A DEEP TRADE AGENDA FOR FUNDAMENTAL RIGHTS:

Framing Fundamental Rights for the new generation EU Trade Agreements with other Developed Countries

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ABSTRACT

This research emerged from the desire to identify mechanisms ensuring that fundamental rights are not jeopardised by far-reaching "deep" trade agreements and rather proactively protected. The "EU Deep Trade Agenda" resulted in ambitious free trade agreements (FTAs) stretching the stakes and implications for rights over a wide range of people. Because these FTAs go significantly beyond strictly trade-related issues, they have gained the label "deep". The thesis borrows this term to examine the new generation EU FTAs from a fundamental rights perspective. The term "deep" is used as a methodological expedient to target the new "deep" features of EU FTAs at different levels of law-making, from the negotiations to the implementation. For each level, the thesis sheds light on major omissions and problems that arise for fundamental rights. To this end, the research investigates the new generation EU FTAs with other major developed economies in North America and Asia, focusing in particular on labour and data privacy rights, in the broader context of digitalisation and backlash to globalisation and free trade.

The thesis develops the notion of "deep agenda for fundamental rights" to refer to mechanisms and best practices that can ensure effective fundamental rights protection in the context of EU "deep" FTAs. From a normative perspective, the thesis identifies and conceives ways to make fundamental rights and trade converge, thus ensuring that they mutually sustain each other. This stance differs from approaches that would exclude any consideration on fundamental rights from the trade agreement altogether. This study is also critical of the current practice in EU FTAs and argues that self-standing provisions on fundamental rights within the text of the FTAs is not enough. Fundamental rights in trade begins with the trade negotiations, goes through new levels of law-making, and up to the implementation. The core message is that fundamental rights require consideration and safeguards at all these levels. The thesis thus provides new lenses to think about fundamental rights in trade, in a way that has so far largely remained unexplored by the literature and neglected in policy circles.

Introduction

I. Synopsis

In 2017, the then Commissioner for Trade at the European Union (EU), Cecilia Malmström, was reassuring the public that labour rights and environmental standards are 'not negotiable', and therefore 'will be part of any deal'.[1] One year later, in an answer to the Parliament, and presenting the official position of the Commission, she stated that the protection of data privacy rights is 'not negotiable' and 'should therefore *not* be covered by trade agreements' (emphasis added).[2] What appears to be a diametrically antithetical approach to fundamental rights in trade agreements is only the tip of the ice-berg of the many contradictions and negligence that characterise current standpoints as to their nexus. Commissioner Malmström subsequently added that 'promoting high standards of personal data protection and facilitating international trade is however not contradictory. The two processes must be clearly separated but can be mutually supportive'.[3] As this research will show, the EU's practice so far, and its answer to the question of how trade and fundamental rights can be mutually supportive and separated, is inadequate in the context of new "deep" trade agreements.

This thesis critically discusses the potential of EU trade agreements and fundamental rights to converge, and for the EU to be a global actor in trade *and* fundamental rights. The analysis shows how different levels of EU trade law-making – from the negotiation of trade agreements to their implementation – may impact fundamental rights: adversely as much as positively. For each level, the thesis first sheds light on omissions and problems that arise for fundamental rights, and then offers proposals whereby fundamental rights would not be jeopardised but in fact protected. Studying fundamental rights at successive stages of the life cycle of trade agreements allows to advance novel conceptualisations of the nexus between EU trade agreements and fundamental rights. The thesis provides new lenses to think about fundamental rights in trade, in a way that has so far largely remained unexplored by the literature and neglected in policy circles. The underlying argument is that fundamental rights are a cross-cutting issue that

[1] Jorge Valero, 'Malmström clashes with Greenpeace over EU-Japan deal's 'green' credentials' (26 June 2017) <https://www.euractiv.com/section/economy-jobs/news/malmstrom-clashes-with-greenpeace-over-eu-japan-deals-green-credentials/>.
[2] Answer given by Cecilia Malmström on behalf of the Commission, Question reference: P-002756/2018 (27 June 2018) <https://www.europarl.europa.eu/doceo/document/P-8-2018-002756-ASW_EN.html>.
[3] Ibid.

should be considered across different aspects of trade agreements, and not be marginal or carved out altogether.

The analysis is motivated by a combination of different elements that form the broader picture in which the research is embedded: the so-called 'new generation' EU free trade agreements (FTAs), stemming from the EU 'deep' trade agenda and negotiated with other developed economies, in a context of digitalisation and backlash to globalisation and free trade. It is against this new background that the thesis urges a re-conceptualisation of the nexus between fundamental rights and trade. Following the trend in international trade, the latest EU trade initiatives go significantly beyond strictly trade-related issues and stretch the stakes and implications for rights over a wider segment of people. Given the complexity and comprehensiveness of the new generation of EU FTAs, it is time to question FTAs in all their aspects. The concept of "deep" that has characterised the new generation EU FTAs for their ambition in economic terms is borrowed here to examine the new generation EU FTAs from a fundamental rights perspective.

This study transposes the term "deep" from its economic understanding, to depict what is called here "a deep trade agenda for fundamental rights". This agenda can be considered a black box to be unpacked and filled with meaning: it will comprise of all the mechanisms that the study will identify and conceive as being able to *ensure that EU deep FTAs do not adversely impact fundamental rights and rather proactively ensure their protection*. This study uses "deep" as a sort of methodological expedient, or device, to target new "deep" features of EU FTAs and explore to what extent the deepening of trade agreements, understood in economic terms, goes in parallel with safeguards for fundamental rights. This study employs the term "deep" to qualify these safeguards. As the research focuses on different stages of the life cycle of trade agreements, the analysis discusses different considerations as to what is needed for fundamental rights at each specific stage. The concrete elaborations of "deep" therefore differ at each level. Their addition nonetheless contributes to the depiction of the deep agenda for fundamental rights.

As it will be explained later, the focus is on two sets of fundamental rights, namely labour and data privacy rights. These rights are investigated in their intersection with different levels of law-making of the latest trade initiatives between the EU and other industrialised countries spanning North America and Asia: the Comprehensive Economic Trade Agreement (CETA) with Canada; the Transatlantic Trade and Investment Partnership (TTIP) with the US; the Free Trade Agreement with Singapore (EUSFTA); and the Economic Partnership Agreement with Japan (EUJEPA). The economic size and weight of these agreements make the EU a crucial player in the emerging global economic governance. As a global actor in trade that is mandated to respect fundamental rights in its external relations, the EU bears responsibility to make trade and fundamental rights converge. The limitations discussed in the thesis yet reveal that more needs to be done to achieve a 'deep' agenda for fundamental rights in trade.

II. Rationale for the Study

This research finds its rationale in the new context of deep trade agreements with far-reaching effects over people's rights and the global discontent with globalisation and free trade. While the study of fundamental rights in the context of trade is not new, it acquires new clothes in the present legal and socio-economic context. New questions and perspectives become relevant which were not applicable in the past simply because of a different state of world affairs. The digitalisation of trade, the growing inequality and stress on labour markets, the emergence of trade agreements that go beyond tariffs alone, the central role of the EU in fostering them together with other major influential economies, and the increasing opposition to free trade globally, are all elements that concur to this new state of affairs. They lead to question what trade agreements do and whose rights they protect.[4] It is against this contemporary context that an up-to-date, innovative exploration of fundamental rights in trade is warranted.

i. A context of deepening trade agreements and global discontent

The interconnectedness of the global economy has highlighted the need to conclude trade agreements that could address new barriers to trade, besides tariffs. The nature of international trade has been structurally affected by technological developments and digitalisation, the intensification of trade in services and foreign direct investment, the unbundling of production and the emergence of global value chains. In this context, some of the major barriers to trade have become divergent domestic regulations. So-called "behind-the-border" policies and rules at the domestic level – from competition to investment, public procurement, intellectual property and health and safety standards, to mention a few – have typically been the object of calls by developed countries for increased regulatory convergence.[5] As the WTO has only partially adapted to these calls, major trading countries have resorted to bilateral trade agreements going beyond what would have been possible under the WTO.[6] Trade negotiations have become less concerned with tariffs and much more with behind-the-border measures. This move away from the multilateral negotiations at the WTO has led to more ambitious and complex trade agreements. Because they go beyond WTO law, they are said to be "deep".[7]

[4] Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73.
[5] Robert Lawrence, *Regionalism, Multilateralism and deeper integration* (Brookings Institution Press 1996).
[6] Joost Pauwelyn, 'New Trade Politics for the 21st Century' (2008) 11 Journal of International Economic Law 559.
[7] Billy Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (OUP 2016); Theresa Carpenter, 'A historical perspective on regionalism' in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism* (CUP 2009); Richard Baldwin, '21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules' (2011) Staff Working Paper ERSD-2011-08.

The EU has followed this international trend, and in fact become a forefront proponent of what has been called a 'deep trade agenda'.[8] The 'new generation' EU FTAs stemming from this agenda depart in several ways from previous free trade agreements. They go significantly beyond tariffs and deal with a broader range of disciplines that had received opposition at the international level, usually involving behind-the-border and domestic regulations, while seeking closer regulatory and institutional alignment.[9] This new generation of EU FTAs reveal an adaptation to the evolving and ever more connected economy. But they also reflect the aim of using trade as a vehicle to integrate further, towards a deep, as opposed to shallow, integration.[10] As Marise Cremona puts it, the degree of reciprocal market integration of the new generation of EU FTAs is such to draw trade partners towards the EU and make them 'virtual Member States'.[11] These FTAs can be understood as providing 'an advanced form of integration without membership'.[12] The far-reaching effects of contemporary deep trade agreements has yet raised much controversy and opposition, in the EU as much as globally.[13]

Endeavours of deeper economic integration have exacerbated the 'globalised discontent' with globalisation and free trade.[14] The promise of globalisation to bring prosperity around the globe is increasingly called into question. Rising economic inequality and job insecurity have bitterly revealed that the benefits to the global economy have not necessarily been accompanied with benefits to ordinary workers.[15] As enhancers of economic integration, free trade agreements are typically blamed for the disruptive effects of globalisation, alongside technological developments.[16] The recent deepening of trade agreements has added another layer to this dissatisfaction. Dani Rodrik has famously illustrated how deep

[8] Araujo (n 7).
[9] Finn Laursen and Christilla Roederer-Rynning, 'Introduction: the new EU FTAs as contentious market regulation' (2017) 39 Journal of European Integration 763.
[10] Alasdair Young, 'The Politics of Deep Integration' (2017) 30 Cambridge Review of International Affairs 453.
[11] Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 88.
[12] Ibid.
[13] Jean-Baptiste Velut and others, *Understanding Mega Free Trade Agreements: The Political and Economic Governance of New Cross-Regionalism* (Routledge 2017).
[14] Joseph Stiglitz, 'The Globalization of Our Discontent' (Project Syndicate, 5 December 2017) <https://www.project-syndicate.org/commentary/globalization-of-discontent-by-joseph-e--stiglitz-2017-12?barrier=accesspaylog>; Frank Garcia and Timothy Meyer, 'Restoring Trade's Social Contract' (2017) 116 Michigan Law Review Online (forthcoming).
[15] Elaine Fahey, *Introduction to Law and Global Governance* (Edward Elgar Publishing 2018) 140-141.
[16] Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion' (2019) Illinois Law Review 1 (forthcoming) 7-17; Paul O'Connell, 'Brave New World? Human Rights in the Era of Globalisation' in Mashood Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Routledge 2010); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018); François Bourguignon, *The Globalization of Inequality* (Princeton University Press 2015); Nicolas Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements' (Queen's University Legal Research Paper No 2018-102, 2018); Branko Milanovic, *Worlds Apart: Measuring International and Global Inequality* (Princeton University Press 2005); Jagdish Bhagwati, *In Defense of Globalization* (OUP 2004); Garcia and Meyer (n 14).

economic integration accrues the tension between market liberalisation and democratic legitimacy.[17] More ambitious in their scope and wider in their reach, deep trade agreements set forth new forms of governance. As such, they become vulnerable to critiques of democratic deficits that have typically characterised debates on global governance.[18]

As shown by the unprecedented opposition to the EU negotiations with the US and Canada, the extent of integration sought via *deep* FTAs has proved extremely controversial, causing intense political and legal debate.[19] Trade agreements are increasingly blamed for impinging on governments' traditional areas of domestic regulation, for delegating decision-making power to technocratic authorities and for opening up to political domination by private interests against national preferences.[20] Eyal Benvenisti has shown how recent cross-regional endeavours of economic integration in the form of ambitious trade agreements 'capture' democracy and affect human rights – not only of the peoples of the Parties to an agreement, but also of 'the global others'.[21] This thesis is to be placed and understood against this background of deepening of trade agreements and increasing discontent with them, for what they do and whose rights they protect (and whose they do not). If trade agreements are no more solely about tariffs and are facing significant opposition from the public at large, it is fair to ask why this is so, and how to make sure that trade agreements can manage globalisation and work for the benefit of all. This study finds in fundamental rights an important path to do so.

[17] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States and Democracy Can't Coexist* (OUP 2011) 205.
[18] Christoph Ohler, 'Democratic Legitimacy and the Rule of Law in Investor-State Dispute Settlement under CETA' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2017* (Springer 2017). For global governance and legitimacy see Michael Zürn, 'Global governance and legitimacy problems' (2004) 39 Government and Opposition 260; Eyal Benvenisti, *The Law of Global Governance* (Brill 2014); Allen Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & International Affairs 405; Ingo Take, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 Swiss Political Science Review 220; Eva Erman and Anders Uhlin (eds), *Legitimacy Beyond the State?: Re-examining the Democratic Credentials of Transnational Actors* (Springer 2010). For global governance and democracy beyond the State see Gregory Fox and Brad Roth (eds), *Democratic governance and international law* (CUP 2000); Michael Zürn, 'Democratic governance beyond the nation-state: The EU and other international institutions' (2000) 6 European Journal of International Relations 183; Joshua Cohen and Charles Sabel, 'Global Democracy' (2004) 37 NYU Journal of International Law and Politics 763; James Boyce, 'Democratizing global economic governance' (2004) 35 Development and Change 593; Gráinne De Búrca, 'Developing Democracy Beyond the State' (2008) 46 Columbia Journal of Transnational Law 101; Jan Aart Scholte, 'Reinventing global democracy' (2014) 20 European Journal of International Relations 3; Jan Wouters and others (eds), *Global Governance and Democracy: A Multidisciplinary Analysis* (Edward Elgar Publishing 2015); Daniele Archibugi and Marco Cellini, 'The Internal and External Levers to Achieve Global Democracy' (2017) 8 Global Policy 65; Steven Wheatley, 'A Democratic Rule of International Law' (2011) 22 EJIL 525.
[19] Armand De Mestral, 'Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties' in Bungenberg and others (n 18) 441.
[20] Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design, and Effects of Preferential Trade Agreements* (CUP 2015) 7; O'Connell (n 16) 7-10.
[21] Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2016) 23 Constellations 58.

ii. The need for a new understanding of fundamental rights in trade

Underlying the thesis is the premise that fundamental rights can be conceived as a source of legitimation of EU trade agreements. It has been observed that global governance suffers from a dilemma: as the need of global governance and global regulation expands, the more demands arise – from bottom-up – for democratic legitimacy and accountability of decision-makers.[22] Human rights can perform a function of legitimation of economic globalisation: they can serve as a benchmark for global economic governance, which then be assessed against them.[23] Following this understanding, human rights are one way of addressing legitimacy problems of trade law-making. Ensuring that they are not undermined should accordingly become a core tenet of trade-law making.[24] This should be the more so in the context of deepening trade agreements which expand their reach and impact on human rights globally. The question of how EU trade agreements can protect fundamental rights has been explored extensively in legal and political science literature, but this study wants to advance a different way to answer it.

In the literature on EU trade agreements and fundamental rights, three main approaches become relevant. Each has been heavily influenced by the very way in which the EU has operationalised this nexus pre- and post-Lisbon. Early literature has looked at the EU as a normative actor, and how it managed to promote and export human rights abroad by using trade agreements as vehicles for an external human rights policy.[25] These studies were the reaction to the early attempts of the EU to condition trade benefits on human rights compliance. Apart from the scholars that are critical of human rights conditionality as such,[26] this literature largely examines the extent to which trade agreements can be an effective tool for the EU to promote human rights, in the sense of persuading the partner countries to abide by human rights. These studies largely predate the *new generation* EU trade agreements. However, similar studies are still

[22] Joris Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality' in Bart Van Vooren and others (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013).
[23] Olivier De Schutter, 'Foreword', in Fons Coomans and Rolf Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012); Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016).
[24] Ernst-U Petersmann, 'Citizens and Transatlantic Free Trade Agreements: How to Reconcile American 'Constitutional Nationalism' with European 'Multilevel Constitutionalism'?' (2018) 19 The Journal of World Investment & Trade 349.
[25] Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 EJIL 468; Marise Cremona, 'The European Union as an International Actor: The Issues of Flexibility and Linkage' (1998) 3 European Foreign Affairs Review 67; Karen Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries' (1998) 3 European Foreign Affairs Review (1998); Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005); Elena Fierro, *European Union's Approach to Human Rights Conditionality in Practice* (Kluwer Law International 2003).
[26] Päivi Leino, 'European Universalism? The EU and Human Rights Conditionality' (2005) 24 Yearbook of European Law 329; Emilie Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press 2009); Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32 Utrecht Journal of International and European Law 41.

conducted with respect to the current EU trade policy with developing and least developed countries.[27] Importantly, the legacy of this approach is evident in post-Lisbon research on trade and fundamental rights.

Given the introduction of chapters on trade and sustainable development (TSD), which contain provisions on labour rights and the environment, a second set of literature comprises research on these chapters and assesses their effectiveness.[28] Focusing on the TSD chapters, these studies limit their scope to what is included there. They take the EU's approach for granted and assess them against the aims that the EU has set for itself, without truly questioning the EU's approach. The resulting critique is that those chapters may not be effective. The third set of literature highlighted here is linked to the previous line of critique and relates to the non-enforceability of the TSD chapters.[29] Once again, it is a critique that builds on what exists, and one that explores the usefulness and suitability of sanctions to enforce the TSD chapters. These arguments are also typically advanced having in mind lower fundamental rights protections in the trade partners. Collectively, these approaches lack an exploration of fundamental rights against the context of far-reaching and sophisticated deep trade agreements and global discontent with deeper economic integration.

In the current state of world affairs, the exploration of fundamental rights in trade necessitates a new understanding of how trade agreements can protect fundamental rights, how they relate and can sustain each other. This thesis is not a fundamental critique of whether trade agreements should be concluded or not. It can be conceived as a critique of effectiveness, which is however different from the literature discussed above. The perspective that is adopted here is that of an external benchmark of fundamental rights protection – hence beyond what can be found in the TSD chapters – throughout the life cycle of EU deep FTAs. This study undertakes such exploration by making use of a methodological expedient: it borrows the concept of "deep" employed to refer to trends of economic integration to examine and depict what that

[27] Jan Vandenberghe, 'On Carrots and Sticks: The Social Dimension of EU Trade Policy' (2008) 13 European Foreign Affairs Review 561; Clair Gammage, 'Protecting Human Rights in the Context of Free Trade? The Case of the SADC Group Economic Partnership Agreement' (2014) 20 ELR 779; Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labor Conditionality in the Generalized System of Preferences (GSP)' (2015) 31 International Journal of Comparative Labour & Industrial Relations 285.

[28] James Harrison and others, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 JCMS 260; Katerina Hradilová and Ondrej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52 Journal of World Trade 1019; Jan Orbie and others, 'The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru' (2017) 5 Labour Standards in a Global Environment 6; Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 Legal Issues of Economic Integration 297; Weifeng Zhou and Ludo Cuyvers, 'Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP' (2011) 45 Journal of World Trade 63.

[29] Axel Marx and others, 'Dispute Settlement for Labour Provisions in EU Free Trade Agreements: Rethinking Current Approaches' (2017) 5 Labour Standards in a Global Environment 49; Marco Bronckers and Giovanni Gruni, 'Taking the enforcement of labour standards in the EU's free trade agreements seriously' (2019) 56 CMLR 1591.

concept could imply from a fundamental rights protection in the context of trade. This is especially possible in light of the conceptual gap that exists in the literature in this regard.

iii. The conceptual gap in the literature

Trade agreements have been said to be deepening, but this deepening has not been problematised or framed in terms of fundamental rights. "Deep" is typically understood to refer to degrees of trade liberalisation and regional economic integration. Discourses on fundamental rights seemingly remain only marginal. One exception to this is the literature on EU integration. This literature has equated ideas of closer integration with political integration, as opposed to a mere economic integration.[30] Discussions on how the internal market has been supplemented with a series of protections for fundamental rights have not been paralleled by literature on how fundamental rights may become implicated in deeper integration processes stemming from deeper external trade.[31] This is despite the fact that the EU has stopped negotiating trade agreements that only deal with tariffs and has instead embarked on a series of trade initiatives that seek closer legal and institutional integration with third countries.[32] The thesis employs the term "deep" to engage in such exploration. It does so by harnessing the indeterminateness and lack of agreement as to the meaning and applications of "deep".

First, there is *no agreed definition or common understanding* of "deep" trade agreements.[33] In international economic law, FTAs are largely considered deep if they have WTO+ or WTO-X provisions, including both behind-the-border barriers to trade deriving from divergent domestic laws, regulations and administrative mechanisms, and so-called 'non-trade' issues.[34] Still, the study of the term has varied. Some scholars have compared the deepness of FTAs by looking at the number of WTO+ or WTO-X provisions and their legal enforceability.[35] Others have examined the extent to which States liberalise trade and go

[30] See Helen Wallace (ed), *Interlocking Dimensions of European Integration* (Palgrave Macmillan 2001); Sophie Meunier and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at Fifty* (OUP 2007); Gráinne de Búrca, 'The Road Not Taken: The European Union As A Global Human Rights Actor' (2011)105The American Journal of International Law 649; Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14 German Law Journal 1867.

[31] Marcilio Toscano and others, 'Protection of Fundamental Rights in Latin American FTAs and MERCOSUR: An Exploratory Agenda' (2014) 20 European Law Journal 811.

[32] Marise Cremona, 'Expanding the Internal Market: An External Regulatory Policy for the EU?' in Bart Van Vooren and others (n 22).

[33] Patricia Goff, 'Limits to deep integration: Canada between the EU and the US' 30 Cambridge Review of International Affairs 549, 551.

[34] Araujo (n 7).

[35] Henrik Horn, Petros Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (Volume VII, Bruegel Blueprint Series 2009); Claudia Hofmann, Alberto Osnago and Michele Ruta, 'Horizontal Depth: A New Database on the Content of Preferential Trade Agreements' (2017) Policy Research Working Paper 7981, World Bank Group 2017.

beyond what they would have done in their absence.[36] Others have linked the concept to the level of institutionalisation, by distinguishing between the *extensive* and the *intensive* dimension of a trade agreement: while the former refers to the range of policy areas covered by an agreement; the latter is concerned with the institutional depth, namely the common institutions created for the functioning of the agreement.[37] Some scholars have thus considered treaty bodies of FTAs as forms of deep institutional integration.[38] Finally, the market integration literature contrasts 'deep' with 'shallow'.[39] Drawing from the interpretation in international economic law, this approach highlights different degrees of economic integration, from a free trade area, to a customs union and so on. The existence of various interpretations allows this study to build on them and develop its own understanding of deep in relation to fundamental rights.

