “Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union, in the Working Group on Geographical indications set up by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the adoption of its rules of procedure” (COM/2019/181 final).

<sup>153</sup> Weiss, ‘Delegation to treaty bodies in EU agreements’ (n 2) 541.

<sup>154</sup> Dawson (n 55) 73. This is not to suggest that ordinary legislative procedure should apply in this case, but to provide an example of how other procedures may lack the checks and balances that would ensure that fundamental rights are not neglected.

<sup>155</sup> *Ibid.*

of procedure, the EP carved out the possibility of issuing recommendations on the proposed positions.<sup>156</sup> This shows an awareness of its lack of say in this process and an attempt to assert its role. At the same time, however, its recommendations would remain unilateral actions. The Commission would be under no duty to take them into account. On the other hand, while the EP has no right to be informed about the discussions of the treaty bodies, one can expect its right to be “immediately and fully informed”, as per Article 218 TFEU, to apply also at this domestic stage.<sup>157</sup> As suggested by Weiss, a more meaningful control by the EP would involve a consent requirement before the Council adopts the position - something which could be enshrined in the Council’s decision approving the FTA.<sup>158</sup>

After a position at the EU level is endorsed, the EP is absent once again at the *bilateral level* when a decision is adopted. Joint and Specialised committees take decisions by consensus.<sup>159</sup> The EP has no formal role in the adoption of decisions. The power to take decisions exclusively rests on the executive intergovernmental bodies and defies parliamentary oversight. From an EU perspective, the dual source of democratic legitimacy, based on the representation by both the Council and the EP, is thereby compromised.<sup>160</sup> It has been suggested that the EP should be made part of the representatives of the EU within the treaty bodies, or at least be granted an observer status and be informed throughout the process.<sup>161</sup>

Once a decision at the bilateral level is adopted, the EP’s control mechanisms are again quite limited. *At the EU level*, the EP is not implicated when the decisions do not require ratification. All the trade agreements under investigation stipulate that the decisions will be binding upon the Parties.<sup>162</sup> While the status of these decisions in EU law is disputed and controversial,<sup>163</sup> what becomes problematic for the present argument is that in this process, even in the absence of direct effect, these decisions are liable to have legal effects on the EU legal order “without any subsequent act of adoption by the Union’s institutions”.<sup>164</sup> The EP would remain outside this process. It has been suggested that the EP be given the possibility to suspend the decision.<sup>165</sup> At the same time, *bilaterally*, the EP’s control powers are limited to its own-

<sup>156</sup> Rule 109: Provisional application or suspension of the application of international agreements or establishment of the Union’s position in a body set up by an international agreement.

<sup>157</sup> Article 218(10) TFEU.

<sup>158</sup> If the treaty body decision amounts to rule-making which interferes with tasks of the European Parliament, see Weiss, ‘Implementing CETA’ (n 95) 16.

<sup>159</sup> See i.a. Art.26.4(3) and Art.26.2(4) CETA; Art.X.4 TTIP; Art.16.4(3) EUSFTA; Art.22.2(3) and Art.22.3(3)(e) EUJEP.

<sup>160</sup> Thomas Verellen, ‘On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case’ (2016) 1 European Papers 1225 (Insight).

<sup>161</sup> Weiss (n 95); Eyal Benvenisti, ‘Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law’ (2013) 23 Constellations 58; Alberto Alemanno, ‘The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences’ (2015) 18 Journal of International Economic Law 625.

<sup>162</sup> Art.26.4(2) CETA; Art.X.4 TTIP; Art.16.4(1) EUSFTA; 22.2(1) EUJEP.

<sup>163</sup> Ramses Wessel and Steven Blockmans, ‘The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union’ in Piet Eckhout and Manuel López Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart 2016).

<sup>164</sup> See Joni Heliskoski, casenote on Case 370/07, *Commission v. Council* (2011) Common Market Law Review 555, 557-558.