Deep is also an *elastic and indefinite* concept, which allows manoeuvre for normative explorations. The employment of WTO+ or WTO-X to qualify the deepness of commitments does not allow a differentiation in terms of scope and degree of commitments. The controversy in the Brexit talks on the type of deal to be agreed is a particularly fitting example: while some have advocated for a 'Canada+++ Brexit trade deal', in practice there has been no common understanding as to what such deal would imply; what each "+" would stand for; or what difference the addition of any "+" would make.[40] The understanding of "deep" in the literature on market integration opens a whole spectrum of possibilities as to the degree of integration to be achieved and its features. The WTO reports that 'deep integration' would refer to 'any arrangement that goes beyond a simple free trade area'.[41] Provided the array of interpretations surrounding

[36] George Downs, David Rocke and Peter Barsoom, 'Is the good news about compliance good news about cooperation?' (1996) 50 International Organization 379, 406; Andreas Dür, Leonardo Baccini and Manfred Elsig, 'The design of international trade agreements: introducing a new dataset' (2014) 9 Review of International Organization 353; Leonardo Baccini, Andreas Dür and Manfred Elsig, 'The politics of trade agreement design: revisiting the depth-flexibility nexus' (2015) 59 International Studies Quarterly 765, 775.

[37] World Trade Organisation, 'The WTO and preferential trade agreements: From co-existence to coherence' (World Trade Report 2011); Vincent Vicard, 'Trade, Conflicts, and Political Integration: Explaining the Heterogeneity of Regional Trade Agreements' (2012) 56 European Economic Review 54.

[38] Damian Raess, Andreas Dür and Dora Sari, 'Protecting labor rights in preferential trade agreements: The role of trade unions, left governments, and skilled labor' (2018) 13 The Review of International Organizations 143, 152.

[39] Lawrence (n 5) 7; Laursen and Roederer-Rynning (n 9) 764; Christopher Magee, 'New measures of trade creation and trade diversion' (2008) 75 Journal of International Economics 349; Aaditya Mattoo and others, 'Trade Creation and Trade Diversion in Deep Agreements' (World Bank Policy Research Working Paper No 8206, 2017); Vincent Vicard, 'On trade creation and regional trade agreements: does depth matter?' (2009) 145 Review of World Economics 167, 168; Kim Soo Yeon, 'Deep Integration and Regional Trade Agreements' in Lisa Martin (ed), *The Oxford Handbook of the Political Economy of International Trade* (OUP 2015) 362.

[40] BBC News, 'Brexit: David Davis wants 'Canada plus plus plus' trade deal' (10 December 2017) <https://www.bbc.co.uk/news/uk-politics-42298971>; Chris Grey, 'Brexiters like Boris Johnson are pushing a Canada +++ Brexit trade deal. Here's what that would actually look like' (News The Essential Daily Briefing, 2 October 2018) <inews.co.uk/opinion/comment/brexiters-are-pushing-a-canada-model-this-is-what-that-would-actually-mean/2 October 2018>.

[41] World Trade Organisation (n 37).

the concept, various audiences might understand "deep" in different ways and relate the degree of deepness to different elements. As a malleable and indeterminate, not least understudied concept, "deep" lends itself particularly well to the present exploration.

Finally, academic debate has not examined this concept *in relation to rights*. None of the interpretations above has gone beyond the categorisation of human rights as WTO-X issues. In international economic law, the existence of provisions falling outside the mandate of the WTO would be enough to call a trade agreement "deep", and human rights would be one such example. From this perspective, a trade agreement would be called "deep" because of the existence of human rights provisions. In these cases, quantitative analyses on the number of WTO-X human rights provisions in trade agreements often lack an explanation of how human rights were understood in the analysis and which provisions were taken into consideration.[42] This thesis takes a different perspective and provides a more sophisticated conceptualisation of "deep" which goes beyond counting human rights provisions in trade agreements. While "deep" can be considered a given concept in international and EU trade, this thesis transposes it to an understanding from a fundamental rights perspective. This concept is used to explore what a "deep" agenda for fundamental rights in the context of trade would mean and imply against the normative aim of fundamental rights protection.

III. Research Question and Aims of the Study

As the latest EU trade negotiations have marked a new era of deep integration, this study is interested in providing an exploratory agenda of ways in which fundamental rights could be protected in their intersection with new and deep dimensions of trade agreements. In the context of the new generation of EU deep FTAs, it is necessary to acknowledge and address novel complex intersections between fundamental rights and trade. While 'deep' trade agreements are typically understood in economic terms, this thesis employs the term 'deep' in relation to fundamental rights as a methodological expedient to engage in an exploration of what is needed, for the protection of fundamental rights, at different levels of EU trade law-making and in their intersection with "deep" features of the new generation EU FTAs. While showing fundamental rights omissions, this study depicts a number of features, mechanisms and advances considerations that would enable different levels of trade law-making to respect and protect fundamental rights.[43] The main research question it seeks to answer is the following:

[42] Two such examples would be Horn, Mavroidis and Sapir (n 35) and Osnago and Ruta (n 35).

[43] The author is aware of the difference between respect and protect but does not enter into the debate. It must be said, however, that the thesis will employ the two terms to refer to two different types of ambitions. See Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 EJIL 771.

In the context of the new generation of EU 'deep' trade agreements with other developed economies, how should we explore and understand a 'deep' agenda for fundamental rights?

Exploring and understanding a 'deep' agenda for fundamental rights

Exploring what is called here "a deep agenda for fundamental rights" can be understood in itself as a methodological question: how to go about the exploration of this agenda? As discussed, this study is not satisfied with examining what can be found in the TSD chapters. Rather, it considers it is necessary to examine and take into account fundamental rights throughout the life cycle of an FTA, focusing in particular on the new features that make the new generation EU FTAs deep and far-reaching in their effects. These include: the scope of the FTA, the actors of negotiations, new levels of law-making in the form of regulatory cooperation, and new institutions for the implementation of the FTA. Each chapter of the thesis, dealing with each of these dimensions, represents a different way of approaching fundamental rights in trade agreements. The starting point is that fundamental rights become relevant to these dimensions. A first aim is to examine the extent of consideration given (or not) to fundamental rights and show major omissions. The research question is also interested in how to *understand* what *could* be "a deep agenda for fundamental rights". A second aim is therefore to engage in a normative investigation as to what would be needed for the protection of fundamental rights at different stages of trade law-making. Each chapter uses "deep" to refer to the mechanisms and safeguards needed for each stage of the life cycle of the trade agreement. "Deep" will therefore acquire different concrete applications for each dimension. Their addition will form the deep agenda for fundamental rights in FTAs.

The role of the EU as a global actor in trade and fundamental rights

A broader purpose of the study is to understand the role and contribution the EU can and should make in the global legal order as a converger of trade and fundamental rights. International Relations literature on the role of the EU in the world has focused on the sort of power the EU exercises in the world, whether a normative, military or civilian power.[44] Legal scholarship has analysed the EU's contribution to international law and its engagement in international organisations;[45] the EU's mode of governance through

[44] Sophie Meunier and Kalypso Nicolaidis, 'The EU as a Trade Power' in Christopher Hill and Michael Smith, *International Relations and the European Union* (OUP 2011) 276-277; Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power' (2006) 13 Journal of European Public Policy 906; Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 JCMS 235; Karen Smith, 'The End of Civilian Power EU: A Welcome Demise or Cause for Concern?' (2000) 35 International Spectator 11.

[45] Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2015); Bart Van Vooren and others (n 22); Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013); Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona, *Developments in EU External Relations Law* (OUP 2008);

legal instruments;[46] or the global reach of EU law and the EU's potential as a rule-maker as opposed to rule-taker.[47] Literature from both disciplines has looked at the novelties brought about by the Treaty of Lisbon to the EU's external action[48] and its normative objectives.[49] While there is no framework for human rights under WTO law, the Treaty of Lisbon has provided a significant 'normative impetus', and in fact an obligation, for the EU to pursue fundamental rights in trade.[50] Not only is the EU the driving force behind this new generation of ambitious deep trade agreements; it is also a global actor mandated to respect and promote fundamental rights in its external relations. Dani Rodrik has also recently commented that the EU has a unique position to stand for principles and values in international trade in a way that neither the US nor China do.[51] This thesis draws from these insights and seeks to understand (how) the EU can be a trade *and* fundamental rights global actor and what this role would imply.

IV. Methodology

In order to overcome the gap in the literature and bring new insights to how fundamental rights intersect with different levels of trade law-making, this research adopts a law-in-context approach that seeks to evaluate, or "reform", the law by adopting an external perspective to it (Figure I.1 below).[52] The research question of this thesis, interested in exploring and conceptualising a 'deep' agenda for fundamental rights in EU FTAs, is not necessarily or solely legal, and could therefore not benefit from a purely doctrinal

[46] Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 CMLR 553; Joris Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law' (CLEER Working Paper 2011/5).

[47] Elaine Fahey, *The Global Reach of EU law* (Routledge 2016); Anu Bradford, 'The Brussels Effect' (2013) 107 Northwestern University Law Review 1.

[48] Larik (n 22); Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP 2008); Marise Cremona and Pascal Vennesson, 'Facing Global Challenges: The Lisbon Treaty and the New European Union's External Relations' (EUI Review Spring, 2010); Henri De Waele and Jan Jaap Kuijper (eds) *The Emergence of the European Union's International Identity – Views from the Global Arena* (Brill 2013); Alasdair Young, 'The European Union as a global regulator? Context and comparison' (2015) 22 Journal of European Public Policy 1233.

[49] Ramses A Wessel and Tamara Takács, 'Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament' (2017) 28 European Business Law Review 103; Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20 ELJ 733; Gabriel Siles-Brügge, *Constructing European Union Trade Policy: A Global Idea of Europe* (Palgrave Macmillan 2014); Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2010); Joris Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders* (Hart Publishing 2011); Stephen Woolcock, 'The potential impact of the Lisbon Treaty on European Union External Trade Policy' (European Policy Analysis, 2008).

[50] A combined reading of Article 207 TFEU and Articles 3(5) and 21 TEU implies that, in its trade relations with third countries, the EU is obliged to observe and promote fundamental rights. See Vivian Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (EUI Department of Law Research Paper No 2016/10, 2016) 10-13.

[51] Dani Rodrik, Keynote at INTA Working Group (20 May 2020) <https://www.youtube.com/watch?v=_KqT7FCukzA&feature=youtu.be>.

[52] Rob van Gestel and Hans-W Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 ELJ 292.

approach.[53] This research requires to take into account complex interactions of regimes, actors, legal activity and institutions, in order to examine how law and different law-making processes might affect fundamental rights. Therefore, this study is not so much interested in an internal inquiry into the meaning of the law, intended as a self-standing system of rules and principles.[54] Rather, it seeks answers to "how*"* and "why*"* new law comes about as it does and for what result, thus focusing on its "determinants" and "implications".[55] The law-in-context approach allows to combine an *internal* perspective on the law – by means of *doctrinal* methods – with an *external* perspective on the law, using qualitative methods and theoretical insights from disciplines also beyond law.[56]

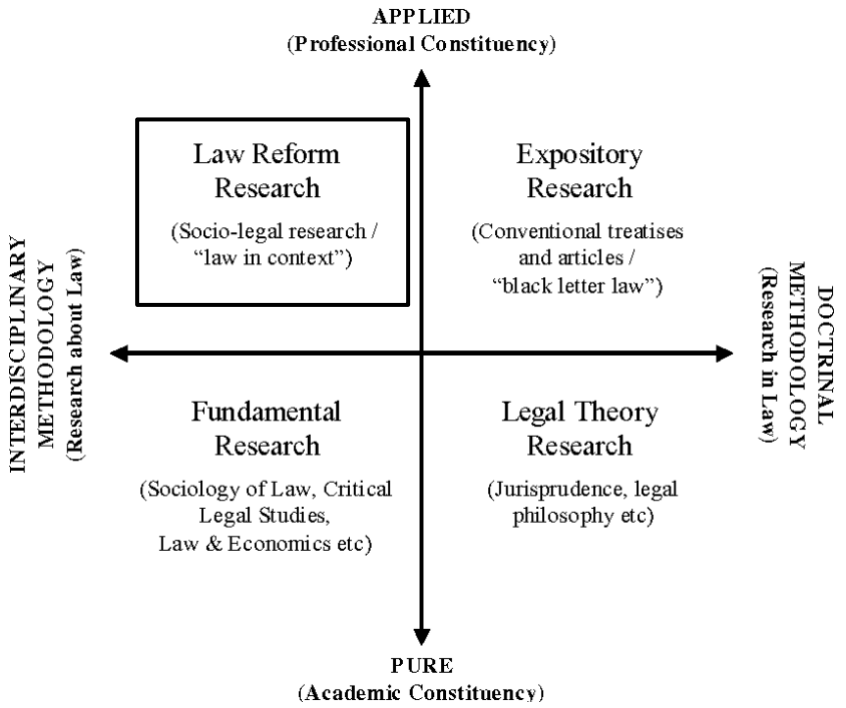

Figure I.1 – Place of the thesis in Legal Research Styles.[57]

The thesis applies this law-in-context approach especially in its core chapters, from 2 to 5, which consider law as an output of complex interactions and critically examine its implications for fundamental rights.

[53] Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing 2011).
[54] See Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 Journal of Legal Education 65.
[55] Rob Van Gestel, Hans-W Micklitz and Miguel-Poiares Maduro, 'Methodology in the New Legal World' (EUI Working Papers LAW No 2012/13).
[56] Van Gestel and Hans-W Micklitz (n 52) 297; Paul Chynoweth, 'Chapter 3 - Legal Research' in Les Ruddock and Andrew Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008); William Twining, 'Reflections on Law in Context' in William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press 1997).
[57] Modified, from Arthurs (1983). See Harry Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Social Sciences and Humanities Research Council of Canada 1983).

Albeit foundational, Chapter 1 reveals a law-in-context approach in the way legal and policy developments in EU external trade and fundamental rights are framed. The chapter shows the role that law had in the evolution of the EU as a global actor in trade and fundamental rights, respectively; but it also puts in perspective how legal and policy changes in turn have been influenced by tangential developments in the global political environment, geopolitical considerations, stalemate within international organisations, or compromised relations with third countries. The chapter thus juxtaposes legal and contextual constraints and opportunities for the EU to be a global actor in trade and fundamental rights. Such an approach provides a more holistic perspective of what the EU can and cannot do, when it comes to external trade and fundamental rights, while considering the law as both a source and outcome of its action.

The starting point of Chapter 2 is *the law* of EU FTAs, which is then called into question and examined in terms of its implications for fundamental rights. The chapter highlights the main flaws of the EU's approach to fundamental rights in FTAs, before providing alternatives to their text. Chapters 3 and 4 adopt a critical perspective on *law-making processes*: they focus on *how new law comes into existence* and analyse their implications for law and the consideration of fundamental rights therein. Chapter 3 focuses on the actors of trade negotiations, their interactions and contribution to law, showing successes and omissions in engagement and substantive contribution to fundamental rights. In this case, FTAs are the law coming into existence and the actors are part of the answer to "why" new law develops as it does. In Chapter 4, the new law coming into existence is represented by the decisions emerging from regulatory cooperation activities. The chapter critically examines the law that governs the operation of these activities and the challenges they raise for fundamental rights. Similarly, Chapter 5 examines how the law of EU FTAs shapes the operation and interactions of new treaty bodies, and what this implies for the protection of fundamental rights at the implementation level.

A common thread in these chapters is that they represent the new features that have accounted for the label "deep" being attached to the new generation EU FTAs. The thesis indeed uses "deep" as a methodological device to target different "deep" dimensions of EU FTAs and explore fundamental rights therein. Each core chapter corresponds to one of these dimensions and proceeds as follows: it starts from the question of how to "search" for fundamental rights in that dimension, then describes what can be found, compares the results across different trade initiatives, and then evaluates them against the normative insights on fundamental rights protection. In order to do so, each chapter deploys a methodological approach that is tailored to its specific research question. The overall methodology of this study can be said to combine the following methods: legal research and analysis; desk-based secondary literature research; in-depth analysis of primary documents, such as trade agreements, policy documents, online content and speeches; and

qualitative data methods, including informal interviews and direct observations. Qualitative methods are particularly useful to complement legal arguments and to study law within its context.[58]

For Chapter 1, the author has undertaken desk-based research in order to develop an extensive literature review on the evolution of the legal and policy dimensions of the EU in trade and fundamental rights, and has supplemented it with legal analysis of relevant case law and treaty provisions of the TEU and TFEU. The methodology for chapters 2, 4 and 5 have started from the collection of trade agreements and the comparison of relevant provisions across trade partners. This bottom-up "mapping" exercise allowed the researcher to highlight the main variations across the texts of the agreements and to understand what could be different. However, showing *omissions* with respect to fundamental rights required going beyond the text of the agreement. The methodological challenge lied in the question of what should have been selected and highlighted within the text of the agreement that could be relevant for fundamental rights. The second step thus involved the collection and analysis of secondary sources, including in particular critical literature on the level of law-making examined in a chapter; and literature on fundamental rights and democracy beyond the State. Drawing on a wide range of legal and social science literature, it was then possible to go back to the agreement and explore the given level of law-making from a fundamental rights perspective. This step served to critically approach the text of the agreement; it allowed to draw and apply normative insights, and thus evaluate the law, either for its consequences on fundamental rights, or for setting out a certain law-making process, in turn with possible implications for fundamental rights.[59]

The methodology for Chapter 3 departs greatly from the others in that it required qualitative data collection. Given its focus on the negotiation stage, there was no trade agreement to compare, nor was it possible to act as an observer of the negotiations. For this chapter, the researcher consulted online material and collected primary sources, such as summaries of negotiating rounds, questions asked by members of the European Parliament to the Trade Commissioner, resolutions of the European Parliament on trade negotiations, online papers and posts by civil society groups. In addition, interviews were conducted with policy officials and civil society actors.[60] The researcher followed a semi-structured in-depth type of interviews, in order to gain on-the-ground perspectives on the interviewees' experience during the trade negotiations.[61] While the interviews were rather flexible, a core set of questions included both procedural

[58] Katerina Linos and Melissa Carlson, 'Qualitative Methods for Law Review Writing' (2017) 84 University of Chicago Law Review 213.

[59] See for example Chapter 4 on Regulatory Cooperation and Chapter 5 on Institution-building.

[60] A total of 17 interviews were conducted in Brussels, in September 2019, following the ethical approval at City, University of London, and a two-day training course on 'Depth Interviewing skills' provided by the Social Research Association (March 2019, London).

[61] Carolyn Mears, 'In-depth interviews' in James Arthur and others (eds), *Research Methods and Methodologies in Education* (SAGE 2012).

and substantive issues. Procedural issues regarded the involvement of civil society at different stages of trade law-making, the venues for participation, structural challenges and responsiveness by the EU institutions. Substantive issues on trade policy and fundamental rights related to the interviewees' perspective on fundamental rights in trade agreements. The data collected helped the research for Chapter 3, but also corroborated some of the arguments in the other chapters.

Finally, Chapter 5 has also relied on qualitative data collection through non-participant observation of two meetings of the EU-Canada Civil Society Forum that were streamed online. Fora of this kind were introduced with the new generation EU FTAs and represent a new venue for civil society engagement during the implementation of the agreements. By observing the operation of these fora, the aim was not to conduct an ethnographic type of study, which typically employs this method.[62] Rather, it was an opportunity for the researcher to witness from afar how treaty law was being implemented, and how and to what extent new venues for civil society were used in practice. It additionally provided the author with a number of insights on the demands and silences of civil society actors in relation to fundamental rights in FTAs with developed countries. As shown next, this study focuses on four specific FTAs with developed countries and on two sets of fundamental rights.

i. The scope of the research

Why fundamental rights

The thesis speaks of "fundamental rights" instead of "human rights" because it is not interested in the rights belonging to human beings as such, but in the rights protected within the EU legal framework. "International human rights" encompasses the set of universal and inalienable rights to which everybody is entitled. Fundamental rights are generally human rights. Employing "fundamental rights" hence becomes a linguistic choice flowing from the EU law and governance perspective of the thesis. This study sets aside longstanding debates that question the universality of human rights.[63] It also does not directly engage with Samuel Moyn's critique that international human rights have been able to coexist with neoliberalism and unable to address increasing material inequality.[64] The critique of the human rights system is not totally new and others point at different targets as to whom, or what, should be blamed for global economic injustice.[65]

[62] Francie Ostrower, 'Nonparticipant Observation as an Introduction to Qualitative Research' (1998) 26 Teaching Sociology 57.
[63] See, for instance, Michael Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19 Human Rights Quarterly 461.
[64] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[65] David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in Rob Dickinson and others (eds), *Examining Critical Perspective on Human Rights* (CUP 2012); Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity 47; China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2004); Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002);

While this debate informs the present research, it is not one of its objects of study. The research is rather interested in the extent to which EU FTAs deal with fundamental rights. Acknowledging with Moyn that rights discourses may be perceived as "not enough", the thesis contends that they are still an important source of legitimation and accountability of international economic governance, albeit not necessarily the only one.

The benchmark for fundamental rights adopted in the thesis is given by a broad reading of the sources of fundamental rights under EU law and international human rights agreements, as well other international instruments such as the ILO Conventions.[66] From an EU law perspective, fundamental rights are understood as encompassing the rights flowing from the sources specified in Article 6 TEU, as well as from the Member States' obligations under international human rights treaties to which they are party. While the European Convention on Human Rights (ECHR) has focused on civil and political rights, the European Charter of Fundamental Rights (CFREU) has introduced some socio-economic rights which were not included in the ECHR and the right to personal data protection.[67] The CFREU constitutes an important yardstick as it incorporates internationally recognised human rights while also developing them further and amplifying their catalogue. From here, the thesis does not embark upon an examination of *all* the possible rights within this catalogue. Rather, the focus is on two sets of rights: labour and data privacy rights.

The main reason behind the choice of these two sets of rights comes from the specific contextual background in which the thesis is placed: a new generation of ambitious and complex trade agreements; concluded between developed industrialised economies; in an era of increased digitalisation and interconnectedness; yet of increased social disruptions and dissatisfaction with the promises of globalisation. Labour rights are taken as amongst the enablers of social justice that warrant exploration in the context of increasing public opposition to free trade.[68] As international trade exchanges increasingly rely on global value chains, labour rights become a matter of relevance also outside the contracting Parties to a trade agreement. As far as data privacy rights are concerned, they represent a new contested set of

Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (CUP 2017). See Gráinne de Búrca, 'Shaming Human Rights' (New York University School of Law, Working Paper No 18-47, 2018) arguing that it is not the human rights movement to be blamed, but the political leaders and financial institutions that have not been committed to redistribution.

[66] See Chapter 2 for a more comprehensive discussion.

[67] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Charter of Fundamental Rights of the European Union [2016] OJ C202/391 (CFREU).

[68] Literature has recently proliferated calling attention to labour, globalisation and trade agreements: see Henner Gott (ed), *Labour standards in International Economic Law* (Springer 2018); Axel Marx and others, 'Protecting labour rights in a globalizing world: an introduction' in Axel Marx and others (eds), *Global Governance of Labour Rights Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar 2015); Alvaro Santos, 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements' (2018) IILJ Working Paper 2018/3 MegaReg Series; Franz Ebert and Pedro Villarreal, 'The Renegotiated "NAFTA": What Is In It for Labor Rights?' (EJIL:Talk! 2018) <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/>.

rights which are implicated in goods and services trade in the digitalised era. Contemporary international trade exchanges affect and present new challenges to labour and data privacy rights, which warrant closer scrutiny in their intersection with different dimensions of new deep FTAs. How they are understood for the purpose of the present study is presented next.[69]

Labour rights. This study addresses labour rights collectively and understands them as encompassing above all the rights recognised by the CFREU, but also by the European Social Charter and a number of ILO instruments to which EU MSs are parties or which they are expected to support as ILO members.[70] Some particularly relevant labour rights in the present context of dissatisfaction with globalisation and free trade include the right to a fair remuneration, the right to information and consultation within the undertaking, the right to a safe workplace and overall fair and just working conditions, and the prohibition of child labour and protection of young people at work.[71] These are increasingly challenged by the transnational nature of many companies operating globally. Recent studies have shown that there is a lowering of labour protection in high income countries.[72] As trade liberalisation is increasingly blamed for – or at least recognised to have a bearing upon – increasing job insecurity and global inequality, labour rights present a fitting case to be examined.[73] While they have typically been included in trade agreements, the new generation of EU deep FTAs opens up to new challenges in their regard warranting scrutiny.

Data privacy rights. While the WTO has been criticised for being fixed at the analogue era, the relationship between trade, data flows and rights is an additional area that warrants exploration in the context of new deep FTAs. Unlike labour rights, data privacy rights are relatively new rights to be considered in the context of trade. They are particularly gaining momentum in the light of technology developments. As data is now the backbone of digital trade, the regulation of cross-border data flows is high on the agenda in Europe as much as in North America and Asia.[74] Trade agreements have become an important vehicle to govern data

[69] See Chapter 2 for a more comprehensive discussion.
[70] This is discussed further in Chapter 2. On the ILO instruments, see for instance the ILO core Conventions, the Declaration of Fundamental Principles and the Rights at Work 1998, the Decent Work Agenda, the four 'Governance (or Priority) Conventions' and the 'ILO Declaration on Social Justice for a Fair Globalization'.
[71] Article 23 (right to a fair remuneration) Universal Declaration of Human Rights; Articles 24, 27, 32 CFREU.
[72] Christian Häberli, Marion Jansen, José-Antonio Monteiro, 'Regional trade agreements and domestic labour market regulation' (2012) International Labour Organization, Employment Working Paper 120; Maria Artuso and Carolan McLarney, 'In A Race to the Top: Should Labour Standards be Included in Trade Agreements? (2015) 40 The Journal for Decision Makers 1.
[73] Shaffer (n 16) 7-17; Slobodian (n 16); O'Connell (n 16); Lamp (n 16); Garcia and Meyer (n 14); Bourguignon (n 14); Milanovic (n 16); Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016); International Monetary Fund, World Bank and World Trade Organisation, 'Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment' (2017) <https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf>.
[74] Walter Berka, 'CETA, TTIP, TiSA, and Data Protection' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).

flows.[75] While the digital economy requires data to flow easily, privacy and personal data need to be protected. The CFREU recognises the right to privacy and data protection as fundamental rights. The two concepts are 'twins but not identical'.[76] In EU law, the rights protected by data protection law concern how data that identify or pertain to individuals are processed, and subjects that processing to a series of safeguards.[77] Examples are the right to be informed, the right of access, the right to erasure and the right to restrict processing.[78] Privacy protection specifically refers to safeguard against misuse of private communications and disclosure of confidential information.[79] While privacy may be broader than data protection, the two can overlap.[80] As trade agreements govern the transfers of data in financial services, e-commerce and telecommunications, affecting both data protection and privacy, the study does not engage in the debate on their distinction and employs the term "data privacy rights", also accommodating language differences across legal systems (such as in the US).

Why developed countries

This study is particularly interested in the EU FTAs with develop*ed*, rather than develop*ing* or least developed, economies for three main reasons.[81] The *first* is factual and relates to the main targets of the 'Global Europe: Competing in the World' strategy behind the launch of the trade initiatives that eventually led to the new generation of EU FTAs. The EU trade agreements of the old generation had mostly been concluded with develop*ing* countries and largely featured development issues.[82] By contrast, the Global Europe strategy marked a turning point in EU trade policy. It showed that the EU was eager to conclude ambitious FTAs with 'economically significant trading partners':[83] industrialised countries with which the EU could have advanced its commercial interests and pursued economic growth.[84] The European

[75] UNCTAD, 'Data protection regulations and international data flows: Implications for trade and development' (United Nations 2016).
[76] Christopher Kuner, 'An International Legal Framework for Data Protection: Issues and Prospects' (2009) 25 Computer Law & Security Review 307.
[77] Ibid.
[78] See Articles 13, 14, 17 and 18, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[79] Kuner (n 76).
[80] Ibid.
[81] It follows that the FTA with Vietnam is excluded from the analysis, even though its negotiations started in 2012, hence after the entry into force of the Lisbon Treaty.
[82] Laursen and Roederer-Rynning (n 9) 764.
[83] Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 CMLR 351.
[84] Lachlan McKenzie and Katharina Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832.

Commission identified 'new geographic targets' in North America and South and East Asia.[85] This renewed regional ambitions of the EU have led to the conclusion of ambitious trade agreements bearing ostensible geostrategic and commercial weight.

A second reason for focusing on developed countries is indeed the significance and weight of these FTAs for the emerging global economic governance.[86] The trade partners of the new generation EU FTAs are influential economies, either globally or in their respective regions. Using a rhetoric of "like-minded countries", the EU has set for itself the goal of cooperating towards the promotion of a rule-based international trade order. It has been found that developed economies are the most likely and willing to undertake commitments going beyond the WTO framework, resulting in a majority of deep North-North FTAs.[87] Being concluded between developed countries having the potential to emerge as global rule-makers, these FTAs are likely to set the precedent for future trade agreements, including for the place of fundamental rights within the global economic order. It is not surprising that underlying the EU's strategy is its willingness to secure its say in the emerging regulatory system for global trade before others would do so.[88] This is particularly significant in the light of competing and less normative views as to what this order should look like.[89]

The final but most important reason is that the selection of developed economies as trade partners allows changing perspective of the way fundamental rights have typically been understood in EU trade agreements. In the past, it was common for the EU to include human rights clauses in trade agreements with developing countries, as a sort of EU political messianism[90] or "offensive" interest.[91] Trade agreements were used as vehicles through which human rights would be promoted and exported abroad. The new generation EU FTAs are unique in that the trade partners are not developing countries. This new context allows to depart from common understandings that consider them as a development issue or as a matter of concern for the *other* trade partner alone; and to look at them as a matter of global relevance in an era of globalisation and increasing inequality. Today fundamental rights emerge as a "defensive" tool for the EU

[85] Laursen and Roederer-Rynning (n 9) 764.
[86] Velut and others (n 13) Introduction.
[87] Goff (n 33) 550.
[88] Bungenberg and others (n 18).
[89] See Thomas Cottier, 'The Changing Structure of International Economic Law and the Future of Regulatory Cooperation' (speech at University of Birmingham's Institute of European Law conference "Transatlantic Perspectives", 28 June 2018) <https://www.youtube.com/watch?v=lcQYgk9c5nA>; U.S.-China Economic and Security Review Commission, Roundtable: A 'China Model?' Beijing's Promotion of Alternative Global Norms and Standards (27 April 2020) <https://www.uscc.gov/hearings/roundtable-china-model-beijings-promotion-alternative-global-norms-and-standards>.
[90] Joseph Weiler, 'In the face of crisis: Input legitimacy, output legitimacy and the political Messianism of European integration' (2012) 34 Journal of European Integration 825.
[91] Vincent Depaigne, 'Protecting fundamental rights in trade agreements between the EU and third countries' (2017) 42 ELR 562, 563.

and the rights of its citizens as a result of deep trade relations with other developed countries.[92] Canada, the US, Singapore and Japan are all industrialised market economies which enable a different perspective on fundamental rights in trade in the present era.

Selection of trade agreements: CETA, TTIP, EUSFTA and EUJEPA

The trade agreements that have been selected for this study comprise four major trade initiatives with other developed economies in North America and Asia: the Comprehensive Economic Trade Agreement with Canada (CETA); the Transatlantic Trade and Investment Partnership with the US (TTIP); the Free Trade Agreement with Singapore (EUSFTA); and the Economic Partnership Agreement with Japan (EUJEPA). While TTIP has failed, it represents one of the most significant endeavours undertaken by the EU with one of its historical trade partners, the US. Methodologically, given the absence of a finalised text, the analysis will rely on the EU's proposals: they reflect what the EU would have been ready to agree with the US, and thus represents an important benchmark and precedent, but cannot reveal whether the US would have in turn agreed to them. For practical reasons, the text will refer to "TTIP" and will speak of "trade agreement" nonetheless. Where possible, the analysis also examines and draws insights from the current transatlantic trade talks.

These trade agreements have been selected for the following reasons. The first and most evident reason is that the research question is concerned with developed economies.[93] Filtering the trade partners of the new generation EU FTAs to select developed countries leads to Canada, the US, Singapore and Japan. In spite of different economic sizes, they are all leading advanced markets, counting for large shares of world trade together with the EU. More specifically, according to the World Bank classification of countries, the US, Canada, Singapore and Japan are high-income countries.[94] While they are all advanced countries, they still differ in the size of the economy: for the year 2016, in terms of GDP, the World Bank ranks the US at the first position, followed by Japan at the third, Canada tenth and Singapore 37th.[95] This first factual reason for their selection carries with it all the reasons for the focus on developed economies outlined previously. Above all, they reflect the objectives of the Global Europe strategy, which pointed at strategic partners in North America and Asia as the main targets for a new wave of EU trade agreements.

The second reason is that CETA, TTIP, EUSFTA and EUJEPA are the embodiment of the EU deep trade agenda. They are commercially-driven FTAs whose scope adds significantly to WTO law.[96] Trade-

[92] Ibid*;* Bruno De Witte, Professor of European Law at Maastricht University, Presentation at 'The Principle of the Autonomy of the EU Legal Order' (The City Law School, London, 16 February 2017).
[93] As such, it excludes for instance the most recent FTAs with Vietnam, Mexico and Mercosur.
[94] World Bank, GDP Ranking <https://datacatalog.worldbank.org/dataset/gdp-ranking>.
[95] World Bank, Gross Domestic Product 2017 <http://databank.worldbank.org/data/download/GDP.pdf>.
[96] See Chapter 1 for a more comprehensive discussion. Gstöhl and Hanf (n 49); Cremona (n 32) 169.

liberalising issues include services, public procurement, foreign direct investment, commercial aspects of IPRs and competition. Most focus is on non-tariff barriers to trade, including innovative mechanisms for regulatory convergence. As discussed, a novel feature of the new generation EU FTAs is also the introduction of TSD chapters with provisions on labour rights and the environment. Both competitiveness-enhancing and sustainable development issues benefit from institutional arrangements for their implementation and monitoring.[97] As such, these FTAs have been said to be emblematic of deep integration.[98] They represent a noteworthy endeavour from the EU to integrate further with other developed economies in North America and Asia, with different regulatory systems, not least different understandings of rights.

The final reason for selecting CETA, TTIP, EUSFTA and EUJEPA is that they are post-Lisbon trade agreements. As it will be explained more in depth in the next chapter, the Treaty of Lisbon has introduced a new normative impetus for the EU to pursue fundamental rights in its external policies. This is why the FTA with South Korea – the first of this new generation of FTAs, also with a developed economy – remains outside the scope of the present study. The negotiations with Canada, the US, Singapore and Japan have all taken place once the Treaty of Lisbon has entered into force (see Figure I.2 and Table I.1 below).[99] In the post-Lisbon era, the expectation is that EU external trade law-making should pursue values of human rights, democracy and the rule of law.[100] This selection then allows to appreciate the extent to which the normative impetus of the Treaty of Lisbon has influenced EU external trade policy and the way the EU operationalises this mandate. This reason also closely connects with the aims of the study, in particular the role of the EU as a global actor in trade *and* fundamental rights.

Figure I.2 – Timeline of EU trade negotiations with Canada, the US, Singapore and Japan.[101]

[97] Araujo (n 7).
[98] Elaine Fahey (ed), *Institutionalisation beyond the Nation State* (Springer 2018) Introduction.
[99] Despite being the first of this new generation of trade agreements, the FTA with South-Korea is excluded from the analysis: its negotiations have started prior the entry into force of the Lisbon Treaty and the agreement has been initialled in 2009.
[100] See Art.21 TEU.
[101] Compilation of the author.

Partner (FTA)	Beginning of negotiations	End of negotiations	Present status
Canada (CETA)	April 2009	August 2014	*Partly in place* (signed 30.10.2016; provisionally applied 21.09.2017)
Singapore (EUSFTA)	April 2010	2012	*In place* (signed 9.10.2018, entered into force 21.11.2019)
Japan (EUJEPA)	March 2013	July 2017	*In place* (signed 17.07.2018, entered into force 1.02.2019)
US (TTIP)	July 2013	October 2016	*Failed*
US (current)	April 2019	n/a	Ongoing trade talks

Table I.1 – Status of the FTAs under examination.[102]

ii. Research boundaries and limitations

The scope of the research is limited to these sets of fundamental rights and to these four trade partners in North America and Asia. Although the thesis draws parallels with approaches to fundamental rights in trade agreements with developing countries, the focus is on the new generation EU FTAs with Canada, the US, Singapore and Japan. It examines the extent to which different levels of trade law-making of the EU's deep FTAs may adversely affect or enhance the protection of labour and data privacy rights. The thesis is not interested in the question of whether trade agreements can be used to export fundamental rights abroad, nor whether they are able to hinder global inequality. The aim is to shed light on necessary safeguards giving rise to a system for preventing harmful effects on fundamental rights – a sort of "harm-proof" environment of trade law-making. The preventive aim of the research implies that issues of enforcement are not

[102] Compilation of the author. The table focuses on the trade agreements and does not consider the Investment Protection Agreements (IPA) negotiated with Singapore and Japan. For Singapore, the EUSIPA negotiations have concluded in 2014 and the agreement will need to be ratified by all EU MSs before it can enter into force. For Japan, negotiations for EUJIPA are ongoing. Source: Current State of Play of EU trade negotiations at <https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> (update August 2020). On TTIP, see Council of the European Union, 'Council decision authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods' (6052/19, 9 April 2019) <https://www.consilium.europa.eu/media/39180/st06052-en19.pdf>, according to which the negotiating directives of TTIP are now obsolete.

examined. While important and addressed by scholars of EU trade and fundamental rights, not least a major request by civil society actors, enforcement goes beyond the conceptualisation of the deep agenda for fundamental rights that the thesis seeks to depict.[103] Similarly, judicial review of trade agreements and their lack of direct effect fall outside the scope of the research.[104]

Beyond the boundaries of the scope of the research, it is important to point at some of the limitations of the thesis. From a methodological point of view, the research was conducted by relying on a wide range of primary and secondary sources, including interviews with relevant actors. Nonetheless, the research suffers from, but also highlights, missing online information on different trade negotiations and, in some cases, the current implementation of FTAs. While telling of the way negotiations were conducted, this lack of information prevented the author from gaining deeper insights into the discussions on the ground. In order to fill this gap, interviews were undertaken. Yet it is submitted that the inherent bias of certain actors only provides a partial and partisan story. For temporal reasons, it was not possible to conduct interviews with negotiators from the EU's trade partners.

Furthermore, the study of the contributions by civil society and the EP in Chapter 3 relies upon material available online. Findings on their engagement leave aside "untrackable" exchanges that might have taken place among different actors at different moments in time. Regarding the substantive contribution, by contrast, the interviews confirmed the standpoints by civil society actors that had been found online. Once again, the time constraint meant that interviews were conducted with a limited number of civil society actors, albeit the most active and vocal in Brussels. The thesis also refers to civil society by providing a definition and to some extent taking the concept for granted. It does not engage in the discussion of representativeness and accountability of civil society itself, which goes beyond the aim of the research. While a crucial discussion for the final argument, the starting point is that civil society should be representative and accountable: the argument holds within these premises.

Temporal boundaries of the research elude the latest developments that have taken place in relation to other EU trade negotiations with developed countries on the one hand, including the US, and a fast-moving international legal order hit by trade wars on the other hand. It is held that the background context is still overall one of digitalisation and backlash to free trade. The thesis is to be placed and understood within this context. Finally, the conclusions that are drawn on the EU as a global actor in trade and fundamental rights do not take into account the fact that some countries are particularly reluctant to deal with fundamental rights issues in the context of trade. Hence, one could say that much of what the EU can

[103] On enforcement, see Bronckers and Gruni (n 29).

[104] On judicial review see Rachel Frid de Vries, 'EU Judicial Review of Trade Agreements involving Disputed Territories: Lessons from the Front Polisario Judgments' (2018) 24 Columbia Journal of European Law 496. On lack of direct effect, see Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 CMLR 1125.

do depends on the trade partner. At the same time, one could say that the EU becomes complicit insofar as it is ready to compromise and proceed with something that is suboptimal for the protection of fundamental rights.

V. Original Contribution

This original contribution of the thesis comes from its holistic approach to the study of fundamental rights in trade: fundamental rights should be a cross-cutting issue to be taken into consideration at different levels of trade law-making and at their intersection with new features of EU 'deep' FTAs. The research puts into practice this perspective. Unlike research that has either neglected these aspects, or only fragmentarily addressed them, the thesis provides a thorough overview of different aspects of EU FTAs and their interplay with fundamental rights. By engaging in such exploratory research, this study offers novel ways of thinking about fundamental rights in trade agreements. It raises complex questions of how we should understand the nexus between fundamental rights and 'deep' FTAs in the present context of digitalisation and backlash to globalisation. A deep trade agenda has emerged, but a deep agenda for fundamental rights has not. This study adds to current debates in the literature and in legal and policy discourses by depicting its own 'deep agenda for fundamental rights' in trade agreements between developed countries.

A further contribution lies on the series of omissions that this study shows in respect of fundamental rights. By engaging in this exercise, the contribution is both methodological and normative. Proving that something is not there, and arguing that it should be there, is methodologically challenging. While the thesis discusses fundamental rights at length, the research may in fact be understood as being about something – fundamental rights – that is typically either absent in trade agreements, or appears only limitedly in EU trade agreements. At a minimum, this study provides a roadmap on how to go about the exploration of fundamental rights in the context of trade agreements; a roadmap that is deemed to open up to new exploratory agendas. Each chapter of the thesis points at different levels of trade law-making and examines them from a fundamental rights perspective. By highlighting omissions, they provide critical and normative insights as to where and how fundamental rights become crucial and need more consideration in the new generation EU FTAs.

A third element of novelty is the selection of developed trade partners, which are additionally representative of two regions which have not been studied together or compared in recent literature on EU external trade. By focusing on the FTAs with trade partners in North America and Asia, this study provides a major comparative perspective across four trade agreements and across two major regions. While not denigrating the importance of examining fundamental rights in trade agreements with develop*ing* countries, the new generation EU FTAs with develop*ed* countries open up to timely and highly needed considerations

on fundamental rights in trade. The FTAs under examination have been concluded between countries which in most cases provide safeguards for the protection of basic human rights. While necessary, human rights clauses that demand the respect of core human rights may be outdated and insufficient to tackle new challenges to fundamental rights. Therefore, understanding the place of fundamental rights becomes significant, not so much as a development issue, but as instrumental to the legitimacy of the emerging global economic governance and the EU as one of the major supporters of 'free' trade.

VI. Outline of the Thesis

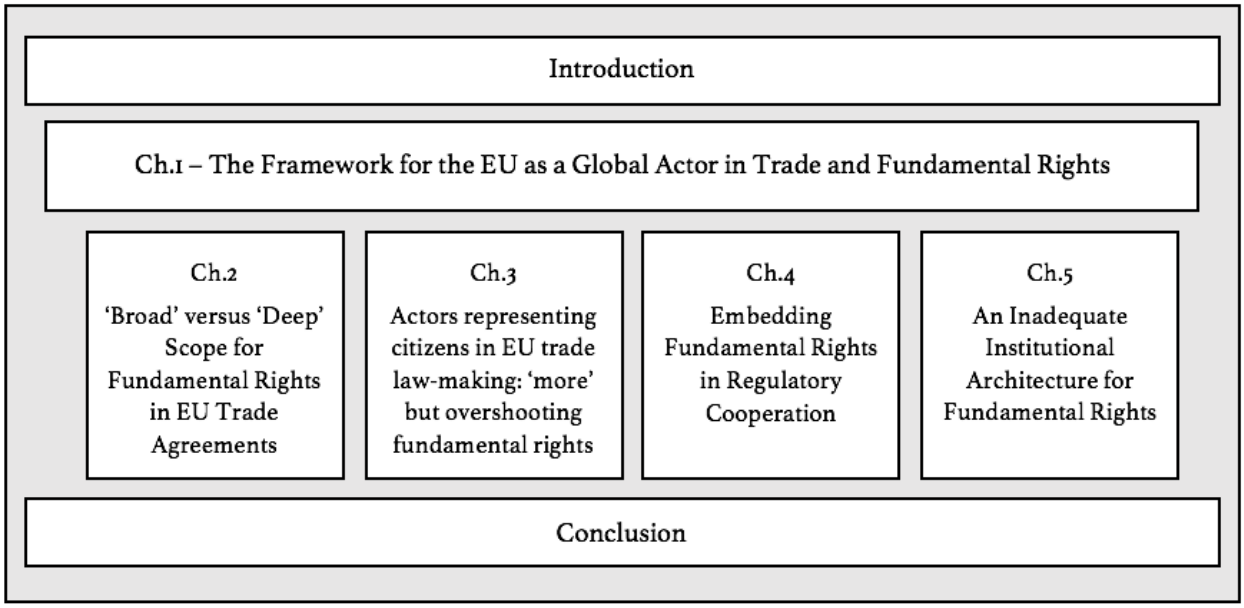

Figure I.3 – Visual representation of the thesis' structure.

Following this introductory chapter, Chapter 1 introduces the framework to understand and conceive the EU as a global actor in trade and fundamental rights, by discussing legal and policy developments up until the Treaty of Lisbon. Chapters 2 to 5 are the core chapters of the thesis: each is dedicated to a level of law-making of the latest EU FTAs in their intersection with the selected sets of fundamental rights. These chapters are characterised by the same underlying exercise, which seeks to explore and understand what is called here 'a deep agenda for fundamental rights' in the new generation EU FTAs with other developed economies. Chapter 2 starts with the text of the FTAs: it examines the scope of fundamental rights by providing an overview of the main provisions on labour and data privacy rights, and discusses other chapters and aspects of the trade agreements that should be imbued with fundamental rights considerations. Chapter 3 deals with the negotiation stage and looks at the extent to which actors representing citizens – in particular the European Parliament and civil society actors – have engaged across trade negotiations and the kind of

proposals they have advanced for fundamental rights in trade. Chapter 4 moves to the treaty chapters on regulatory cooperation, as new levels of law-making that warrant scrutiny in their interplay with fundamental rights. Similarly, Chapter 5 studies the institutions created by the FTA and assesses their adequateness in protecting fundamental rights. The conclusion elaborates on the core argument of the study by drawing on the main findings and outlines some policy recommendations; it also provides some insights on how the thesis opens new avenues of research.

Chapter 1 – The Framework for the EU as a Global Actor in Trade and Fundamental Rights

1.1. Introduction

Trade and fundamental rights are two manifestations of the EU's international presence. On the one hand, the EU is an incontestable power in trade, which has been able to develop thanks to the economic size of its Member States, to its origin as an economic organisation and the legal framework governing it, and its unique status as official member at the World Trade Organisation. Over time, the EU has sought deeper economic and political ties with third countries via trade agreements. Fundamental rights, by contrast, have emerged only at a later stage in the EU legal framework. Yet they are now at the backbone of the EU's identity and have seen their sources substantially widening internally. Compared to trade, however, the fundamental rights component of the EU's external actorness is less clear, and often contested. This chapter retraces the evolution of the EU legal framework and policy agenda in trade and fundamental rights, and re-frames the EU as a global actor in trade *and* fundamental rights. The question it seeks to address is *How has the EU evolved as a global actor in trade and fundamental rights?*

Starting from the premise that law plays a role in constructing and shaping the EU's external action, the chapter compares developments in the legal frameworks for trade and fundamental rights respectively.[1] It examines how these developments have influenced the EU's external action and the corresponding policy agendas. The chapter thus provides an historical perspective on the evolution of the EU as a global actor in *trade* and on the EU as a global actor in *fundamental rights*, and emphasises the added value of the Treaty of Lisbon, which has brought them together. While human rights have never really been absent from the EU external action, the Treaty of Lisbon has introduced a legal obligation for the EU to respect and promote fundamental rights in its external relations. It represents a novel framework able to steer the EU's external action and to raise new questions as to its role as a global actor in trade *and* fundamental rights. This chapter thus provides the context to ask new questions about fundamental rights in the context of EU "deep" trade agreements.