<sup>165</sup> Weiss ‘Delegation to treaty bodies in EU agreements’ (n 2) 552.

developed monitoring mechanisms, which would supervise the implementation of the decision and the FTA more broadly.<sup>166</sup>

Overall, the EP's role in the implementation phase has remained low profile. This is in stark contrast with the EP's recently enhanced involvement in the negotiation and conclusion of EU FTAs, often praised for having enhanced the democratic quality of EU external trade. Yet an FTA does not stop at its entry into force. Implementation is a crucial phase in its life-cycle.<sup>167</sup> The lack of parliamentary say during the implementation of an FTA goes to the detriment of the dual source of EU democratic legitimacy.<sup>168</sup> Furthermore, an enhanced role during trade negotiations means the EP will be held responsible to meet its constituencies' expectations.<sup>169</sup> The EP is the only *institution* that could exercise political control and have a formal say in the process of decision-making, but from which it is yet excluded, both at the EU and bilateral level. An additional layer to this would be judicial review by the CJEU, which can exercise ex-post scrutiny over decisions of EU FTAs bodies, which are subject to its jurisdiction as legal acts adopted within the frame of EU legal acts, i.e. EU FTAs.<sup>170</sup> Yet this would only be ancillary to an institutional architecture that should incorporate safeguards to create a sort of 'harm-proof' institutional environment in the first place.<sup>171</sup>

## 5. Designing an Institutional Architecture for Fundamental Rights

The analysis of the institutional design of EU FTAs informs as to the extent to which the institutional architecture of EU FTAs is adequate to safeguard and promote fundamental rights. Following the theoretical framework, and with a view to understanding the implications of a certain institutional design for the outcome, in this case fundamental rights, this paper has focused on the mandate of the treaty bodies and on the interactions and accountability mechanisms of the decision-making processes. A series of limitations have been found, which lead to believe that, with the exception of labour rights, the implementation of EU FTAs may easily overlook fundamental rights. Not only the preferences set up for the treaty bodies are narrow-sighted from a fundamental rights perspective - this may shape the preferences of the members of the institutions, how they understand their role, and eventually what they will discuss at their meetings. For the Joint Committees, this means they may neglect the

<sup>166</sup> Laura Puccio and Roderick Harte, 'The European Parliament's Role in Monitoring the Implementation of EU Trade Policy' in Olivier Costa (ed), *The European Parliament in Times of EU Crisis* (Palgrave 2019).

<sup>167</sup> Patrick Leblond, 'Making the Most of CETA: A Complete and Effective Implementation Is Key to Realizing the Agreement's Full Potential' (2016) CIGI Papers No. 114, 30 October 2016.

<sup>168</sup> Weiss, 'Delegation to treaty bodies in EU agreements' (n 2) 552.

<sup>169</sup> Puccio and Harte (n 166).

<sup>170</sup> See Articles Art.218(11), 263, 267 TFEU.

<sup>171</sup> The paper is interested in what can be done before, within the framework of the institutional architecture of EU FTAs, rather than after. For a discussion on the limits of CJEU judicial review of trade agreements in matters of fundamental rights see Katarzyna Szepelak, *Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations – Where do we stand today?* in Eva Kassoti and Ramses A Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER PAPERS 2020/1).

relevance of fundamental rights of the decisions they take, because their role is to facilitate the implementation of the FTA; whereas for the DAGs and the CSF this means they may not discuss issues on fundamental rights other than labour rights. The analysis has shown that, even where such discussion may occur and the DAGs and the CSF be given the chance to present them to the decisional bodies, the rules for decisions-making defy monitoring and accountability mechanisms, vis-a-vis civil society as much as the EP. In this context, it is hard to see how fundamental rights will be the consequent policy outcome.

First, regarding the gaps in the *mandate*, it is important that fundamental rights are embedded in the general objectives of the institutions, or in their specific tasks. Regarding the tasks of the institutions, it should be clear what their role would have to be in relation to fundamental rights. Above all, the mandates of the DAGs should include ongoing on-the-ground monitoring of the impact that the FTA may have on fundamental rights. Dedicated sessions during the CSF meetings should include exchanges on these issues and should result in concrete proposals to be advanced to Joint and Specialised committees. At the moment, the DAGs and CSF do not provide a platform with a clear mandate for monitoring fundamental rights. Implementation of EU FTAs is limited to what can be found therein. It remains at the discretion of the actors engaged in those bodies whether to add initiatives going beyond the scope of the FTAs. CETA shows that under best practices of transparency and regular exchanges with civil society, this could be possible. As discussed, however, it still has to be seen whether discussions will touch upon issues relating to fundamental rights, and whether they will reach the agenda of the decisional treaty bodies. Not only new initiatives for fundamental rights could come forward, but also policy space for deliberation could emerge.<sup>172</sup> Importantly, the new treaty bodies that institutionalise the involvement of civil society are unique in their effect of enabling dialogue on a series of issues related to trade. Research has shown that horizontal dialogues between EU and partner countries' civil society have great value in themselves.<sup>173</sup> EU trade union representatives, for instance, attach a lot of importance to maintaining a dialogue with the trade unions of the trade partner, because these are the ones who have the knowledge of the situation in those countries.<sup>174</sup> The mandate of the DAGs and CSF should accordingly put more emphasis on exploring the normative relationships between trade and fundamental rights, so as to trigger discussions thereon and lead to new policy outcomes.