The first two main sections, on the EU as a Global Actor in Trade (1.2) and on the EU as a Fundamental Rights Actor beyond Trade (1.3) help understand the EU as a trade actor in the world and its increased engagement with fundamental rights. The first *sub*sections of each section look at the *legal*

[1] Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) Introduction.

framework contributing to make the EU a global actor in trade and in fundamental rights respectively.[2] The focus is on the provisions granting competences, widening the scope (of the Common Commercial Policy and fundamental rights) and mandating EU's participation in multilateral fora. The second *sub*sections, on the other hand, look at how the legal framework has manifested in the EU *external relations* with third countries: in trade agreements and the incorporation of fundamental rights therein over time. The last section (1.4) adds to this picture the novelties brought about by the Treaty of Lisbon on the relationship between fundamental rights and EU external relations, and introduces the dimensions of EU trade agreements that will be explored in their intersection with fundamental rights.

1.2. The EU as a Global Actor in Trade

Via trade the EU has sought and has been able to deepen its ties with third countries, making trade the most prominent manifestation of EU global actorness.[3] This section first presents the *legal framework* of EU external trade, with a focus on how the evolution of this framework has allowed the EU to become a global actor in trade (1.2.1). It then turns to how this legal framework has manifested *externally*, in the EU's trade policy agenda (1.2.2).

1.2.1. The Legal Framework for the EU as a Global Actor in Trade

With a view to providing an overview of the legal framework that enables the EU to be a "global" actor in trade, the focus is on Treaty provisions that: (1) grant the EU *exclusive competences* in trade; (2) expand the *scope* of trade disciplines over which the EU has an exclusive say; and (3) expect the EU to contribute to the development of international law by *participating in multilateral fora*.

Competences. Exclusive competences in trade have emerged out of the EU's origin as a customs union and the consequent establishment of a common commercial policy (CCP). The customs union, and the establishment of a common external tariff, meant that there would be an *external* dimension to the *internal* market. With the Treaty of Rome, the European Economic Community acquired an external personality to act as a single actor in international trade: external competences were introduced for the implementation of the CCP and for the conclusion of Association Agreements with third countries.[4] Gradually, the pursuance of an uniform CCP required the EU MSs to speak with a single voice and to adopt a common position vis-a-vis third countries.[5] The Court soon recognised the importance of

[2] The perspective of the EU as a global actor in trade, either at the multilateral level or bilaterally, allows speaking of the EU as a single actor, subject to international developments in trade. Such perspective however conceals – yet does not reject the importance of – the multiple voices that characterise the definition of EU trade policy internally.
[3] Andreas Dür and Hubert Zimmermann, 'Introduction: the EU in International Trade Negotiations' (2007) 45 JCMS 771.
[4] See respectively Art.113 and Art.238 EC. Sophie Meunier and Kalypso Nicolaidis, 'The EU as a Trade Power' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (OUP 2011) 276.
[5] Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart Publishing 2015) 23-29.

transferring trade powers from the single MSs to the EEC: the interaction of internal and external measures in commercial policy meant that the removal of barriers for goods *internally* needed the application of common rules for the same goods *externally*.[6] This has been pivotal for the early development and expansion of the EU's exclusive competences in trade.[7] The Treaty of Lisbon (ToL) has now codified subsequent rulings of the Court on allocation of competences and grants the EU exclusive competence in the area of CCP.[8] The ToL has also extended significantly trade-related disciplines that can be decided through Qualified Majority Voting, thereby enhancing the supranational character of the EU in the area of trade.[9]

Scope. The scope of the CCP has been widened over the years, through both case-law and Treaty amendments. Under Article 113 EC [now Article 207 TFEU], the Treaty of Rome provided a few examples of what the CCP covered: changes in tariff rates, conclusion of tariff and trade agreements, measures of liberalisation, export policies and trade-defence measures.[10] In the 1970s, the scope of international trade was developing faster than for the EU, and a mismatch emerged between the two systems.[11] In a first ruling, the Court called for a broad interpretation of Article 113 EC, which had to be read as providing a *non-exhaustive* list of the scope of CCP.[12] A couple of decades later the Court was called again to clarify the Community's competences in trade. This time, the Court introduced *mixed* competences for trade in services and IPRs: international agreements covering these elements had to be agreed and ratified not only by the Community, but also by the MSs.[13] At present, under Article 207 TFEU, the scope of CCP came to encompass services, commercial aspects of IPRs and FDI. Some have observed how this expansion of the scope of CCP was the result of an adjustment 'to the constantly evolving international trade environment'.[14] Given the ubiquity of matters related to trade, one may question which new directions EU trade will take. In the recent *Opinion 2/15*, the ECJ clarified that the EU does not enjoy exclusive competence in Investor-State Dispute Settlement and investments

[6] Opinion 1/75 *Opinion pursuant to Article 228 (1) of the EEC Treaty* ECLI:EU:C:1975:145, Opinion of the Court 1363. See ibid 20.
[7] Ramses A Wessel and Tamara Takács, 'Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament' (2017) 28 European Business Law Review 103, 106.
[8] See Art.3(1)(e) TFEU, to be read together with Art.207 TFEU. Rulings of the Court include: Opinion 1/78 *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber* ECLI:EU:C:1979:224; Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty* ECLI:EU:C:1994:384.
[9] Unanimity is still required in certain sensitive cases, see Art.207(4) TFEU. Joris Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders* (Hart Publishing 2011) 14; Peter-Christian Muller-Graff, 'The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP 2008) 200; Meunier and Nicolaidis (n 4) 281; Koutrakos (n 5) 19-27.
[10] See Art.113 EC.
[11] Alasdair Young, *Extending European Cooperation: The European Union and the 'New' International Trade Agenda* (Manchester University Press 2002) 24-29.
[12] Opinion 1/78 (n 8). For a thorough discussion, see Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011), 19.
[13] Opinion 1/94 (n 8) para 98.
[14] Koutrakos (n 5) 71.

that do not pertain to Foreign Direct Investment.[15] Mixity remains a contested issue, among EU institutions and scholars in the field, with consequences on EU's competences to conclude international agreements, not least in relation to their content and design.[16]

Participation in multilateral fora. The combination of exclusive competences and Treaty obligations to support multilateralism has contributed to the development of the EU as a global actor in trade. The EU is required to engage in multilateralism and to cooperate with other International Organisations;[17] to contribute to the development of International Law, and to the development of world trade and the progressive abolition of restrictions on international trade.[18] The extent to which the EU manages to influence the global legal order and to provide its own contribution to the formation of International Law as an active co-creator can be considered an aspect of the EU being a global actor.[19] With the creation of the EEC and the introduction of exclusive competences in CCP, the EC started acting as a GATT member at a time when it still was not.[20] Supported by the Court's rulings, the Commission eventually came in to represent the MSs' positions within the GATT negotiations.[21] When the WTO was created, the EC officially became a full member, yet still along with all EU MSs. As the only non-state actor that engages in international fora on an equal footing with states, the EU has since then actively cooperated with third countries in the context of the WTO, in order to guarantee a free-from-barriers and rules-based international trade system.[22] The EU was able to catalyse processes of constitutionalisation of WTO law and judicialisation of international trade.[23] Within the WTO, the EU has managed to act as a single actor and to influence the rules of the global economic governance.[24] Recent stalemate at WTO negotiations, however, resulted in the EU's turn to bilateralism. As presented

[15] E.g. portfolio investments. Opinion 2/15 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2017:376, Opinion of the Full Court.

[16] Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart 2010); Guillaume Van der Loo and Ramses A Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54 CMLR 735.

[17] Art.3(5) TEU; Articles 21(1) and (2) TEU; Art.220(1) TFEU. See Jed Odermatt and Ramses A Wessel, 'The Challenges of Engaging with International Institutions – The EU and Multilateralism Under Strain' in Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Egar 2019).

[18] Art.206 TFEU, and similarly also Art.21(2)(e) TEU.

[19] Dimitry Kochenov and Fabian Amtenbrink, 'Introduction: the active paradigm of the study of the EU's place in the world' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013).

[20] In 1947, when the GATT came into being, individual MSs were party to it. See Detlev Brauns and Tomas Baert, 'The European Union in the World Trade Organization Post-Lisbon: No Single change to the single Voice?' in Christine Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing 2015) 110.

[21] Eeckhout (n 12) 13.

[22] Christina Eckes, 'How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures' (2014) 12 ICON 904; Alasdair Young and John Peterson, *Parochial Global Europe: 21st Century Trade Politics* (OUP 2015).

[23] Larik (n 9); Tilman Krüger, 'Shaping the WTO's institutional evolution: the EU as a strategic litigant in the WTO' in Kochenov and Amtenbrink (n 19).

[24] Thomas Streinz, 'Cooperative Brexit: Giving back control over trade policy' (2017) 15 Editorial ICON; Larik (n 9) 281; Krüger (n 23).

next, this move has not undermined the EU's global actorness in trade and has in fact allowed the pursuance of more ambitious trade agreements with a significant bearing on global economic governance.[25]

1.2.2. The Deepening of EU External Trade

The shifting landscape of international trade meant that the legal framework for the EU as a global actor in trade has been stretched to adjust to new realities, while EU trade policy has evolved to tackle new pressures and geopolitical dynamics. From being an advocate of multilateralism, the EU turned to a bilateral trade liberalisation agenda. It targeted strategic industrialised countries in Asia which had until then little economic and geopolitical relevance to the EU. While one may debate whether the focus on developed countries is truly 'global', the resulting trade agreements undeniably represent important precedents in the region and with significant spillovers over global governance.[26] In order to appreciate major shifts in EU trade policy that have led to a 'deepening' of EU external trade, the following developments are discussed next: the expansion of the international trade agenda, the stalling negotiations at the WTO, the US's turn to bilateralism, and the emergence of megaregional trade agreements in Asia.

Year	Place/name	Subjects covered	Countries
1945-1947	Geneva/GATT	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva/Dillion Round	Tariffs	26
1964-1967	Geneva/Kennedy Round	Tariffs and anti-dumping measures	62
1973-1979	Geneva/Tokyo Round	Tariffs, non-tariff measures, "framework agreements"	102
1986-1994	Geneva/Uruguay Round	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc.	123
2001-?	Doha/Doha Round	21 subjects including i.a. agriculture, intellectual property, geographical indications, competition, investment, environment, transparency in public procurement, etc.	159

Table 1.2 – Trade Rounds since the creation of the GATT up to now.[27]

[25] Jean-Baptiste Velut, 'Introduction: The political and economic governance of new cross-regionalism', in Jean-Baptiste Velut and others (eds), *Understanding Mega Free Trade Agreements: The Political and Economic Governance of New Cross-Regionalism* (Routledge 2018).
[26] Ibid.
[27] World Trade Organisation, 'The GATT years: from Havana to Marrakesh' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 1 February 2019; World Trade Organisation, 'Subjects treated under the Doha Development Agenda' <https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm>.

Starting with the international agenda, a first comparison of the *subjects* covered during the negotiating rounds shows that trade negotiations were initially only concerned with tariffs, but over time came to cover a significantly wider set of subjects (Table 1.2 above). Against a context of increasing economic interdependence, the removal of tariffs at the border that had shaped the post-war period trade system was not sufficient to achieve international trade liberalisation. For the first time with the Tokyo Round, the multilateral trade agenda expanded to non-tariff measures. During the Uruguay Round these came to include i.a. public procurement, subsidies and investment measures, and minimum standards for IPRs protection.[28] Standards Codes were signed by like-minded countries, in matters of Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures, as well as in Intellectual Property Rights in the form of the TRIPS Agreement.[29] At the end of the 1990s, it was the EU, next to the US, that was pushing for an even more ambitious, "deep" trade agenda.[30] At the Ministerial Meeting in 1996, the Commission put forward proposals for negotiating the so-called 'Singapore issues': competition policy, investment, public procurement and trade facilitation.[31] A few years later, the EU also envisaged negotiations over non-agricultural market access, labour and environmental standards.[32] Particularly regarding labour rights, the EU's proposals were not endorsed and were largely opposed by developing countries.[33]

A second comparison, that of the *number of countries* in successive rounds, indeed further explains the complexity of the EU's attempt. A deep trade agenda could hardly find widespread support in a negotiating arena of a significantly expanded number of participants. Among these, a new big segment encompassed developing countries which strongly opposed any discussion over matters that could intrude in their domestic policy space.[34] Proposals to negotiate "trade and" issues were indeed often rejected as deemed too intrusive of national sovereignty.[35] While the EU adopted an "aggressive" negotiating stance during the Doha Round,[36] some of these issues (in particular trade and investment, trade and competition and transparency in government procurement) were formally withdrawn from the agenda of the Doha Round in the so-called 'July decision' in 2004.[37] The difficulty of negotiating deep trade disciplines at the WTO had a significant bearing on the decline of multilateralism, epitomised by

[28] Young and Peterson (n 22).
[29] Marion Jansen, 'Defining the Borders of the WTO Agenda' in Martin Daunton, Amrita Narlikar and Robert Stern (eds), *The Oxford Handbook on The World Trade Organization* (OUP 2012).
[30] Stephen Woolcock, 'The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?' (2003) 38 Intereconomics 249.
[31] Ibid; Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20 ELJ 733, 734.
[32] Young and Peterson (n 22) 88.
[33] Billy Melo Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality' (2018) 67 International and Comparative Law Quarterly 233, 237.
[34] Ibid 255.
[35] Ibid.
[36] Alasdair Young, 'Trade Politics Ain't What It Used to Be: The European Union in the Doha Round' (2007) 45 JCMS 789, 798.
[37] Jansen (n 29) 167.

the stalling negotiations of the Doha Round. Against this backdrop and in an attempt to re-establish its leadership, in the early 2000s the US devised a 'competitive liberalisation' trade policy.

A third significant development in the international trade system was the US's offer to negotiate bilateral Preferential Trade Agreements with any country willing to make substantial concessions to market access.[38] A major economy was turning its back to multilateral negotiations at the WTO and resorting to bilateral trade agreements. The US could thereby exercise a stronger bargaining power to secure its economic interests and regulatory standards.[39] Research shows that, up to 2008, the Preferential Trade Agreements concluded by the US were conceived as a tool to transpose their regulatory approach to trade partners.[40] This was particularly true for the US strategy of 'hub and spoke' bilateralism in East Asia – in contrast to the liberal, multilateral rule-based strategy maintained by the EU.[41] Countries that were not ready to abide by US rules would have been left behind, whereas at the multilateral level the US would have garnered more support from its trade partners.[42] What could not be achieved at the Doha Round was advanced at the negotiating table at the bilateral level. The US preference for bilateralism pushed the EU in the same direction. Bilaterally, the EU and the US were willing to secure sophisticated trade agreements that introduced obligations outside WTO type commitments. In the 2000s, the US and the EU emerged as the world's two leading global regulators.[43]

The move away from the WTO is also to be understood as a "geopolitical shift" in light of new regional endeavours in Asia.[44] The emergence of the so-called 'mega-regional' trade agreements has given rise to new specific forms of global governance which reveal the willingness of 'new' regions to integrate further.[45] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP) are two of such examples. The CPTPP is the legacy of the Trans-Pacific Partnership (TPP). In 2008, the US decided to engage with a trade initiative of Asia-Pacific countries and to negotiate what came to be called TPP.[46] The participation of the US persuaded other countries, above all Canada, to join.[47] TPP yet risked failing

[38] Billy Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (OUP 2016) 32-33.
[39] Ibid 23.
[40] Henrik Horn, Petros Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (Bruegel Blueprint Series 2009) 43.
[41] John Ikenberry, 'Power and liberal order: America's postwar world order in transition' (2005) 5 International Relations of the Asia-Pacific 133, 145-146.
[42] Jansen (n 29).
[43] See literature on both the EU and the US as global regulators, e.g. Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020); André Sapir, 'Europe and the global economy' in André Sapir (ed), *Fragmented Power: Europe and the Global Economy* (Bruegel 2007) 12; and Daniel W Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press 2007) 36.
[44] Elaine Fahey, *Introduction to Law and Global Governance* (Edward Elgar 2018) 132.
[45] Megaregional trade agreements have been defined as aiming at deep economic integration and going beyond trade, to improve regulatory compatibility. See definition provided by Thomas Hirst, 'What Are Mega- Regional Trade Agreements?' (World Economic Forum, 9 July 2014) <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>. Fahey (n 44) 141.
[46] The Trans-Pacific Strategic Economic Partnership Agreement (TPSEP). See Griller, Obwexer and Vranes (n 46) 9.
[47] Australia, Peru and Vietnam were signed in 2009; Malaysia in 2010; Canada and Mexico in 2012 and Japan in July 2013.

after Trump's decision to withdraw from it. Under the lead of Japan and Canada, TPP members decided to revive the agreement.[48] The calibre of CPTPP now makes it a potential template for future agreements.[49] It also brings with it geopolitical implications, which have notably pushed China to join the RCEP.[50] Unlike CPTPP, the RCEP is an ASEAN-led trade agreement, including also Japan, South Korea, China, India, Australia and New Zealand. It has been argued that RCEP embodies a new regional economic order bringing a paradigm shift in Asia.[51] Importantly, RCEP members largely eschew high-priority regulatory issues for the US and the EU, respectively TRIPS+ IPRs and commitments on environment and labour.[52] The trade agenda of these mega-regionals resonates with past divergences of the WTO negotiations.[53] The conclusion of trade agreements in Asia, the rise of China and the recent US's turn to nationalism, mean that the locus where rules for trade are decided is changing, with implications for global-standard setting and the role of the EU therein.[54]

Towards the EU "deep" trade agenda

The combination of these developments in international trade had important implications for EU trade policy and its global actorness in trade. The EU began to focus less on the multilateral level and headed to negotiate bilateral FTAs with strategic trade partners.[55] In 2006, the EU Commission launched the strategy "Global Europe: competing in the world": this strategy is what underpins the so-called 'new generation' EU FTAs and what started off 'the EU deep trade agenda'.[56] The latter meant that the EU was keen to go deeper than what was possible to negotiate at the multilateral level and willing to define new regional ambitions to address geopolitical twists in the aftermath of economic integration endeavours in Asia. The new generation EU FTAs is significantly more ambitious than the first-generation EU FTAs,[57] but less than the most recent agreements with Ukraine, Moldova and Georgia, which aim at closer approximation with EU laws.[58] The Global Europe strategy is a specific trade

[48] Sri Jegarajah, Craig Dale and Leslie Shaffer, 'TPP nations agree to pursue trade deal without US' (CNBC, 20 May 2017) <https://www.cnbc.com/2017/05/20/tpp-nations-agree-to-pursue-trade-deal-without-us.html>.
[49] Araujo (n 38) 35.
[50] David Groten, 'China's approach to regional Free Trade Frameworks in the Asia-Pacific: RCEP as a prime example of Economic Diplomacy?' in Michael Staack and David Groten (eds), *China und Indien im regionalen und globalen Umfeld* (Verlag Barbara Budrich 2018) 85.
[51] Araujo (n 38).
[52] Meredith Kolsky Lewis, 'The TPP and the RCEP (ASEAN+6) as potential paths toward deeper Asian Economic Integration' (2013) 8 Asian Journal of WTO & International Health Law and Policy 351, 368.
[53] Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements' (n 33) 250.
[54] John Ikenberry, 'The Future of the Liberal World Order' (2011) 90 Foreign Affairs 56.
[55] Young and Peterson (n 22).
[56] Araujo (n 38).
[57] What would be called the "first generation" of EU trade agreements, encompassing the Customs Union with Turkey; FTAs with Iceland, Norway and Switzerland in the 1970s; FTAs with the Faroe Islands, Mexico, Chile and South Africa; FTAs with Mediterranean partners as part of Association Agreements in the 1990's. See European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016' COM(2017)654 final.
[58] Araujo (n 38).

liberalisation agenda, unique in what it sets out to in terms of the *venue of trade negotiations*, *trade partners* and *content of trade agreements*.

On the *venue*, the EU has followed the US in turning to bilateral FTAs as opposed to negotiations at the multilateral level. The conclusion of bilateral, rather multilateral, trade agreements is not to be underestimated: it represents a major departure from the original preference of EU trade policy. Under the European Commissioner for Trade, Pascal Lamy, between the 1990s and the 2000s FTAs were given a moratorium. Lamy believed that negotiations at the WTO would have provided a better venue for the liberalisation of trade globally, in addition to the possibility of settling disputes and obtaining binding rulings.[59] However, as discussed, the EU eventually re-evaluated the usefulness of bilateral FTAs. It has been argued that the new generation EU FTAs is the response to a reality where 'multilateral trade liberalisation no longer presents a viable outlet for the EU's trade policy goals'.[60] Competition from other trading powers led the EU to find alternative ways for the promotion of its economic interests abroad.[61] The EU's stronger negotiating power at the bilateral level meant it could advance its regulatory standards and international norms more easily than at the multilateral level.[62] The Global Europe strategy epitomises this shift towards bilateralism, together with a focus on commercial interests and industrialised trade partners.[63]

Regarding *trade partners*, the Global Europe strategy targeted economically strategic countries in Asia, such as South-Korea, and the ASEAN region. Prior to this strategy, the EU concluded trade agreements with accessing and neighbouring countries in central and eastern Europe; in the South, with Middle-East and Northern African countries; APEC countries; and countries with which closer economic cooperation would have counterbalanced the US economic influence, such as Chile and Mexico.[64] Unlike the US strategy to open up to any country willing to engage in trade negotiations,[65] the EU prioritised rising economic powers that could potentially benefit its exports and economic growth.[66] Some of them were the same countries that had opposed the negotiation of the Singapore issues during the Doha Round: a bilateral consensus could have translated into a consensus at the multilateral level and facilitated trade liberalisation globally.[67] Furthermore, the negotiations of CPTPP

[59] Ibid 32.
[60] Ibid 37-38.
[61] Ibid.
[62] Ibid 23. See also Jed Odermatt, 'Convergence through EU Unilateralism' in Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart 2020).
[63] Lachlan McKenzie and Katharina Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832, 833.
[64] Euro-Mediterranean Association Agreements (EMAs) with Tunisia, Morocco, Jordan, Israel, Algeria, Egypt, Lebanon, and an Interim Agreement for the benefit of the Palestinian Authority for the West Bank and the Gaza Strip. See Marise Cremona (ed) *Developments in EU External Relations Law* (OUP 2008), 246, 267 and 270. See e.g. the series of Lomé Conventions with ACP countries. Araujo (n 38) 33.
[65] Araujo (n 38) 34.
[66] McKenzie and Meissner (n 63) 833.
[67] Araujo (n 38) 34.

and RCEP have borne a weight in EU trade policy and its quest for large-scale economic agreements with the US and Canada.[68] Against the prospect of being excluded by these megaregionals that could possibly set multilateral rules for trade, the EU targeted the US and Japan for bilateral trade negotiations and China for a possible investment treaty.[69] The strategy was motivated by economic interests as much as by the EU's willingness to secure its say in the emerging global economic governance.

Countries in the Asian region are typically wary of international law and institutions, hard law and human rights obligations.[70] On the one hand, international economic law suffers from a 'Western' bias.[71] The seeds for CPTPP and RCEP can be found in the desire to deepen economic integration against a context of fast economic integration among developed countries in the 'Global-North'[72] and the ensuing North-definition of 'free trade'.[73] On the other hand, trade negotiations across regions have the potential to gradually bridge regulatory models, if not even cultural and political traditions.[74] It has to be seen whether the EU's pivot to Asia reaffirms this 'Western' bias of international economic law, as the EU exports its own standards; or the extent to which the opposite might occur. The EU rhetorically demands no more than international human rights standards, yet recent case law on data transfers and personal data protection reveals that the EU is also keen to ensure that its own standards are abided by.[75] Questions arise as to what the EU demands from its trade partners, what the EU may be ready to compromise, the trade-offs at play and the boundaries and bottom-lines of these compromises when it comes to fundamental rights and trade.[76]

Turning to the *content*, the new generation of EU FTAs purports to advance "deep" trade agreements with commitments adding to, or going beyond, the WTO framework. It covers "deep" issues that received opposition at the multilateral level, or for which the WTO proved an unfitting forum. EU FTAs now include measures that build upon commitments already existing in the WTO ('WTO+') and commitments that have *not* been agreed within the WTO ('WTO-X') (see Table 1.3 below). The new generation EU FTAs are characterised by a particular emphasis on non-tariff barriers to trade, sustainable development chapters and increased integration of legal orders. In the context of digital trade, provisions on data flows are particularly noteworthy. The recent WTO negotiations on e-commerce reveal its analogue character and need to update to address contemporary issues related to

[68] Griller, Obwexer and Vranes (n 46) 11.
[69] Araujo (n 38) 35.
[70] Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2016) 27 European Journal of International Law 945; Simon Chesterman, 'New Frontiers in International law: The Asian Paradox' *OUP blog* (20 February 2017).
[71] Fahey (n 44) 143.
[72] Lewis (n 52).
[73] Pasha Hsieh, 'The RCEP, New Asian Regionalism and the Global South' (IILJ Working Paper 2017/4 MegaReg Series) 10.
[74] Velut (n 25) 5.
[75] C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* ECLI:EU:C:2020:559.
[76] Chapter 2 will provide an overview of the commitments on labour and data privacy rights across FTAs.

digitalisation.[77] As it will be shown in the next chapter, the new generation EU FTAs to an extent reflect this lack of an international reference framework, to the point that the EU has recently defined its own template for provisions on data flows in all future FTAs.[78] Importantly, the new generation EU FTAs also cover issues relating to sustainable development, including labour and environmental standards outside the WTO.[79] They also seek the establishment of mechanisms for regulatory convergence and cooperation, mutual recognition and institutional arrangements.[80] The ambitious scope of the new generation EU FTAs makes them 'international regulatory regimes in their own right', sustained by innovative institutional mechanisms in place for implementation, monitoring and dialogue.[81]

WTO+ areas	**WTO-X areas**	
PTA industrial goods	Anti-corruption	Health
PTA agricultural goods	Competition policy	Human rights
Customs administration	Environmental laws	Illegal immigration
Export taxes	IPRs	Illicit drugs
SPS measures	Investment measures	Industrial cooperation
State trading enterprises	Labour market regulation	Information society
Technical barriers to trade	Movement of capital	Mining
Countervailing measures	Consumer protection	Money laundering
Anti-dumping	Data protection	Nuclear safety
State aid	Agriculture	Political dialogue
Public procurement	Approximation of legislation	Public administration
TRIMS measures	Audiovisual	Regional cooperation
GATS	Civil protection	Research and technology
TRIPS	Innovation policies	SMEs
E-commerce (under negotiation)	Cultural cooperation	Social matters
	Economic policy dialogue	Statistics
	Education and training	Taxation
	Energy	Terrorism
	Financial assistance	Visa and asylum

Table 1.3 – WTO+ and WTO-X policy areas in PTAs.[82]

In what has been referred to as a 'post-American economic order'[83] – if not a post-globalisation era –, the EU still finds in trade the primary tool to exert influence globally.[84] Over time, against a context of

[77] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 Harvard Journal of International law 261.
[78] European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf>.
[79] Gstöhl and Hanf (n 31) 739-744.
[80] Marise Cremona, 'Expanding the Internal Market: and External Regulatory Policy for the EU?' in Bart Van Vooren and others (eds), *The EU's role in global governance: the legal dimension* (OUP 2013) 169; Araujo (n 38) 37.
[81] Velut (n 25) 9.
[82] Adapted from Horn, Mavroidis and Sapir (n 40).
[83] Velut (n 25) 4.
[84] European Commission 'Commission reinforces tools to ensure Europe's interests in international trade' (12 December 2019)

stalemate at the multilateral level and of increasing backlash to multilateralism, the EU has turned to ambitious bilateral trade agreements with strategic industrialised partners. The "deepening" scope of EU FTAs and their overreach over sensitive domestic issues have yet called into question what can be legitimately put in an FTA.[85] Such debate has concerned economic as much as so-called 'non-trade' issues, a term imprecisely used to refer to a wide range of matters that are considered not to strictly pertain to trade, and to encompass issues including fundamental rights. The existence of this debate hints at significant developments in EU trade policy and the shifting place of fundamental rights therein. The next section turns to examine how the EU has evolved as an actor in fundamental rights and how the latter have reached the external dimension of the EU's action in trade. While the narrative of the EU as a global actor in trade is typically unquestioned, the same does not hold for the EU as a fundamental rights actor.

1.3. The EU as a Fundamental Rights Actor beyond Trade

Born as an organisation for closer economic cooperation, the EU was originally not committed to or aimed at protecting fundamental rights.[86] The possibility to expand the economic integration project to fundamental rights was yet never completely excluded from the agenda.[87] The gradual increase in the *internal* commitment to fundamental rights and the effort to streamline human rights across EU *external* policies have led scholars to wonder about the extent to which the EU could be considered a 'fundamental rights organisation'.[88] Many consider the ToL as setting forth the coming age of the EU 'as a fundamental rights actor', while others remain more sceptical of this narrative and argue that the EU in fact 'did not take that road'.[89] This section first outlines the EU legal framework on fundamental rights and shows how the latter have expanded within EU law. It then turns to the *external* dimension, to present how fundamental rights have typically been incorporated and evolved over time in the EU's international agreements. It shows that, despite the consolidation of the framework for fundamental rights, internally the EU has not yet a fully-fledged human rights policy. At the same time, the EU has

<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2091#:~:text=President%20of%20the%20European%20Commission,international%20trade%20rules%20are%20respected>.

[85] Elaine Fahey, *Introduction to Law and Global Governance* (Edward Elgar 2018).

[86] Exceptional to this are the Treaty of Rome's provisions prohibiting discrimination among citizens of EC Member States; recognising the freedom of movement for workers; and condemning unequal pay between men and women.

[87] Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials* (6th edn, OUP 2015).

[88] Critical views include Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 CMLR 1307; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645; Dimitry Kochenov, Gráinne De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015); Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019). More positive approaches include Samantha Besson, 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?' (2006) 6 Human Rights Law Review 323; Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008); and Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011).

[89] To echo and paraphrase the argument by Gráinne De Búrca, 'The Road not taken: the European Union as a global human rights Actor' (2011) 105 The American Journal of International Law 649.

for a long time promoted human rights externally, without yet seeking the level of institutionalisation or regulatory endeavours that characterise trade issues.

1.3.1. The Legal Framework for the EU as a Fundamental Rights Actor

Fundamental rights have become part of EU law as a corollary to the smooth functioning of the internal market, sustained by developments in the case law and political momentum, both reflected in successive Treaty amendments.[90] The story of the EU as an actor in fundamental rights is one of legal, policy and institutional developments.[91] This section focuses on the legal aspects shaping the EU as a fundamental rights actor. It provides an overview of the EU's limited *competences* in fundamental rights, the expansion of the *scope* of fundamental rights within EU law, and the EU's *participation in multilateral fora on human rights*.

Competences. The EU's exclusive competence in trade has no corresponding when it comes to fundamental rights protection.[92] In *Opinion 2/94*, the Court concluded that 'no Treaty provision confers on the Community institutions any general power to enact rules on human rights'.[93] According to Weiler and Fries, this 'lack of human rights legislative competence' was in fact allayed by the 'judicial supervisory competence' of the CJEU.[94] The judicial activism of the Court is indeed one of the factors that led to an increase in the internal commitment to fundamental rights, albeit possibly as a quid pro quo to legitimise the primacy of EU law over national constitutions.[95] Initially the Court was reluctant to engage with challenges to EU law on fundamental rights grounds or to recognise them as part of the EU legal order.[96] Yet cases that arose in matters of economic integration eventually proved foundational and recognised fundamental rights to be general principles of EU law and to be inspired by the

[90] Gráinne de Búrca argues that fundamental rights were granted a legal framework which is comparable to, and in fact more extensive than, the one currently provided by the Treaty of Lisbon; and that what is usually referred to as the silence over fundamental rights in the EEC and Euratom Treaties in 1957 must be put in the context of a conscious and deliberate choice of adopting a 'step-by-step' functional approach as opposed to a 'one-giant-step' federal approach for the integration process of the Union. Gráinne De Búrca (n 89).

[91] Giulio Itzcovich, 'Legal order, legal pluralism, fundamental principles. Europe and its law in three concepts' (2012) 18 ELJ 358.

[92] Not even under the form of shared or supporting competences. See Articles 3 to 6 TFEU providing lists of the areas respectively under exclusive, shared and supporting competences. Following Article 4 TEU, 'competences not conferred upon the Union in the Treaties remain with the Member States'.

[93] Opinion 2/94 *Opinion pursuant to Article 228 of the EC Treaty* ECLI:EU:C:1996:140, para 27. However, some scholars argued that for a reading of Opinion 2/94 as 'permitting a Community human rights policy, provided that certain conditions are maintained', see Joseph Weiler and Sybilla Fries, 'A human rights policy for the European Community and Union: The question of competences' in Philip Alston, Mara Bustelo and James Heenan (eds), *The EU and Human Rights* (OUP 1999).

[94] Joseph Weiler and Sybilla Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' (1999) Harvard Jean Monnet Working Paper 4/99.

[95] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law and the Charter' (2014) 13 Cambridge Yearbook of European Legal Studies 361, 362.

[96] Craig and De Búrca (n 87); Samantha Velluti, 'The promotion and Integration of human rights in EU external trade relations' (2016) 32 Utrecht Journal of International and European Law 83.

constitutional traditions of the MSs.[97] The Court then specified that its scrutiny would not only apply to EU acts, but also to the MSs' action when implementing EU law.[98] There was a need to ensure that the increased scope of EU competences and actions would comply with fundamental rights and that in case of non-compliance there would be the possibility of legal challenge.[99]

Successive Treaty amendments codified the case law of the Court, who had gradually moved to recognise a wider range of rights.[100] Importantly, a number of legal bases were introduced to adopt legislation on issues that are now recognised as fundamental rights: from gender equality in employment and occupation,[101] to anti-discrimination on grounds of sex, racial or ethnic origin, religion, disability, age or sexual orientation,[102] and recently, with the ToL, the protection of personal data.[103] This development has accounted for the enactment of secondary legislation, as shown by several Directives or the recent GDPR.[104] In the absence of a general competence on fundamental rights, legislation that gives expression to fundamental rights is a significant way in which fundamental rights have been given protection beyond their recognition as general principles, and through which their content and scope of application have been defined.[105] Over the years, and particularly since the 2000s, the Court has thereby witnessed an expansion of its jurisdiction on the protection of fundamental rights.[106] The entry into force of the Charter on Fundamental Rights of the European Union (CFREU) consolidated this trend.[107]

Despite the increasing commitment of the EU legal order to fundamental rights, the ToL has avoided the introduction of an EU general competence to enact fundamental rights legislation and an internal fully-fledged fundamental rights policy.[108] The attribution of binding status to the CFREU, and its elevation to primary law, has equally made little contribution in this regard. Article 51(2) states that the Charter does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Article 6(1) TEU similarly states that 'The provisions of the Charter shall not

[97] See, for instance, Case 29/69 *Stauder v Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491. Respectively on butter subsidies, export licenses and coal trade.

[98] Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR 1-2925.

[99] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 648.

[100] For instance, the right to a fair trial, non-discrimination and freedom of expression. For an exhaustive and comprehensive overview of the case law, see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019); Wetzel (n 88) 7.

[101] Art.157(3) TFEU.

[102] Introduced by the Treaty of Amsterdam, now Art.19 TFEU.

[103] Art.16(2) TFEU.

[104] See, for instance, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. The CJEU has relied on this legislation to interpret cases where fundamental rights were at stake (see for instance C-144/04 *Mangold* [2005] ECR I-9981 and C-555/07 *Kücükdeveci* [2010] ECR I-00365).

[105] Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 CMLR 219, 224.

[106] Tridimas (n 95).

[107] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[108] Muir (n 105) 220.

extend in any way the competences of the Union as defined in the Treaties'.[109] These articles reflect the wariness of the MSs and daunting prospects on thorny issues of constitutional balance within the EU, subsidiarity and constitutional national autonomy.[110] The combination of these caveats and the missed incorporation of the CFREU into the ToL, not least the absence of a freestanding competence on fundamental rights, reveal some of the limits of the EU as a 'fundamental rights organisation'.

Furthermore, Article 6(2) TEU provides that the EU will accede to the European Convention of Human Rights (ECHR). Among the functions, or aims, of this provision is to introduce an external judicial supervision by the Strasbourg Court over the EU institutions.[111] The actualisation of this provision still remains a dead letter because, in its Opinion 2/13, the ECJ has precluded the EU's accession to the ECHR for the time being.[112] Accession to the ECHR would have opened the way to remedial action by individuals against breaches of human rights by EU institutions and would have sent a positive message about the EU's commitment to protect fundamental rights internally as much as externally.[113] One of the reasons behind the need to accede to the ECHR has been the expansion of EU competences in a number of areas that increasingly affect the fundamental rights of individuals.[114] By introducing an element of external accountability, the EU's accession to the ECHR would have enhanced its role in human rights.[115] The EU is now at a critical juncture: while its accession is an obligation under EU law, it is difficult to foresee which will be the way forward.[116]

Scope. As discussed, in the absence of what is now the Charter, a first record of fundamental rights emerged from the case law of the Court.[117] The ToL has now consolidated this and refers to three main sources of fundamental rights: the CFREU, the ECHR and the fundamental rights guaranteed by the constitutional traditions common to the Member States.[118] Article 6 TEU codifies early case law which (1) had made fundamental rights part of the general principles of EU law and (2) recognised the fundamental rights as enshrined in the constitutional traditions of the MSs. It arguably reflects to a lesser extent the case law that (3) accepted international human rights instruments as an additional

[109] Douglas-Scott (n 99) 680.
[110] Von Bogdandy (n 88) 1317; Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CMLR 945.
[111] Douglas-Scott (n 99) 659; Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254.
[112] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454, Opinion of the Full Court.
[113] Douglas-Scott (n 99). Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (European Issue 173, 14 June 2010).
[114] Jörg Polakiewicz, 'EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?' (26 September 2013) <https://ssrn.com/abstract=2331497> 28.
[115] Douglas-Scott (n 99).
[116] Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (EU Law Analysis, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html>; Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) 47 International Law and Politics 783, 784.
[117] Tridimas (n 95).
[118] Art.6 TEU.

source for fundamental rights. Besides the ECHR, no other international human rights treaties are mentioned, either by a general or explicit reference.[119] Such wording reveals a preference for European, rather than international, standards.[120] There are instances in which the ECJ has *drawn inspiration* from other sources of fundamental rights in order to determine the content of EU fundamental rights; yet less often has it *relied upon* specific provisions of such other sources.[121] Before the CFREU was granted binding status, the ECJ used to refer to the ECHR and general principles of EU law. Now the ECJ practice has reversed and the Charter is the preferred and primary source of fundamental rights.[122]

Unlike the ECHR, the CFREU is an EU-specific document and catalogue of fundamental rights which is binding and has the same legal value as the Treaties. Fifty articles on fundamental rights are grouped around six titles: on dignity, freedoms, equality, solidarity, citizens' rights and justice. The CFREU has been inspired by and mirrors most fundamental rights contained in the ECHR.[123] The rights of the ECHR are not all incorporated in the CFREU, but when they are, they are equated in their meaning and scope to those of the CFREU.[124] Compared to the ECHR, the CFREU has granted more weight to socio-economic rights, which take inspiration from the European Social Charter. The CFREU also includes an article on the protection of personal data which is not present in the ECHR, nor in the European Social Charter. Another significant aspect following the adoption of the Charter is that litigation has increasingly concerned rights per se, rather than issues pertaining to economic integration.[125] The Court also appears to be applying a higher standard of scrutiny.[126] It has been observed that the EU's attempt to put forward its own internal regime in multilateral fora has failed, as opposed to the success when promoting international sources.[127]

Participation in multilateral fora. The EU's contribution to the formation of International Law (IL) via participation in relevant UN bodies can be considered an aspect of the EU being a global actor in

[119] Art.6(3) TEU.

[120] Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 EJIL 771, 775.

[121] Ibid. Among the instruments which have been mentioned in the ECJ case law feature the European Social Charter, the ILO Conventions, the International Convention on the Rights of the Child, the UN Convention on Refugees, ICCPR and the ICESCR. See Craig and De Búrca (n 87) 386-387.

[122] For an overview of the caselaw, see Chloé Brière and Areg Navasartian, 'Lex Generalis and the Primacy of EU Law as a Source of the EU's Duty to Respect Human Rights Abroad: Lessons Learned from The Case-Law of the CJEU' in Eva Kassoti and Ramses A Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER PAPERS 2020/1). See also Craig and de Búrca (n 87); Grainne De Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168, 175; Nikos Lavranos, 'The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté' (2013) 4 European Law Reporter 133.

[123] See Art.52(3) CFREU.

[124] Art.52(3) CFREU. Craig and De Búrca (n 87) 425; Douglas-Scott (n 99).

[125] Tridimas (n 95); Frantziou (n 100).

[126] Tridimas (n 95).

[127] For instance, for the definition and inclusion of the notion 'reasonable accommodation' during the negotiations of the UN Disability Convention, see Gráinne De Búrca, 'The European Union in the negotiation of the UN Disability Convention' (2010) 35 ELR 174, 192-193.

fundamental rights.[128] The Treaty obligations for the EU to observe and contribute to the development of IL, as well as to engage in multilateralism and cooperate with other international organisations, do not only apply to trade, but also to human rights. In its international activities, the EU is expected to contribute to *i.a.* peace, solidarity, eradication of poverty, human rights, in particular the rights of the child, as well as respect the principles of the UN Charter. The special status within the WTO has no equivalent within the UN bodies, where the EU has only an observer status.[129] The several efforts to take part in the main UN human rights (HR) fora and in coordinating EU MSs voices resulted in the successful development of a single voice and the emergence of an impressive consensus among EU MSs.[130] Yet, overall, research on the EU's position and role in four different UN HR bodies has found that the Union holds an 'aspiring outsider-marginal position'.[131] The very existence of a single voice has been pointed out as a reason why other countries have opposed the EU's understanding and approach to human rights.[132] The little influence of the EU at the main UN HR fora reveals further limitations of the EU as a *global* player in fundamental rights.[133] Despite the serious challenges when trying to promote multilateralism and the advancement of international human rights law, the EU has over time found ways to incorporate fundamental rights clauses in its international agreements with third countries.[134]

1.3.2. The Broadening of Fundamental Rights in EU External Relations

Unlike in the case of trade, the absence of a general competence on human rights means that the story of fundamental rights in the EU's external dimension could not be one of bilateral human rights agreements. What we can see, though, is the presence of human rights provisions in EU international agreements. The EU has 'mainstreamed' human rights across a range of external policies. Yet especially when included in trade agreements, these provisions have remained quite rudimentary and have not enjoyed the same level of institutionalisation or regulatory attempts as other economic aspects of trade

[128] See Art.3(5) TEU.
[129] "Observer status" implies that the EU has to rely on its MSs' votes. The EU can also be a full participant in some specialised UN conferences, for instance the 2009 Durban Conference. Joëlle Hivonnet, 'The European Union in the 2009 Durban Review Conference', in Wouters and others (eds), *The European Union and Multilateral Governance Assessing EU Participation in United Nations Human Rights and Environmental Fora* (Palgrave Macmillan 2012).
[130] Wetzel (n 88).
[131] Jan Wouters and others (n 129) 258. In the UN HR Council, in particular, the EU's influence has been qualified as 'rather disappointing'; Karen Smith, 'Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations' (2006) 44 JCMS 113, 133.
[132] Gjovalin Macaj and Joachim Koops, 'Inconvenient Multilateralism: The challenges of the EU as a player in the United Nations Human Rights Council' in Wetzel (n 88) 77-78.
[133] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2009) Jean Monnet Working Paper 01/09.
[134] Davide Zaru and Charles-Michel Geurts, 'Legal Framework for EU Participation in Global Human Rights Governance' in Wouters and others (n 129) 54; Karen Smith, 'The European Union at the Human Rights Council: speaking with one voice but having little influence' (2010) 17 Journal of European Public Policy 224, 237.

agreements. As it will be discussed below, human rights provisions have found a place in international agreements. However, they have remained a tool to monitor the human rights record of the third country and to condition tariff concessions and other benefits over compliance with human rights. As a result, backed with this rationale and aim, EU international agreements have broadened the basis of the range of human rights to be respected. However, they have not designed tools or provisions to prevent possible adverse effects of a specific policy or agreement on the enjoyment of human rights. As it will be discussed in the next chapter, the new generation EU FTAs – in particular the place of fundamental rights therein – 'suffer' from this legacy.

The trajectory of the place of fundamental rights in EU external relations is one that has developed by means of conditionality, or the so-called 'human rights conditionality clauses'.[135] *Negative* conditionality implies that when human rights obligations are not respected, benefits are withdrawn; whereas *positive* conditionality refers to benefits made conditional upon the fulfilment of the obligations arising from the agreement.[136] Since its inception, the EU has concluded international agreements of different kinds, with goals varying from closer economic cooperation, to financial assistance for economic development and support of processes of democratisation.[137] Depending on the specific external policy and agreement, the motivation behind the incorporation of human rights clauses differed, but was typically concerned with the level of human rights protection in that country. For instance, in the context of *enlargement* and *neighbourhood* policies, the requirement to respect human rights was motivated by security and immigration concerns.[138] In relation to *trade* agreements, provisions on human rights emerged as a reaction to the EU's concerns about being contractually bound to a country violating fundamental rights.[139] In trade agreements, conditionality clauses became the default mechanism whereby violations of basic human rights could lead to the suspension of the

[135] See Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014) 327-329; Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 EJIL 468; Karen Smith, 'The use of political conditionality in the EU's relations with third countries: how effective?' (1998) 3 European Foreign Affairs Review 253; Elena Fierro, *European Union's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003). For an overview of the evolution of legal basis for human rights conditionality clauses in EU Agreements with third states see Emily Reid, *Balancing Human Rights, Environmental Protection and international Trade: lessons from the EU experience* (Hart Publishing 2015) 123-126.

[136] See Pál Dunay and others, 'The role of human rights in the EU's external action in the Eastern Partnership, the Southern Neighbourhood and in Sub-Saharan Africa' (FRAME Deliverable 3, 2016) 20.