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<sup>172</sup> The history of the European Union provides several useful examples of how new issues, legal competences and powers have come to be added to the initial, merely economic, project. See Alec Stone Sweet and others, 'The Institutionalization of European Space', in Alec Stone Sweet and others (eds), *The institutionalization of Europe* (OUP 2001).

<sup>173</sup> Van Den Putte (n 118).

<sup>174</sup> Informal interview with EU trade union representative.

Second, the institutional structure of EU FTAs showcases the distributive effects of institutions. The EU is increasingly forcing and forging new entities that appear to streamline civil society participation, and also opening up venues for civil society actors to provide their views and opinions. Yet the DAGs and the CSF have been conceived above all as *ad hoc* advisory bodies. They remain much less formalised and on the margin than other treaty bodies for the implementation of EU FTAs. Their absence from the chapters on institutional provisions clearly hints at this. At the same time, the “institutional layering” - namely the *addition*, as opposed to the *improvement*, of the interactions with already existing institutions<sup>175</sup> - has resulted in the creation of too many entities and mechanisms: they have overcrowded the institutional architecture of EU FTAs and “fatigued” participation by interested parties.<sup>176</sup> DAGs have been created for each FTA, but the coordination, organisational and financial consequences only realised at a later stage.<sup>177</sup> The Joint Committee for EUJEPA has recognised that “there exist many frameworks for policy dialogues” and recommended different bodies seek “synergies”.<sup>178</sup> Members of the DAGs harshly criticise not being informed about proposals and their lack of involvement throughout the process.<sup>179</sup> All this has arguably an impact on participation of those representing citizens.

Most importantly, what emerges is a stark contrast between centralisation of decision-making powers by the Joint Committees and dispersion of decision-takers. When it comes to processes of decision-making, neither civil society or the EP have a say. They do not take part in the meetings of the Joint and Specialised Committees, but only interact with them in differing and confusing formats. As shown, the interactions between civil society and the committees are highly inconsistent and discretionary across FTAs. Participation of civil society has been fragmented across several venues, exacerbating coordination to advance recommendations to other bodies.<sup>180</sup> Chances for fundamental rights to be discussed would be enhanced by allowing the EP and civil society representatives to be present at the meetings of the treaty bodies. As to the EP, its gradual empowerment in external trade should be extended to the implementation stage, by providing it with a body or platform to engage. Arguably, to the extent that the EP and civil society actors were made formal members of those bodies, they could operate as a check on the work of executive bodies and provide a means of political control.

<sup>175</sup> Orfeo Fioretos, ‘Historical Institutionalism in International Relations’ (2011) 65 *International Organization* 367.

<sup>176</sup> Jan Orbie and others, ‘Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements’ (2017) *Third World Thematics: A TWQ Journal*; Diana Potjomkina, ‘Multistakeholderism in the EU’s Trade Governance’ (Institute for European Studies, Issue 2018/01, October 2018).

<sup>177</sup> European Commission, ‘Non-paper’ (n 86).

<sup>178</sup> First Meeting of the Joint Committee under EUJEPA, ‘Joint Minutes’, available at <[https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc\\_158381.pdf](https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158381.pdf)>.

<sup>179</sup> See i.a. intervention by Lina Carr (ETUC) and Tanja Buzek (EESC) at Civil Society Forum November 2019. Video recording of the Forum provided by email and made available for one week by Andreas Tibbles, Trade Policy Officer, Trade Agreements Secretariat (TCT) Global Affairs Canada. The recording is not available online.

<sup>180</sup> Potjomkina (n 176).