[137] This is also the case for the European and Association agreements with Eastern European and Mediterranean countries. The Union has been negotiating agreements with neighbouring countries since the early 1990s. With partners from Eastern Europe, and more in particular with the so-called Newly Independent States from the Soviet Union, the EU concluded Partnership and Cooperation Agreements; and Euro-Mediterranean Association Agreements with neighbours from the South, mostly African and Middle-East countries.

[138] Judith Kelley, 'New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy' (2006) 44 JCMS 29, 31.

[139] The origins are to be found in the impossibility for the EU to suspend its development aid to Uganda despite the human rights abuses that were occurring in the country. See Lorand Bartels, 'Social issues: Labour, environment and human rights' in Simon Lester and Bryan Mercurio (eds), *Bilateral and regional trade agreements* (CUP 2009).

agreement.[140] In 1995, the Commission made the inclusion of human rights conditionality clauses the standard policy for all trade and cooperation agreements.[141] By then, 114 countries had agreed to human rights conditionality clauses in their agreements with the EU.[142]

Over time, the formulation of human rights clauses has evolved in a way that has changed the *scope* of human rights covered by conditionality. Across external policies, the sources of human rights in these clauses have broadened. In *enlargement* policy, the Copenhagen Criteria for accession indicated as relevant benchmarks the ECHR and the Protocol allowing citizens to take cases to the European Court of Human Rights; the Framework Convention for the Protection of National Minorities and Recommendation 1201 of the Council of Europe's Parliamentary Assembly.[143] With respect to *neighbourhood* policy, the latest generation of Accession Agreements (AAs) with Ukraine, Moldova and Georgia expand the basis of the essential elements clause to a comprehensive list of international instruments: the UDHR, the UN Charter, the Helsinki Declaration, the Paris Charter and the ECHR (yet not to the CFREU or EU principles of law). The AA with Ukraine, in addition, mentions the ECHR as only one amongst '*other relevant international human rights instruments*' that are to be taken into consideration.[144] This wording can provide wider leeway as to the international instruments that might apply, which could extend to instruments that parties might adopt in the future.[145]

With respect to *trade and cooperation* agreements more specifically, the typical wording has been 'respect for human rights and democracy'.[146] Initially, human rights were left unspecified: they

[140] The first operative clauses appeared in 1990, under the form of "basis clauses", whereby the agreement was "based on", for instance, 'respect for the democratic principles and human rights' (Article 1 of the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic [1990] OJ L295/67). Before this, the first reference to human rights was introduced in the Preamble of the Lomé Convention III and then in Article 5 of the Lomé Convention IV in 1989: while referring to 'human rights obligations', it did not provide for mechanisms of suspension in case of human rights violations. In 1992, for the first time in the agreement with Brazil, respect for human rights was linked to an 'essential elements clause', with significant implications for enforceability. Under Article 60 of the Vienna Convention on the Law of Treaties of 1969, a violation of an essential element of a Treaty constitutes a material breach that will entitle the other party to take action to either terminate or suspend the Treaty according to the procedural requirements set in Article 65. Following the introduction of the so-called 'suspension clause', the Europe Agreement with Bulgaria provided for a more flexible mechanism allowing consultations and dialogues prior the suspension of the agreement. See Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005) 23-24.
[141] Ibid 12. The latter came to be reflected, in the same year, in the revision of the IV Lomé Convention which included a combination of the "basis clause" and the "essential elements clause" as well as a "non-execution clause". See Article 366a(3) in Agreement amending the Fourth ACP-EEC Convention of Lomé as Revised by the Agreement signed in Mauritius on 4 November 1995 [1998] OJ L156/3. See also Lorand Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 EJIL 715, 738.
[142] Annabel Egan and Laurent Pech, 'Respect for Human Rights as a General Objective of the EU's External Action' (Working Paper No 2015/161, Leuven Centre for Global Governance Studies).
[143] European Commission, 'Agenda 2000: For a Stronger and Wider Union' (Communication) COM(97)2000 final, 44.
[144] Art.2 of the Association Agreement with Ukraine, see Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 ELR 391, 399-400.
[145] This can also be inferred by the term 'relevant', which is broader than 'binding' or 'applicable', and which leaves the list virtually open-ended. See Nicolas Hachez, ''Essential Elements' Clauses in EU Trade Agreements making trade Work in a Way that Helps Human rights?' (2015) Working Paper No 2015/158, Leuven Centre for Global Governance Studies, 17.
[146] Or variations of it, for instance, 'principles of democracy'.

were not coupled with an international instrument on human rights;[147] alternatively, they referred to the Universal Declaration of Human Rights (UDHR).[148] Gradually, such wording was extended by adding a link to a broader range of IL instruments.[149] Particularly in agreements with member countries of the Organisation for Economic Cooperation and Development (OECD), reference was made to the UDHR, the Helsinki Final Act, the Charter of Paris, the UN Charter and the Document of the Bonn Conference on Economic Cooperation in Europe.[150] For agreements with members of the Council of Europe, the relevant standard for fundamental rights came from the ECHR. In addition to this, the human rights clauses in the recent Framework Agreements with Indonesia[151] and Korea[152] witness an interesting development, i.e. the wording '*and other relevant international human rights instruments*'. Just like in the AA with Ukraine, this type of phrasing leaves open the way to the application of international instruments that might be adopted in the future by the parties, thus making the list virtually open-ended.[153]

Another way in which human rights have entered the trade agenda is via the Generalised System of Preferences (GSP). For trade relations with *developing* countries, the EU has designed arrangements which condition benefits on the fulfilment of certain labour standards contained in the International Labour Organisation (ILO) Conventions. Development aid has in general been made conditional upon the UDHR and the UN Charter.[154] Subsequent revisions of the GSP have massively widened the catalogue of human rights to be respected if the third country is to benefit from the trade preferences. Since Regulation 3281/94, whereby benefits could be withdrawn in case of practice of forced labour as defined in the relevant ILO Conventions, new standards were added: i.a. child labour and non-discrimination in respect of employment and occupation.[155] Especially with the introduction of the so-called GSP+ scheme in 2005, the standard came to cover 16 human and labour rights in UN and ILO

[147] Bartels (n 140) 26; Hachez (161) 16.

[148] As for this period, given the combination of international law instruments and the initial lack of clarity as to the EU competences to enact new legislation in the field of fundamental rights, it has been argued that the 'standard envisaged in the Human Rights clause is the general international law standard'. See Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

[149] Bartels (n 140) 26-27.

[150] Ibid; Hachez (n 145) 16.

[151] Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part [signed on 9 November 2009, entered into force 1 May 2014] OJ L125/17.

[152] Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part [signed 10 May 2010, entered into force 1 June 2014] OJ L20/2.

[153] Hachez (n 145) 17; Velluti (n 96) 55.

[154] Williams (n 158) 119.

[155] Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries [1994] OJ L348/1. In Article 9, the Regulation refers to the ILO Conventions no 29 and 105 on forced labour; and in the Geneva Conventions on slavery. See Brandtner and Rosas (n 148); Jan Wouters and others, 'A comparative study of EU and US Approaches to Human Rights in External Relations' (Policy Department DG External Policies, 2015).

Conventions.[156] While the sources of human rights to be protected have been broadened, the application of these clauses has been very rare.[157] It has been observed that, unlike enlargement and neighbourhood policies which give more prominence to civil and political rights,[158] the GSP scheme has been the first EU tool that provided for a social incentive, presenting elements of civil rights as well as economic and social rights.[159]

The most recent approach of the EU in the new generation of EU trade agreements has been to include human rights conditionality clauses in parallel political Framework Cooperation Agreements (FCAs) and to have Trade and Sustainable Development (TSD) chapters with provisions on labour rights and environmental issues within trade agreements. Regarding conditionality, an FCAs is usually linked with the trade agreement via passerelle clauses or by cross-reference, so that the trade agreement is conditioned on compliance with the essential elements clause in the FCA.[160] The policy was reportedly aimed to overcome the unwillingness of some developed trade partners to have conditionality clauses within the FTAs, which caused roadblocks during the trade negotiations.[161] On the TSD chapters, they can be said to represent a fundamentally new way of conceiving the place of fundamental rights in EU trade agreements, albeit not without limitations. Having outlined the legal and policy dimension of the EU as an actor *in trade* on the one hand, and as an actor *in fundamental rights* on the other, the next section provides a framework to study how trade and fundamental rights intersect in the Post-Lisbon new generation EU FTAs.

[156] Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] OJ L169/1, Annex III. The number raises at 27 Conventions if considering the Conventions of part B on environment and governance principles. The most recent framework for the GSP is provided by Regulation 978/2012, which counts 15 human and labour rights Conventions – hence no more 16 – because the 16th Convention (on the Suppression and Punishment of the Crime of Apartheid) was removed. The total number of Conventions (Part A and B) is still 27 because of the addition in Part B, of the United Nations Framework Convention on Climate Change (1992). Contrary to the application to be a beneficiary of the standard GSP, countries that want to apply for the GSP+ need to ratify and implement the international standards set in the relevant ILO Conventions. Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1.

[157] GSP preferences have been withdrawn three times, for matters relating to forced labour, freedom of association and collective bargaining and for violations of the UN Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child. See Reid (n 135).

[158] Even though the latter have been taken into consideration as part of the acquis communautaire in the country assessments for accession. See Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2005) 71-73, 123-124.

[159] Brandtner and Rosas (n 148).

[160] It has been observed that most of the time the link is not made clear, making it difficult for a Party to suspend the agreement on the basis of a violation of human rights by the other Party. Francesca Martines, 'Human Rights Clauses in EU Agreements', in Sara Poli (ed) *Protecting Human Rights in the European Union's External Relations* (CLEER PAPERS 2016/5) 53.

[161] Ibid.

1.4. The Framework for the EU as a Global Actor in Trade *and* Fundamental Rights

This section sets the framework for the examination of the EU as a global actor in trade *and* fundamental rights and its exploration in terms of 'deepness' in the context of the new generation EU FTAs with other developed economies in North America and Asia. It first presents the major novelty introduced by the ToL in relation to fundamental rights in EU external relations (1.4.1.), and then recalls how 'deepness' will be analysed in the following chapters of thesis (1.4.2).

1.4.1. The New Obligation to respect Fundamental Rights in EU External Trade

As already mentioned, with the ToL, the respect for fundamental rights is an underlying obligation across different policies, including trade.[162] The ToL represents a pivotal and innovative legal development: it subjects EU trade policy to the values and principles that guide the Union's international action, including fundamental rights. The ToL places Article 207 TFEU under Part V on the Union's External Action and specifies that EU trade policy 'shall be conducted in the context of the principles and objectives of the Union's external action'.[163] These principles and objectives are set out in Articles 3(5) and 21 TEU. The former requires that, in its relations with the wider world, the EU uphold and promote its values and interests, and contribute i.a. to the *protection* of human rights. This Article has been interpreted as establishing an obligation for the EU to 'achieve' and 'act consistently' with these objectives.[164] In a softer form, Article 21(1) TEU states that:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article 21(1) and (2)(b) TEU contain the relevant principles and objectives that, according to Article 21(3) TEU, the Union shall *respect* in its external action. Such combined reading can be interpreted as providing a duty for the EU to *at least* 'respect' human rights in its external policies.[165]

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[162] Case C-263/14 *European Parliament v Council* ECLI:EU:C:2016:435, para 47. Marise Cremona and Joanne Scott, 'Introduction: EU Law Beyond EU Borders', in Cremona and Scott (n 2); Tamara Lewis, 'Coherence of human rights policymaking in EU institutions and other EU agencies and bodies' (FRAME Deliverable No 1, 2014) 33.
[163] Art.207(1) TFEU.
[164] Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 EJIL 1073.
[165] Ibid 1074. Katarzyna Szepelak, 'Judicial Extraterritorial Application of the EU Charter of Fundamental Rights and EU Trade Relations – Where do we stand today?' in Kassoti and Ramses A Wessel (n 122) 40.

It must be noted that these provisions refer to 'human rights' as opposed to 'fundamental rights'. The scope of the former can be quite vague, especially if contrasted with the possibility of including a reference to fundamental rights and the Charter. Nonetheless, it is safe to argue that the catalogue of *human rights* of the EU include the *fundamental rights* of the CFREU.[166] Not only have the EU political institutions repeatedly stated that the EU external action has to comply with the rights contained in the CFREU;[167] a rich amount of recent case law of the CJEU has also confirmed this view.[168] A number of EU international agreements have recently been subject to judicial review, and in some cases even struck down, for not complying with fundamental rights contained in the Charter.[169] Furthermore, in *Council v Front Polisario*, the General Court indicated the Charter as the relevant set of fundamental rights to be analysed when assessing the potential impact of a trade agreement on fundamental rights.[170]

The *Front Polisario* case does not directly touch on the issue of territorial scope of application of the Charter.[171] However, it provides new material on the extraterritorial application of EU fundamental rights by opening up to an ex-ante duty of scrutiny of the implications of an EU FTA on the enjoyment of fundamental rights by non-EU nationals in the EU's trade partners.[172] Such scrutiny has been interpreted as possibly going towards an assessment of whether such violations could be the *effect* or a *consequence* of the Agreement.[173] This is important for the overall stance in this thesis whereby the EU should ensure that agreements concluded with third countries do not cause fundamental rights violations in the other Party (nor within the EU). Yet the *Front Polisario* is possibly a very specific case which does not capture the complexity of the new generation EU FTAs, which could have subtler negative effects, for which it would be difficult to show the link with trade agreements, and which might escape from judicial review.[174]

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[166] Brière and Navasartian (n 122).

[167] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy Communication on Human Rights and Democracy at the Heart of EU External Action, 'Towards a More Effective Approach' (2011) COM(2011)886 final, 7; The institutional aspects of setting up the European External Action Service European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI)) [2009] OJ C265E/9.

[168] For a comprehensive overview, see Brière and Navasartian (n 122).

[169] For instance, the EU-Canada PNR Agreement. See Opinion 1/15 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2017:592 Opinion of the Court (Grand Chamber).

[170] Case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:973 para 228, to be contrasted with the Opinion of Advocate General Wathelet, claiming that the impact assessment of an agreement would be satisfied with an examination of its impact on jus cogens and erga omnes norms. See C‑104/16 P *Council v Front Polisario* ECLI:EU:C:2016:677, Opinion of AG Wathelet, paras 257-276. The ECJ eventually did not rule on the impact assessment matter referred to by the AG. See also Eva Kassoti and Ramses A Wessel, 'EU Trade Agreements and the Duty to Respect Human Rights Abroad: Introduction to the Theme', in Kassoti and Wessel (n 122).

[171] Case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953, paras 231 and 247.

[172] Ibid.

[173] Geraldo Vidigal, 'Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in Frente Polisario v Council and the Protection of Fundamental Rights Abroad' (*EJIL:Talk!*, 2015) <https://www.ejiltalk.org/13901-2/>.

[174] On the limitations of the Court's approach to judicial review when assessing the compatibility of trade agreements with the Charter, see Szepelak (n 165). On the questions arising for the relationship between EU law and international law, see

The innovation of the ToL yet remains that the CCP is now under the umbrella of external relations and its objectives and principles, among which are the respect and promotion of fundamental rights. The ToL has stretched the objectives to be pursued in trade, by placing side-by-side traditional trade-liberalisation objectives and more political objectives.[175] The juxtaposition of trade interests ('possession goals') and values ('milieu goals') in the objectives of EU external relations can be said to be peculiar to the EU's governance mode of foreign policy.[176] The fact that fundamental rights are considered part of EU law is also the main difference with the framework provided by the WTO.[177] Despite aims of 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand',[178] the objectives of the WTO do not encompass protection or promotion of fundamental rights and have often been criticised for being very much limited.[179] The general exceptions allowed under Article XX GATT cover i.a. the need to protect public morals as well as human, animal or plant life or health. However, it is an exhaustive, limited list, which reflects the societal values of the 1940s. No reference is made to human rights.[180]

In the context of bilateral trade agreements, the EU thus emerges as a peculiar and important global actor from a fundamental rights perspective. Its action in the international arena has to be guided by interests as much as values. While the new provisions of the ToL do not erase the tension between market goals and more political objectives, including the respect of fundamental rights,[181] they make the EU a global actor required to pursue fundamental rights *in* and *through* trade. Until recently, the EU has been a fundamental rights actor *through* trade: it has used trade agreements as tools to *export* human rights in third developing and least developed countries. By contrast, Article 21 TEU provides a 'new normative impetus' which outdoes the narrow understanding of using trade agreements and conditionality clauses for aims of development, for instance.[182] The new normative impetus of the ToL means that the EU should be a fundamental rights actor *in* trade. A combined reading of the above provisions – Articles 207 TFEU and Articles 3(5) and 21(1) TEU – indeed suggests two views in the Treaties on the nexus between trade and fundamental rights: not only trade *can* and *has to* work as an instrument for the pursuit of fundamental rights objectives; but the EU's external action, and the FTAs

Eva Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)' (2017) 2 European Papers 23; Paul J Cardwell and Ramses A Wessel, 'EU External Relations and International Law: Divergence on Questions of 'Territory'?' in Elaine Fahey (n 62).

[175] See Article 21 TEU.

[176] Gráinne De Búrca, 'EU External Relations: The Governance Mode of Foreign Policy' in Van Vooren and others (n 94).

[177] Vincent Depaigne, 'Protecting fundamental rights in trade agreements between the EU and third countries' (2017) 42 ELR 562, 569.

[178] See Preamble Agreement Establishing the World Trade Organization (1994) 1867 UNTS 154.

[179] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2014).

[180] With the exception of products from prison labour in para (e), see General Agreement on Tariffs and Trade (1947) 55 UNTS 194.

[181] Steven Bernstein, 'The elusive basis of legitimacy in global governance three conceptions' (2004) GHC Working Papers 04/2, 19.

[182] Vivian Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (2016) EUI Department of Law Research Paper No 2016/10.

themselves, should also be consistent with such principles and objectives; or their violation would imply a breach of the obligations in Articles 3(5) and 21(1) TEU.

Beyond stretching the scope of the objectives of EU external trade, the ToL is also pivotal for the *reach* aimed by these objectives. It has been argued that the ToL vests the EU with a role for the achievement of these objectives *globally*.[183] The obligation to pursue and promote such objectives in the EU external relations, when applied to trade, reflects the ambitions of the EU to be a global actor in this area.[184] As discussed, the Global Europe strategy of 2006 echoes these ambitions: in the choice of the venue, partners and content of the new generation of "deep" FTAs. Through bilateral FTAs which increasingly aim at regulatory convergence, the EU is pursuing its 'desired leadership role' in the development of international regulation and standards.[185] The Global Europe strategy also makes the aim of 'a global reach' explicit when asserting that the EU 'must play a leading role in sharing best practice and developing global rules and standards'.[186] Questions arise as to which standards and practices are developed globally; the extent to which they may undermine or in fact take into consideration, or even encompass, fundamental rights; and the role of the EU in these processes of law- and policy-formation. The following section explains how these questions will be addressed in the next chapters when exploring different dimensions of trade law-making of EU deep FTAs and their intersection with fundamental rights.

1.4.2. Studying the Intersection of the new generation EU FTAs and Fundamental Rights

The new legal obligation for the EU to respect and promote fundamental rights in external trade provides the legal background to engage in an exploration of how these two agendas intersect. It provides the 'legal hook' to study the EU as a global actor in trade *and* fundamental rights. Yet the reason for engaging in this study also comes from the broader context of backlash to free trade and globalisation and the conclusion of deep FTAs with far-reaching effects.[187] Given the little research on the implications of deep FTAs on fundamental rights, the next chapters deprive the concept of "deep" of its economic understanding and aim to conceive what this concept could imply from a fundamental rights perspective. "Deep" is used to study fundamental rights at different levels of EU trade law-making and in those new features that account for the label of "deep". In its bare or most abstract conceptualisation, the thesis uses "deep" to refer to *what would ensure that trade agreements do not*

[183] Joris Larik, 'Shaping the international order as an EU objective' in Kochenov and Amtenbrink (n 19).
[184] Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2010).
[185] Cremona (n 80) 169.
[186] European Commission, 'Global Europe: Competing in the World' COM(2006)567 final, 9.
[187] See Introduction of the thesis.

adversely impact fundamental rights. Yet what it implies in practice will depend and change according to the dimension that is investigated.

By examining the law, the actors, the law-making procedures and institutional infrastructures of the EU FTAs, the thesis provides some ground for an exploratory agenda for the study of fundamental rights at different stages of EU trade law-making. These are the elements of EU "deep" FTAs that will be 'intersected' with fundamental rights in the following chapters of the thesis. Each chapter deals with the following dimension in turn: a wider scope of EU FTAs (Chapter 2); representative actors of trade negotiations (Chapter 3); new law-making mechanisms in the form of regulatory cooperation (Chapter 4); and new institutions created by the trade agreements (Chapter 5).

Thesis chapter	Stage	Dimensions of deepness
Ch.2	Agreement	Scope
Ch.3	Negotiation	Actors
Ch.4	New levels of law-making	Regulatory Cooperation
Ch.5	Implementation	Institutional Architecture

Table 1.4 – Elements for the exploration of deepness of fundamental rights per chapter of the thesis.

For each dimension, the analysis considers what is there and what should be there, having in mind the objective of safeguarding fundamental rights. Exploratory questions on the extent to which fundamental rights are (or would be) taken into consideration in each of these dimensions form the basis for normative arguments on how fundamental rights should be granted protection. The structure of the next chapters reflects this endeavour. They first explain how these dimensions account for the label "deep" of EU FTAs and how they are relevant to fundamental rights; then, they engage in the exploration of the 'descriptive intersection' and shed light on major limitations and omissions from a fundamental rights perspective; finally, they provide normative considerations as to the way forward. Because "deepness" has no definite meaning that can be known, its exploration at different levels leaves room for interpretation and allows to tailor normative considerations to each specific case. The combination of the findings of the chapters flow into the broader conceptualisation of a "EU deep trade agenda for fundamental rights."

1.5. Conclusion

The evolution of the EU's international presence reveals a clear mismatch between the EU's global actorness in trade, on the one hand, and in fundamental rights on the other. The legal framework on external trade has enabled the EU to conclude trade agreements going deeper than what was possible to

negotiate at the multilateral level. While being very active at the WTO, it is bilaterally that the EU took advantage of the possibility of speaking with a single voice over an increasingly deeper set of trade disciplines. The EU emerges as an incontestable power in trade, but the same cannot be entirely said with respect to fundamental rights, for which limitations still remain – internally as much as externally. Internally, the EU still lacks a fully-fledged human rights policy; externally, trade agreements and arrangements have broadened the sources of human rights to be respected, but the addressee has mostly remained the trade partner.

The Treaty of Lisbon adds to this picture and provides a new legal framework to appraise the EU's action in trade *and* fundamental rights. Not only does it enable the EU to pursue fundamental rights, it also ties the EU to the respect of fundamental rights in its external relations. In light of increasing demands, expectations, not least legal obligations, for the EU to pursue fundamental rights in its relations with the wider world, it remains unclear what this pursuance would imply in practice. The new generation EU FTAs thus represent a good field of investigation. They have been negotiated and concluded at a turning point in the legal framework for fundamental rights in the EU's external dimension. As the EU engages in ambitious trade initiatives with countries spanning North America and Asia, new challenges and opportunities arise as to the EU as a global actor in fundamental rights. The EU has now an external competence to pursue fundamental rights in relations with third countries and is under an obligation to respect fundamental rights. Hence the significance of looking at EU "deep" trade agreements from a fundamental rights perspective.

To this aim, four new features and dimensions of EU trade law-making are explored in the following chapters: (1) the scope of trade agreements; (2) the actors of trade negotiations; (3) spaces of law-making beyond the State under the form of regulatory cooperation chapters; and (4) the institutions created via the trade agreements. The underlying argument is that each of these elements calls for an exploration in its descriptive and normative nexus with fundamental rights. The first dimension that is explored in the next chapter is the *scope*. Chapter 2 examines what can be found on fundamental rights in the new generation EU FTAs. By engaging in a critical analysis of the EU's approach to fundamental rights in EU FTAs, Chapter 2 provides the starting point and background warranting the examination of the other dimensions.

Chapter 2 – 'Broad' versus 'Deep' Scope for Fundamental Rights in EU Trade Agreements

2.1. Introduction

The EU is a global actor in trade that is expected to abide by fundamental rights in its external relations. What this means in practice, and how it is operationalised, is far from straightforward. Some have suggested that, in the future, trade agreements will be replaced by human rights agreements with trade chapters.[1] Albeit unorthodox, this suggestion is telling of the need to rethink how these two agendas speak to each other. As outlined in Chapter 1, the EU was born as a primarily economic organisation, yet the smooth functioning of the internal market led to the introduction of safeguards for the protection of fundamental rights. *Externally*, the EU's aspiration to deepen integration with third countries via ambitious trade agreements can be understood as the equivalent to what the EU has done *internally* with its Member States – though inevitably more modest in nature. This parallel is useful to understand the exercise undertaken in this chapter. As the scope of EU FTAs is said to be 'deepening' in economic terms, a key question is *the extent to which this process is accompanied by the introduction of provisions that can safeguard the protection of fundamental rights*.

This chapter is interested in the scope of fundamental rights within the broader and deeper scope of EU FTAs. The aspects it seeks to explore are descriptive and normative. Descriptively, the chapter examines how the nexus between fundamental rights and trade agreements materialises in the text of the FTAs, by asking: to what extent do the FTAs incorporate provisions on fundamental rights in their scope and how do these provisions differ across trade partners and regions? What do they reveal as to the understanding of the nexus between these agendas? From a normative perspective, the chapter pledges for an appreciation of the fundamental rights dimension to the scope of trade agreements, how these can coexist and mutually sustain each other. Exploring fundamental rights in the scope of EU FTAs then has two main objectives: first, to shed light on the scope of fundamental rights, in the sense of 'how much' can be found in relation to their protection; second, to identify the main limitations and ways forward. Methodologically, the chapter engages in the challenging exercise of identifying omissions in relation to fundamental rights. The aim is to depict a 'deep scope for fundamental rights': a scope for trade agreements that would provide safeguards for fundamental rights and enable their protection.

[1] Giacomo Barbieri (ETUC), remark at the 2nd Civil Society Forum CETA (12 November 2019), notes of the author. Video recording of the Forum was provided by email and made available to the researcher for one week by Andreas Tibbles, Trade Policy Officer, Trade Agreements Secretariat (TCT) Global Affairs Canada. The recording is not available online.

By focusing on labour and data privacy rights in the EU FTAs with other developed countries, the chapter takes a specific angle: one that is interested in understanding how to improve the protection of these two sets of rights in the broader context of globalisation and digitalisation. To this end, the chapter proceeds as follows. It starts by providing an overview of the interplay between trade and fundamental rights in the present context of globalisation and digitalisation (2.2). It then turns to the legal analysis of relevant provisions in the text of the FTAs (2.3). Finally, it addresses the main limitations and discusses what a 'deep scope for fundamental rights' would imply (2.4). The main argument is that, rather than calling for incorporating more standards within the FTAs, or focusing on the 'extensiveness' of the scope of fundamental rights, it is above all necessary to appreciate the 'qualitative' added-value that provisions other than on fundamental rights per se may bring to the protection of labour and data privacy rights. This chapter thus provides a new perspective that differs from the traditional stance of human rights advocates and other members of civil society, and which instead appreciates the intersection of the new scope of EU deep FTAs and the impact it can have on fundamental rights.

2.2 The Intersection of Two Agendas: Trade and Fundamental Rights

This section first provides some background on how the newly expanded scope of EU FTAs may implicate fundamental rights (2.2.1). Against this context, it outlines the scope of fundamental human rights recognised at the EU and international level which trade agreements should respect (2.2.2).

2.2.1. The Expanded Scope of EU FTAs and its Relevance to Fundamental Rights

The scope of the new generation EU FTAs is both more comprehensive and, in economic terms, deeper than its precedent. The EU 'deep' trade agenda seeks to further liberalise trade in areas such as services and investment that can impact on a wide range of human rights.[2] It is therefore important to identify and appreciate potential adverse effects on fundamental rights, and to conceive of safeguards to prevent them. Alongside more ambitious and far-reaching trade agreements, recent developments in digitalisation and the backlash to globalisation are exposing new fragilities of international trade. This

[2] Jan Wouters and Nicholas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' (2009) 3 Human Rights & International Legal Discourse 301, 316; Samantha Velluti, 'The promotion and integration of human rights in EU external trade relations' (2016) 32 Utrecht Journal of International and European Law 41, 42; 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) 124; Susan Aaronson and Jamie Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (CUP 2007).

context warrants a renewed examination of ways in which the two agendas – trade and fundamental rights – intersect and are relevant to each other.[3]

With respect to labour and data privacy rights, the present context of global value chains and the data driven economy means that labour and data underlie dynamics of international trade. The changes that have transformed global trade – from unbundling of production and the emergence of global value chains, and the intensification of trade in services and foreign direct investment, alongside with technological developments – make the economic relevance of labour and data flows to trade both undeniable and pivotal. For instance, in digital trade, most cross-border services rely on transfers of data, which may, and in fact often do, encompass personal data. Commitments to liberalise trade in services are also a fitting example of how FTAs might add downward pressure onto labour rights. While the relationship between trade and labour rights is highly contentious,[4] trade agreements may play a role, alongside technology, in facilitating the outsourcing of services jobs.[5] In other cases, the outsourcing of production creates a 'transnational' dimension that gives rise to 'governance gaps' or 'deficits' in global labour protection.[6] As a result, national standards fall short of being an effective means to address labour.[7] Fragmented production makes it extremely difficult to identify employment relationships, should one think about how to improve them and support workers' rights effectively.[8] These are only a few examples of how a more ambitious scope requires consideration of its relevance to fundamental rights. The EU Sustainability Impact Assessments provide additional examples of potential adverse impacts of trade agreements on economic, social, human rights, and environmental issues.[9]

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[3] For a more comprehensive discussion, 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).

[4] Robert Finbow, *The Limits of Regionalism: NAFTA's Labour Accord* (Ashgate 2016) chapter 1.

[5] Richard Baldwin, *The Globotics Upheaval: Globalisation, Robotics and the Future of Work* (Weidenfeld & Nicolson 2019); see also Koert Debeuf, 'The labour market is not ready for the future' *EUobserver* (20 November 2019) <https://euobserver.com/who-is-who/146470?utm_source=euobs&utm_medium=email>, quoting Duris Nicholsonova ''the differing level of employment social standards and rules on the cross-border provision of services, where they have a significant effect as competitive factors' have proved to be divisive among those states'.

[6] Gary Gereffi and Frederick Mayer, 'Globalization and the Demand for Governance' in Gary Gereffi (ed), *The New Offshoring of Jobs and Global Development* (ILO 2006) 39; Katherine Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation' (1995) 16 Michigan Journal of International Law 987.

[7] See Erika de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade/World Trade Organization' (1995) 17 Human Rights Quarterly 1995, 443.

[8] Stephanie Barrientos and others, 'Decent work in global production networks: Framing the policy debate' (2011) 150 International Labour Review 297, 301. See also Jeff Kenner, 'The Enterprise, Labour and the Court of Justice' in Adalberto Perulli and Tiziano Treu (eds), *Enterprise and Social Rights* (Kluwer Law International 2017).

[9] In the case of EUJEPA, for instance, 'The FTA could have a direct positive effect on the gender gap in employment and wages in the EU, whereas the effect could be negative in Japan', see European Commission and others, 'Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan Final Report' (2016) <http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154522.pdf> 212. For methodological issues, however, impact assessments are controversial and much contested documents in their own terms. See Elisabeth Bürgi Bonanomi, 'Measuring Human Rights Impacts of Trade Agreements – Ideas for Improving the Methodology: Comparing the European Union's

Still, many argue that fundamental rights should be kept separate from trade agreements because 'trade agreements are for trade'.[10] It may be said, indeed, that the baseline purpose of trade agreements remains to set the rules for the exchange of goods and services. Yet the question of 'what is international trade law for' has no such easy answer.[11] Neglecting or ignoring that trade agreements are relevant to fundamental rights, and vice versa, would mean to give precedence to the trade agenda while sidelining its fundamental rights dimension. The parallel with the EU internal market – a 'free' and highly regulated market where rights have come to be recognised Union-wide and codified in a Charter – is possibly the clearest example of how different countries can integrate economically while simultaneously recognising the importance of protecting rights. Opponents to 'overloading the boat' with so-called 'non-trade' issues also observe that the EU already includes chapters on trade and sustainable development (TSD), which address issues pertaining to labour rights and the environment.[12] To be sure, they are not chapters on fundamental rights strictly-speaking. They nonetheless constitute another aspect of the expanded scope of the new generation EU FTAs and warrant examination of how they contribute to protect fundamental rights. The literature has widely criticised them for lacking enforceability and for being ineffective in promoting labour standards in EU trade partners.[13] Yet scholars have neglected the question of the extent to which TSD chapters prevent FTAs from perpetuating downward pressures on labour rights: not so much *externally* in third countries, but *internally*, as a result of market liberalisation between developed countries. The critique has largely remained attached to the imaginary of a developing country as a trade partner.

This chapter deals with such expanded scope of EU FTAs and its relevance to fundamental rights. Starting from the premise that FTAs may trigger or facilitate adverse impact on fundamental rights, this chapter adopts a preventive perspective, which predates questions of enforcement. The aim is to contribute to the overall question of how to retool trade agreements to safeguard fundamental rights.[14] This approach differs from perspectives asking how to make sure that the commitments within an agreement are abided by. A significant methodological challenge in this regard is to show what is typically not included in FTAs and which could contribute to ensure that fundamental rights are not adversely impacted. The next section briefly outlines the catalogue of fundamental human rights recognised at the international and EU level: they provide the framework of reference of the range of fundamental human rights that trade agreements should respect. This is not to claim that EU FTAs

Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology' (2017) 9 Journal of Human Rights Practice 481.

[10] Informal interview with an EU official.

[11] Harlan Cohen, 'What Is International Trade Law For?' (2018) IILJ Working Paper 2018/6 MegaReg Series.

[12] European Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (17 July 2017) <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> (non-paper of the Commission services).

[13] See James Harrison and others, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2018) 57 JCMS 260; Marco Bronckers and Giovanni Gruni, 'Taking the enforcement of labour standards in the EU's free trade agreements seriously' (2020) 56 CMLR 1591.

[14] Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion' (2019) Illinois Law Review 1 (forthcoming).

should include them all in their text. For sure, however, they represent the catalogue of fundamental human rights – recognised at the international and EU level – that should not be undermined and be considered i.a. in ex-ante and ex-post impact analyses.[15] At the same time, they give an indication of what could ideally be found in FTAs and the main sources of reference. Within this catalogue, special attention is given to labour and data privacy rights, which are the main case studies of the thesis.

2.2.2. The Scope of Fundamental Human Rights under International and EU Law

International Legal Framework for Human Rights

The recognition of a wide range of human rights over different generations and across countries shows that human rights are malleable, dynamic and subject to historical and cultural contexts.[16] An international law perspective is helpful to identify which human rights can be said to have received global recognition and acceptance. The UDHR is probably the best collection of what States have agreed as constituting "human rights". Since the adoption of the UDHR, the range of human rights recognised under different sources of international law has extended to encompass a wider spectrum of civil, political, social and economic rights as well as additional categories of rights. The International Covenant on Civil and Political Rights (ICCPR), including its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) exemplify part of this development. Beyond the ICCPR and the ICESCR, additional conventions and declarations promoted by the UN have contributed to expand the scope of human rights, by developing and redefining specific rights for certain categories of people, such as women, children, migrants, people with disabilities and indigenous people.

Regarding *labour rights* specifically, a number of them are recognised in both the UDHR and the ICESCR. These include i.a. the prohibition of slavery; the right to choose a job; the right to work under just and favourable conditions; guarantees of protection against unemployment; the right to receive decent and non-discriminatory remuneration; the right to form and join trade unions. The most comprehensive set of internationally recognised labour rights is yet provided by the ILO. The ILO is the author of the Declaration on Fundamental Principles and Rights at Work (1998), which sets out four fundamental principles and rights at work: freedom of association and right to collective bargaining; the elimination of all forms of forced or compulsory labour; the elimination of discrimination in respect of employment and occupation; and the effective abolition of child labour. These are considered 'core

[15] It has been argued, indeed, that the EU Treaties can assist in identifying which types of impacts should be taken into account in the EU external action. See Marise Cremona and Joanne Scott, *EU Law Beyond EU Borders* (OUP 2019) 20.
[16] The concept of "Human Rights" itself has historically been subject to criticism, for reflecting Western philosophy and tradition; their universality has been questioned, alongside calls for cultural relativism. See Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008).

labour standards' binding upon all ILO members, regardless of whether the latter have ratified the Fundamental ILO Conventions that elaborate on each standard. A total of eight of these Conventions exist, yet not all the ILO members have ratified them all.[17] The ILO is also the author of instruments recognising a wide range of labour rights and principles, i.a. the four 'Governance (or Priority) Conventions' and the 'ILO Declaration on Social Justice for a Fair Globalization'. Together with the objectives of the 'ILO Decent Work Agenda', they provide a comprehensive framework of reference targeting pressing challenges to labour rights in the context of globalisation.

Regarding the *right to protection of personal data*, there is no corresponding to the ILO Conventions, in the form of a global convention or treaty. Despite the recent rise in legislation by several States around the world, there appears to be no sufficient ground for recognising a global legal right to the protection of personal data.[18] The UDHR and the ICCPR recognise the right to privacy and private life, but do not mention data protection.[19] The main instruments for data privacy rights remain regional. These include the OECD Privacy Guidelines, the APEC Privacy Framework and the Council of Europe (CoE) Convention 108.[20] As the name suggests, the OECD Guidelines are not binding, and only provide minimum standards.[21] Likewise, the APEC Privacy Framework comprises a set of voluntary principles that the APEC countries can decide to implement.[22] Convention 108 is the only binding instrument. It recognises a series of data privacy principles that are nonetheless quite basic and which largely draw from the OECD Guidelines.[23] The Additional Protocol has brought it closer to the EU's approach,[24] without yet coming to aid to some of its main shortcomings regarding the specificity of the principles,

[17] The eight fundamental ILO Conventions include: the Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950) (C87); the Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951) (C98); the Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) (C29); the Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) (C105); the Minimum Age Convention (adopted 26 June 1973, entered into force 19 June 1976) (C138); the Worst Forms of Child Labour Convention (adopted 17 June 1999, entered into force 19 November 2000) (C182); the Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953) (C100); and the Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960) (C111).
[18] Christopher Kuner, 'An International Legal Framework for Data Protection: Issues and Prospects' (2009) 25 Computer Law & Security Review 307.
[19] Ibid.
[20] Organisation for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD Guidelines); Asia-Pacific Economic Cooperation (APEC) Privacy Framework; Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted 28 January 1981, entered into force 1 October 1985) ETS 108 (CoE Convention 108). For a more comprehensive overview, see Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (OUP 2013) chapter 2.
[21] Para 6 OECD Guidelines (n 20).
[22] Kuner (n 20) 17.
[23] Graham Greenleaf, 'A world data privacy treaty? 'Globalisation' and 'modernisation' of Council of Europe Convention 108' in Normann Witzleb and others (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014).
[24] It sets up national supervisory authorities and it conditions exports of data on the recipient State having an adequate level of protection. In particular, closer to the EU's Directive of the time (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L281/31) (Directive 95/46/EC on Processing of Personal Data). See below for the EU's approach.

implementation and enforcement.[25] Given its openness to accession by non-members of the Council of Europe, Convention 108 has often been considered the closest example to a potential UN-sponsored convention.[26]

EU Legal Framework for Fundamental Rights

As discussed in Chapter 1, the 'catalogue' of EU fundamental rights derives from the three sources mentioned in Art 6 TEU: the CFREU, the ECHR and the fundamental rights guaranteed by constitutional traditions common to the MSs. The CFREU not only reflects the rights recognised by the ECJ case law as deriving from the ECHR and the constitutional traditions of the EU MSs; it also includes rights contained in the Council of Europe's Social Charter; the Community Charter of Fundamental Social Rights of Workers; and international agreements to which EU MSs, or the Union alone, are parties.[27] Human rights treaties to which the EU is a party only include the UN Convention on the Rights of Persons with Disabilities.[28] From this standpoint, the Union is not formally bound by any other human rights treaty,[29] yet there are arguments sustaining that the EU would be bound by the obligations flowing from the UN Charter, i.e. the respect of the rights contained in the UDHR, the ICCPR and the ICESCR.[30]

Turning to *labour rights* under EU law, the CFREU provides an extensive catalogue and thus recognises them as fundamental rights. In the CFREU, labour rights include i.a. the prohibition of slavery and forced labour; freedom of assembly and of association; non-discrimination; equality between men and women; workers' right to information and consultation within the undertaking; right of collective bargaining and action; right of access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; prohibition of child labour and protection of young people at work; social security and social assistance. It must be pointed out, however, that labour

[25] Greenleaf (n 23) 98.

[26] Lee Bygrave, 'Privacy and Data Protection in an International Perspective' (2010) 55 Scandinavian Studies in Law 165, 181-182.

[27] See Preamble. However, the ECJ has not used these instruments for the interpretation of the CFREU provisions. See Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials* (6th edn, OUP 2015) 387.

[28] The EU ratified it in 2009, see Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

[29] This includes the ECHR, until the EU has acceded to it. See Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 EJIL 1071, 1078.

[30] Charter of the United Nations (signed on 26 June 1945) 1 UNTS XVI; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 UNGA Res 2200A(XXI), entered into force 3 January 1976) 993 UNTS 389 (ICESCR). See United Nations Human Rights Office of the High Commissioner Regional Office for Europe, 'The European Union and International Human Rights Law' <http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> 22-24. It has also been argued that an understanding of the EU as an intergovernmental organisation makes it subject and bound to the rules of customary international law (CIL). An international law perspective would imply that insofar as human rights form part of CIL, the Union will have to respect them. See Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 EJIL 771, 776 and 792; Bartels (n 29) 1078.

rights have not always enjoyed a place in EU law.[31] Internally, the trajectory is one of piecemeal expansion of labour rights by way of secondary law.[32] The Treaty of Rome omitted any EU competence in matters of labour law,[33] for upwards harmonisation was deemed to flow spontaneously from the operation of the common market.[34] The 'decoupling' of the social and economic spheres yet eventually fell apart.[35] EU labour law emerged gradually as a form of 'market regulation of transnational competition',[36] serving the functioning of the internal market and countering fears of social dumping as the EU enlarged.[37] Over time, social commitments under the Treaties expanded, and so did the EU competences.[38] EU labour law evolved along a path of partial harmonisation by means of directives setting minimum standards.[39] Here, a wider range of rights were recognised to workers: on working conditions, such as health and safety, decent work and working time; posting of workers; fixed-term and temporary employment; as well as information and consultation.[40]

The Charter also recognises the *rights to data protection and privacy* as fundamental rights.[41] Just as labour rights, data privacy rights have not always enjoyed a place in EU law. When the

[31] Antonio Cassese and others, *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (European University Institute 1998).
[32] Claire Kilpatrick, 'The displacement of Social Europe: a productive lens of inquiry' (2018) 14 European Constitutional Law Review 62; Catherine Barnard, 'EU Social Policy: From Employment Law to Labour Market Reform' in Paul Craig and Graínne De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).
[33] Rebecca Kahn, *New Labour Laws in Old Member States: Trade Union Responses to European Enlargement* (CUP 2017) 67.
[34] Phil Syrpis, 'The EU's role in labour law: An overview of the rationales for EU involvement in the field' in Alan Bogg, Cathryn Costello and Anne Davies (eds), *Research handbook on EU labour law* (Edward Elgar 2016), 24. Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution – A Labour Law Perspective* (CUP 2006) 16. Also as a result of competition, see Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 Current Legal Problems 199, 217.
[35] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 JCMS 645; Stefano Giubboni, 'The Rise and Fall of EU Labour Law' (2018) 27 ELJ 7.
[36] Giubboni (n 35).
[37] Tonia Novitz, 'In Search of a Coherent Social Policy: EU Import and Export of ILO Labour Standards?' in Jan Orbie and Lisa Tortell (eds*), The European Union and the Social Dimension of Globalization: How the EU Influences the World* (Routledge 2009) 39; Wolfgang Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy' in Stephen Liebfried and Paul Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Brookings, 1995) 399; Kenner (n 8).
[38] The EU competence in labour law is now enshrined in Art.153 TFEU, yet excluding pay, the right of association, the right to strike or the right to impose lock-outs, see Art.153(5) TFEU. See Kilpatrick (n 32) 69.
[39] While allowing MSs to adopt more stringent protective standards, see Art.153(4) TFEU. see also Kenner (n 8) 247.
[40] For working conditions and health and safety, see for instance Council Directive 89/391/EEC; Council Directive 89/654/EEC; Council Directive 92/91/EEC; Directive 2003/10/EC; Directive 2009/148/EC; Council Directive 2010/32/EU; Council Directive 94/33/EC. For decent work, see 2014/51/EU: Council Decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) [2014] OJ L32/32. For working time, see Directive 2002/15/EC; Directive 2003/88/EC. For posting of workers, see Directive 96/71/EC. For fixed-term and temporary employment, see Directive 91/383/EEC; Council Directive 97/81/EC; Council Directive 1999/70/EC; Directive 2008/104/EC. For information and consultation, see e.g. Directive 2002/14/EC; Council Directive 91/533/EEC; Council Directive 2003/72/EC; European Works Council Directive 94/4595 (now Directive 2009/3896); Directive 2008/94/EC; Council Directive 2001/23/EC (please find full references in the bibliography).
[41] Art.8 CFREU (on data protection) and Art.7 CFREU (on privacy). Despite the existence of a longstanding debate on their difference, they are considered together for the purpose of the thesis.

Commission proposed the legislative package for what then became the Directive on the processing of personal data,[42] its motivation came from the realisation that divergent legislation would have hindered the cross-border flows of data between the MSs, thus impeding the 'proper functioning' of the internal market.[43] EU data protection law largely emerged with an integrationist purpose, because of its capacity to ease free trade in personal data within the EU, rather than to protect rights.[44] Unlike labour rights, however, data privacy rights have not been confined to the partial harmonisation under the Directive. Following the introduction of the legal basis in ToL,[45] the Regulation on Data Protection (GDPR) has been adopted, with the aim of fully harmonising EU data protection law.[46] It has been observed that, over the years, the fundamental rights dimension of data protection has grown in prominence *next to* the market-based rationale, albeit without appeasing the tension between the two.[47] The GDPR is deemed today the most stringent system for data protection in the world: it consolidates and adds safeguards to some of the rights that were already present in the Directive, such as the right to information and access to data;[48] but it also introduces new ones, such as the right of data portability and the right to restriction of processing.[49]

The EU thus comes to trade negotiations with a heavy baggage in terms of fundamental rights that should be respected. This internal normative dimension leads to a tension when coupled with ambitious objectives of external trade and negotiations with trade partners that might not share, and in fact see as an unfair imposition, the EU's understanding of fundamental rights. Above all, the language of 'fundamental rights' is not used in trade negotiations; and they typically remain outside the trade talks. The mandates for the negotiations, however, usually refer to core labour rights, but not to data privacy rights.[50] The next section provides an overview of what can be found in relation to labour and data privacy rights in the new generation EU FTAs.