A final point indeed concerns accountability mechanisms. The Joint Committees can take binding decisions, which may have implications for fundamental rights, without having to account to the EP or civil society.<sup>181</sup> Even though civil society can interact with the Joint and Specialised Committees and submit views, no accountability mechanisms are in place requiring the Joint or Specialised committees to follow up on their comments or recommendations.<sup>182</sup> Most problematic, it is not clear how issues raised would possibly be filtered and selected in the context of a multitude of insights. The most recent CETA CSF is a clear example of this. One can hardly conclude that the outcome of the deliberations will be translated into recommendations or other measures. The annex to the EU textual proposal for regulatory cooperation in TTIP on the institutional set up is illuminating in this respect: it identifies “political accountability”, “effective coordination” and “transparency” as essential elements for the institutional set-up of regulatory cooperation activities.<sup>183</sup> It recognises that an institutional architecture requires some normative, “good governance” anchors. Attaching these principles to the institutional chapters of EU FTAs would enhance democratisation, as an ongoing endeavour;<sup>184</sup> it would mean designing and institutionalising processes that are informed by aims of democratic governance, as opposed to policy effectiveness.<sup>185</sup> In the light of no institutionalised democratic procedures for decision-making,<sup>186</sup> the scholarship on Global Administrative Law could represent a useful benchmark that could be employed as overarching objectives for the institutional chapters and for decision-making processes: it provides mechanisms, practices and principles, such as transparency, participation, reasoned decision, legality and effective review of rules and decisions that could be applied to decision-making processes.<sup>187</sup>

The contribution of an institutional architecture to fundamental rights lies in creating institutions with a mandate to monitor and assess the impact on fundamental rights; in creating policy space for horizontal exchanges on local fundamental rights issues; and in creating an institutional environment where procedures for decision-makers are subject to accountability and monitoring mechanisms. An examination of the institutional architecture of the EU FTAs reveals a series of omissions that do not fulfil these needs. The design of the institutional architecture of the new generation EU FTAs lags behind in creating an institutional environment where fundamental rights can be protected. The present evaluation reveals that the EU is leading globally and has made huge steps when it comes to involving civil society at the implementation stage, but important gaps remain as to accountability and meaningful participatory mechanisms. It shows that the proliferation of treaty bodies for the implementation of EU FTAs has not equated with an institutional architecture that can adequately safeguard fundamental rights.

## 6. Conclusion

Once a trade agreement is concluded, it is pivotal that the impact of its implementation on fundamental rights is monitored. It is also important that the institutional architecture creates an environment where its bodies are accountable and can deliberate and exchange views on fundamental rights in the context of trade. Starting from the question of the extent to which the institutional architecture of EU FTAs is adequate to protect fundamental rights, this paper has highlighted some of the main shortcomings of the institutional architecture of the new generation FTAs from a fundamental rights perspective. The results of the study lead to foresee little consideration of fundamental rights at the implementation stage. Historical institutionalism tells us that institutional design matters, for it affects the outcome. Rules for how institutions are to operate define the preferences of the members of the institutions and the interactions among them. Institutions will have distributional effects, which will be reflected in decisions-making processes. Historical institutionalism also tells us that it will be difficult for institutions to depart from certain practices once they are undertaken. The picture that emerges from the analysis of the institutional design of EU FTAs bodies at first sight suggests a departure from past practices where only Joint and Specialised Committees were created. In fact, when looking at what the new bodies are for and how they are to interact with the decision-making bodies, it may be said that the picture is one of two steps forward and three steps backwards. The institutional design falls short of creating an institutional architecture that can adequately protect fundamental rights or enable deliberation in their respect.

The mandate of the DAGs and CSF is defined by the Parties to the agreement and can be said to reflect their preferences. There remain several gaps in what they can monitor and influence. Substantively, labour rights are the only set of rights to be the object of their monitoring. Procedurally, they have limited tools to monitor the work of the Joint and Specialised Committees. Deficiencies in decision-making processes and distributive effects are evident in the fact that the DAGs and the CSF remain consultative bodies; that they enjoy only discretionary interaction with the Joint Committee; and that there are no follow-up mechanisms whereby they would know whether and how their views were taken into account. The layering and copy-pasting of treaty bodies across different FTAs shows that inefficient path-dependencies are already visible. As to the EP, the analysis has shown that it has no place in treaty bodies, nor has it a treaty body for itself. Its involvement could have accounted for political scrutiny, so that the implementation of FTAs is responsive to citizens' preferences and safeguards their fundamental rights. The institutional architecture of EU FTAs could have institutionalised the involvement of the EP, alongside the creation of bodies for civil society, so as to reflect their demands to have a say and ensure that the efforts at democratising EU external trade do not stop at the negotiation stage.

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