[42] Directive 95/46/EC on Processing of Personal Data (n 24).
[43] See Orla Lynskey, *The Foundations of EU Data Protection Law* (OUP 2015) 49.
[44] Ibid 8, 47.
[45] Art.16 TFEU.
[46] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR).
[47] Christopher Kuner, 'Extraterritoriality and regulation of international data transfers in EU data protection law' (2015) 5 International Data Privacy Law 235; Lynskey (n 43) 9, 36, 46-47.
[48] Articles 10 and 11 (right to information) and Art.12 (the subject's right of access to data) Directive 95/46/EC on Processing of Personal Data.
[49] Art.18 GDPR.
[50] Council of the European Union, 'Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada' (9036/09, 24 April 2009); Council of the European Union, 'Directives for the negotiation of a Free Trade Agreement with Japan' (15864/12, 29 November 2012); Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (11103/13, 17 June 2013).

2.3. Exploring the Scope of Fundamental Rights in EU FTAs

This section explores the scope of fundamental rights in the new generation of EU FTAs by looking at provisions that expressly deal with them. The aim is twofold: to provide a thick description of what the Parties have committed to in relation to fundamental rights; and to compare how these commitments differ across trade partners. This examination serves as a basis to draw conclusions on how the Parties have understood and operationalised the nexus between trade and fundamental rights. Given the main case studies of the thesis, this section first maps and compares provisions on labour and data privacy rights (2.3.1). In light of the different approach to these rights, a specific taxonomy is created for each set of rights, which allows to appreciate the variation across EU FTAs and compare their levels of ambition. Once the commitments *within* the FTAs are mapped, the second part of this section identifies commitments on fundamental rights *beyond* the FTAs themselves: it focuses in particular on the Framework Cooperation Agreements and the Joint Interpretative Instrument between the EU and Canada (2.3.2).

2.3.1. Mapping Provisions on Labour and Data Privacy Rights in EU FTAs

Commitments on Labour Rights

A comparison of the commitments on labour rights across the new generation EU FTAs reveals different levels of ambition along a regional divide. Labour rights can be a highly contentious issue during trade negotiations. Asian countries have typically been reluctant, and adopted a defensive attitude, to the inclusion of provisions on labour rights in trade agreements, or human rights more broadly.[51] During the negotiating rounds with Japan, the reference to ratification of fundamental ILO Conventions proved to be highly sensitive.[52] Whereas with Singapore, it was the human rights clause that received opposition.[53] By contrast, since the late 1990s, the US, Canada and the EU have pushed for the incorporation of a 'social clause' in WTO law, and have traditionally included provisions on labour rights in their trade agreements.[54] CETA has been referred to as the first agreement between two

[51] Tamio Nakamura, Professor at Waseda University, presentation at the EU-Japan Forum (Brussels, 11 March 2019) notes of the author; Ludo Cuyvers, 'The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries: Perspectives for ASEAN?' (2014) 22 Journal of Contemporary European Studies 427, 437-438; Franz Ebert and Anne Posthuma, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' in Barbara Fick (ed), *International Labour Law* (Edward Elgar 2015) 15. The Japan-Singapore trade agreement (2002), for instance, contains no labour provisions but only general exceptions on the basis of 'products of prison labour'. See Japan-Singapore Economic Partnership Agreement (JSEPA) <https://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>.

[52] European Commission, 'Report of the 15th EU-Japan FTA/EPA negotiating round 29 February - 4 March 2016' <https://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf>.

[53] Lachlan McKenzie and Katharina Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832.

[54] Liam Campling and others, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2015) 155 International Labour Review 357, 359-360.

countries with a history of negotiating labour chapters.[55] As to the negotiations with the US for TTIP, the EU's proposal for the TSD chapter reflects an ambitious agenda of what the EU was willing and ready to commit to together with the US. It is hard to conclude, however, whether the US would have agreed to it.[56]

As it will be shown below, allegedly more ambitious commitments on labour rights have coincided with the inclusion of a wider scope of standards beyond core labour standards. While a welcome step, this approach does not necessarily capture the intricacies of different aspects of trade agreements between industrialised countries and their impact on labour rights, against the wider context of digitalisation and backlash to globalisation. This flaw is corroborated by the compartmentalisation of these clauses within the newly-introduced TSD chapters. No other provisions on labour rights can be found beyond the TSD chapters. Figure 2.1 below shows the categories of provisions that these chapters typically include: (1) obligations, "best endeavour" commitments or mere references to labour standards and commitments to uphold current levels of protection; (2) cooperation on labour issues; (3) an institutional set-up for consultation and monitoring mechanisms; and (4) dispute settlement arrangements.[57] The comparative analysis of EU FTAs focuses on the first of these categories.

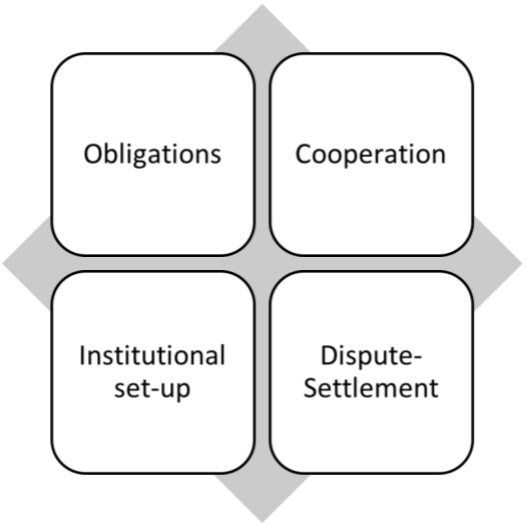

Figure 2.1 – Overview of categories of labour-related provisions in EU FTAs.

As we will see, compared to the provisions on data privacy rights, commitments on labour rights are far more elaborate. They can therefore benefit from a series of distinctions which allow to compare

[55] Jeffrey Vogt, 'The Evolution of Labour Rights and Trade – A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership' (2015) 18 Journal of International Economic Law 827, 850.
[56] Especially given its reluctance to the ratification of ILO conventions. The US, for instance, still relies a lot on the 1998 ILO Declaration and is reluctant to include references to the more encompassing fundamental ILO Conventions. Vogt (n 55) 830.
[57] See James Harrison and others, 'Labour standards provisions in EU free trade agreements: reflections on the European Commission's reform agenda' (2018) 18 World Trade Review 635.

different levels of ambition across the FTAs under analysis (see Table 2.5 below).[58] Despite slight variations in the language, the texts make express references to a combination of the following objects: the four core labour standards contained in the ILO Declaration; the fundamental ILO Conventions; the ILO Decent Work Agenda and its objectives; decent work; and high levels of protection. While mentioned, they may be made the object of obligations (✓), or only form part of best endeavours commitments (~). A comparison of these objects across the EU FTAs reveals that one obligation can be found in EUSFTA, two in EUJEPA, three in CETA and five in the EU's proposal for TTIP.[59]

	Commitment to	**Object**	**EUSFTA**	**EUJEPA**	**CETA**	**TTIP**
Status quo	Uphold	Levels of protection	✓	✓	✓	✓
Negative obligation	Respect	Core labour standards	~	✓	✓	✓
Positive obligation	Ratify	Fundamental ILO Conventions	~	~	~	~
	Implement		~	~	~	✓
	Realise	Decent Work Agenda	✗	✗	✓	~
	Ensure	Decent working conditions	✗	✗	✗	✓
	Provide for	High levels of protection	✗	✗	✗	✓

Table 2.5 – Taxonomy of the obligations on labour rights across EU FTAs.[60]

Asian trade partners

EU-Singapore FTA. The only obligation in EUSFTA is common to all the other FTAs and is the so-called 'non-lowering clause'.[61] Under the latter, the Parties shall not waive or derogate from their labour laws in a manner affecting trade or investment.[62] The relevant standard consists of national labour laws,

[58] The first distinction is between *hortatory/aspirational* commitments to 'promote' and 'encourage', and *binding* commitments phrased in the language of 'shall'. For reasons of space and for the sake of the argument, the analysis gives precedence to the latter. Formulations such as 'shall strive' or 'shall continue to improve' are not considered in the obligations. The second distinction relates to the *nature* of the commitments, i.e. whether they maintain the *status quo*, whether they give rise to *negative* obligations (e.g. respect) or *positive* obligations (e.g. protect, or commitments requiring some action, e.g. ratify or implement a convention). Finally, the *object* of the commitments is telling of the *scope* of what the Parties have committed to, which could be specific *rights* or *conventions*.

[59] The number of obligations follows the taxonomy of table 2.5 and does not count other obligations, for instance on exchange of information (which are nonetheless addressed in the text).

[60] Compilation of the author based on the texts of the agreements. For TTIP, the relevant document is the EU Textual Proposal for the Chapter on Trade and Sustainable Development (tabled for discussion with the US in the negotiating round of 19 - 23 October 2015 and made public on 6 November 2015) <https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf> (TTIP).

[61] Art.12.12 EUSFTA.

[62] Art.12.12(2) EUSFTA 'A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, where such failure to effectively enforce would affect trade or investment between the Parties.'

which implies that the Parties are required not to go below the status quo.[63] This is despite the fact that Singapore has not ratified two fundamental ILO Conventions on the freedom of association and the right to organise, and non-discrimination in employment and occupation.[64] Alongside best endeavours towards the ratification and implementation of the Fundamental ILO Conventions,[65] the Parties only affirm their commitments to implement the conventions that they have *already* ratified.[66] Still, EUSFTA includes a provision whereby the Parties 'commit to respecting, promoting and effectively implementing the principles concerning fundamental rights at work',[67] which include the subject matter of the two Fundamental ILO Conventions not ratified by Singapore. It has been argued that, as principles of the ILO Declaration, they do not provide sufficiently precise standards and would be more difficult to implement.[68] Overall, in EUSFTA, the Parties have only bound themselves not to lower their national standards.

EU-Japan EPA. Also EUJEPA contains a non-lowering clause, which largely echoes the one in EUSFTA.[69] EUJEPA yet contains a provision with a stronger wording in relation to the respect of core labour standards, according to which 'the Parties *shall* respect, promote and realise in their laws, regulations and practices the internationally recognised principles concerning the fundamental rights at work' (emphasis added).[70] Although this obligation does not add to EU MSs' commitments on the ILO Conventions they have all ratified, it might be significant for the protection of certain core labour rights in Japan, which has not ratified the ILO Conventions on Abolition of Forced Labour and on Discrimination.[71] However, like in EUSFTA, the Parties are not required to ratify the fundamental ILO Conventions they have *not* ratified, but they commit to 'continued and sustained efforts' towards their ratification.[72] Overall, the Parties have only bound themselves to the respect their national laws and core labour standards. At the same time, EUJEPA includes a series of obligations relating to the exchange of information on the status of ratification of the ILO Conventions and on trade-related labour issues.[73]

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[63] This is so regardless of other best endeavour commitments whereby the Parties will strive to continue improve their laws, see e.g. Art.12.2(2) EUSFTA.

[64] ILO C87 and ILO C111). See Ratifications for Singapore at <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103163>.

[65] Art.12.3, second para, EUSFTA.

[66] Art.12.4 EUSFTA.

[67] Art.12.3 EUSFTA. While it is considered here of little binding force, it has been interpreted by AG Sharpston as an obligation. See para 149 (the reference is made to Art.13.5, which is yet the equivalent of what is now Art.12.3 EUSFTA) in Opinion 2/15 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2016:992, Opinion of Advocate General Sharpston delivered on 21 December 2016.

[68] For instance, during the negotiations of TTP, labour unions in the US have criticised the ILO declaration for not providing clear standards on labour rights, unlike the Conventions. Alvaro Santos, 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements' (2018) IILJ Working Paper 2018/3 MegaReg Series.

[69] Art.16.2(2) EUJEPA.

[70] Art.16.3(2) EUJEPA.

[71] See Ratifications for Japan at <https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102729>.

[72] Art.16.3(3) EUJEPA.

[73] Respectively Art.16.3(4) and Art.16.3(1) EUJEPA.

These provisions can be seen as a useful means to report on their efforts. One may wonder, however, about the direction and rationale of this reporting: it appears more a unilateral demand from the EU to Japan, than a two-way learning opportunity in matters of labour rights in trade.

North American trade partners

Both CETA and the EU's proposal for TTIP include a binding non-lowering clause like the ones discussed in EUSFTA and EUJEPA.[74] They also feature an obligation to respect and provide protection to the core labour standards in their labour laws.[75] Yet, importantly, CETA and TTIP go beyond these provisions in different ways and reveal a willingness by the EU to commit to a wider range of objects in relation to labour rights.

EU-Canada FTA. CETA includes an obligation for the Parties to ensure that their labour laws promote the objectives of the ILO Decent Work Agenda, in accordance with the ILO Declaration on Social Justice for a Fair Globalization.[76] The objectives are: (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and (c) non-discrimination in respect of working conditions, including for migrant workers. CETA expands on the second objective by compelling the Parties to ensure that their labour laws 'embody and provide protection for working conditions that respect the health and safety of workers'.[77] To this aim, the Parties are expected to formulate policies that (1) promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work; and (2) policies that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority.[78] Despite the objective of 'promoting' principles via laws and policies, these commitments significantly expand the baseline beyond core labour standards.[79] CETA includes a provision whereby the Parties *reaffirm their commitments* to implement in their laws the fundamental ILO Conventions that they have ratified; like EUJEPA and EUSFTA, it only envisages efforts to ratify the remaining ones.[80] In addition, CETA requires the Parties to exchange information on their advances: not just on the ratification of the fundamental ILO Conventions on core

[74] Art.23.4 CETA and Art.17 TTIP.
[75] Art.23.3(1) CETA and Art.4(2)(a) TTIP.
[76] Art.23.3(2) CETA.
[77] Art.23.3(3) CETA.
[78] Ibid. The Parties are furthermore forbidden from justifying the postponement of cost-effective protective measures on the basis of lack of full scientific certainty, where 'existing or potential hazards or conditions' could cause 'injury or illness to a person'.
[79] See additional commitments relating to labour inspection, Art.23.5(1)(a) CETA. On this, see also Art.4(6) TTIP.
[80] Art.23.3(4) CETA. At the moment of the negotiations, Canada had not ratified ILO C98. Canadian trade unions have argued that the ratification was not the result of CETA and that its ratification was already in progress. See 2nd Civil Society Forum CETA (12 November 2019) (n 1).

labour standards (as in EUJEPA), but also of the Priority and other ILO Conventions, which may better target pressing challenges to labour rights in the context of globalisation.[81]

EU's proposal for TTIP. The EU's TTIP proposal appears to suggest that the EU would have demanded a series of commitments on a wide range of objects. Significantly, it goes beyond all the other FTAs under analysis in different ways. First, it follows a structure which departs significantly from the other agreements. The provision that binds the Parties to respect and protect core labour standards is elaborated via a number of Articles that expand on each labour standard: they provide examples of the content of the specific standard; what the standard implies in terms of what has to be protected and how.[82] These Articles provide different degrees of obligation: from commitments to implement policies and measures, to more general endeavours to promote, exchange information, cooperate and share experiences. At first sight, the provisions on labour rights seem more extensive than those contained in CETA, and they are. However, the *objects* of binding obligations remain limited to the core labour standards of the 1998 ILO Declaration, which is already binding on EU MSs and the US. At the same time, by providing clear examples of actions to be taken for their implementation, these provisions may preempt criticism of lack of precision that would hamper their effective implementation.

Second, the EU's proposal for TTIP differs from the other FTAs in that it includes an obligation whereby the Parties would have to protect (a) health and safety at work and (b) decent working conditions for all.[83] Whilst the former is common to CETA, the latter is unique. The text also provides examples of issues that are relevant to decent work, i.a. 'wages and earnings, working hours and other conditions of work in order to ensure a minimum living wage'.[84] Third, unlike all the other FTAs, the *implementation* of the ILO conventions is the object of a binding obligation, and not merely part of commitments that are reaffirmed or of sustained efforts.[85] However, like all the other FTAs, it does not include obligations to *ratify* ILO Conventions that the Parties have *not* yet ratified, but only envisages sustained efforts.[86] This could have been significant for the US, which has only ratified two of eight Fundamental ILO Conventions.[87] Finally, the EU's textual proposal for TTIP is the only one that requires domestic laws and policies of the Parties to provide for high levels of protection in the area of labour – something which two industrialised countries can be expected to have resources and institutional capacity for.[88] It remains unclear, however, what this would mean in practice and how it would be implemented.

[81] Art.23.3(4) CETA.
[82] See Art.4(2)(a) TTIP and Articles 5-8 TTIP.
[83] Art.4(3) TTIP.
[84] Art.4(3)(b) TTIP.
[85] Art.4(3) TTIP.
[86] Art.4(2)(b) TTIP.
[87] See Ratifications for US at <https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871>.
[88] Art.3(2) TTIP.

With the new generation of FTAs, the EU has tended to ask more than what its trade partners typically used to include in their trade agreements. However, one can fairly conclude that the EU has been less demanding of Singapore and Japan, than of Canada or the US. For sure, the difference in the commitments in the new generation EU FTAs reflects different kinds of preferences, political considerations, above all different negotiations – as it will be shown in Chapter 3. In any event, it seems that, on the one hand, the EU accepted to commit to a narrow set of labour rights in its FTAs with Singapore and Japan. On the other hand, in case of political willingness and agreement, as shown by CETA, the direction is towards the inclusion of a wider range of objects, i.e. a *broader* scope for labour rights. Importantly, this broader scope remains circumscribed within the TSD chapters. By contrast, as it will be explored in the next section, an exploration of data privacy rights in EU FTAs reveals that, despite their quasi-absent scope, their cross-cuttingness has been appreciated and reflected within the text.

Commitments on Data Privacy Rights

In the context of trade agreements, data privacy rights can be even more contentious than labour rights. The TTIP negotiations are a case in point: the Safe Harbour Agreement had just been struck down, and the fate of TTIP was said to very much depend on the EU and the US finding mutual trust and agreement on the issue.[89] At the time, the EU was also in the early process of designing the GDPR and the trade negotiations with the US were the last place where it would want to discuss issues of personal data protection.[90] Also in the later negotiations with Japan data protection became central: as Japan repeatedly expressed its interest in free data flows, parallel dialogues were launched and an adequacy decision was eventually reached. TTIP and EUJEPA show that the EU wants to keep commitments on data privacy outside trade agreements. Indeed, the EU's stance so far has been that data protection is a fundamental right, and that should not be subject to, and a subject of, trade negotiations.[91]

This is reflected in the fact that, unlike labour rights, commitments on data privacy rights are not grouped in a single self-standing chapter; nor do they require the Parties to realise or promote specific standards in their laws. In most cases, data privacy rights form the ground of the general exceptions. Provisions on general exceptions are not to be understood as providing an obligation for the Parties. Rather, they only leave open the possibility to derogate from more general commitments to liberalise trade in services and to allow free flow of data. Besides exceptions, some of the FTAs under analysis have in common that specific provisions on data privacy rights are dispersed in sections of the

[89] Anthony Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (Palgrave 2020); Viviane Reding, 'Speech - Towards a more dynamic transatlantic area of growth and investment' (29 October 2013) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_867>.
[90] Ibid.
[91] European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' COM(2017)7 final.

FTA where they are deemed the most relevant, namely cross-border services, such as e-commerce, telecommunications and financial services. These provisions may contain an obligation for the Parties to 'maintain' and/or 'adopt' measures for data protection and privacy rights (Table 2.6 below).[92]

Commitment to	Object	Chapter	EUJEPA	EUSFTA	TTIP	CETA
Maintain/adopt	Measures/safeguards for data protection and privacy rights	Financial services	✗	✓	✓	✓
		Telecommunications	✗	✗	✗	✓
		E-commerce	✗	~	✗	~
General Exception for protection of personal data and privacy			✓	✓	✓	✓

Table 2.6 – Taxonomy of provisions on privacy rights across EU FTAs.

All the EU FTAs examined here include a general exception on grounds of protection of personal data and privacy. Measures for data privacy rights are usually included as grounds of exceptions because of the sensitivity of data regulation in international data flows. The starting point for the provisions is trade liberalisation and free data flows; from here, data protection and privacy become the exception to the free flow of data. Under EUJEPA, EUSFTA, TTIP and CETA, the Parties remain free to apply measures for 'the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts'.[93] Because of the controversy deriving from its potential use for protectionist measures, the exception is subject to the condition that the measures do not represent a disguised restriction on trade.[94] These provisions mirror the general exception under Article XIV GATS. It has been argued that the presence of several conditions to the applicability of this exception is liable to undermine and weaken the very purpose of it, i.e. the possibility of introducing safeguards for the protection of personal data and privacy.[95] It is therefore pivotal that, in addition to the exceptions, the FTAs include obligations whereby the Parties commit to maintain and/or adopt measures for the protection of data privacy for data transfers.

EU-Japan EPA. EUJEPA stands out amongst the other FTAs as the sole agreement that has no express positive obligation for the safeguard of data privacy rights. It has a review clause whereby the Parties

[92] In the former case, the *nature* of the commitment can imply attaching to the *status quo* (e.g. 'maintain' measures) or positive obligations (e.g. 'adopt' measures). In the absence of specific standards, the *object* of the commitment can be said to consist of measures for the protection of personal data.
[93] See Art.28.3(2)(c)(ii) CETA and Art.7-2 TTIP Chapter on trade in services, Chapter VII on Exceptions; Art.8.62(e)(ii) EUSFTA under Section G on Exceptions; Art.8.3 EUJEPA.
[94] Ibid. The full condition is that measures are not applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services'.
[95] Kristina Irion, Svetlana Yakovleva and Marija Bartl, 'Trade and privacy: Complicated bedfellows? How to achieve data protection-proof in free trade agreements' (independent study commissioned by BEUC and others, published 13 July 2016, Amsterdam, Institute for Information Law).

shall reassess the need for the inclusion of provisions on the free flow of data within three years of entry into force of the Agreement.[96] At the same time, it is the only FTA that has led to the adoption of an adequacy decision allowing the free flow of personal data between the EU and Japan.[97] When looking at the text, only the section on *financial* services provides a specific exception for the protection of personal data.[98] There are no specific obligations or exceptions for telecommunications and e-commerce. On *telecommunications*, the Parties are required to ensure the confidentiality of telecommunications and related traffic data of users, which is nonetheless only one aspect of privacy.[99] On *e-commerce*, EUJEPA stresses the importance for businesses of their consumers' trust and the need to guarantee the protection of their data and privacy. However, the Parties only '*recognise* the importance of adopting or maintaining measures' to protect the personal data of e-commerce users.[100] The Parties are therefore not required, as per the text of the FTA, to adopt or maintain such measures.

EU-Singapore FTA. What in EUJEPA is an exception for *financial* services, in EUSFTA is worded as an express obligation for the Parties to 'adopt or maintain appropriate safeguards to protect privacy and personal data, including individual records and accounts' – with the caveat that these safeguards are not used to circumvent the agreement.[101] Regarding *telecommunications*, EUSFTA contains an obligation, comparable to that in EUJEPA, whereby the Parties shall ensure the confidentiality of telecommunications and related traffic data,[102] omitting express reference to data privacy rights. On *e-commerce*, EUSFTA recognises that, while information needs to flow freely on the internet, it is important to ensure the confidence of users of e-commerce.[103] To this end, the Parties agree that the development of e-commerce 'must be fully compatible with international standards of data protection'.[104] Given the absence of such international standard on data privacy rights, it is not clear to which standard this provision refers. Possibly, it could imply instruments such as the OECD Privacy Guidelines or the APEC Privacy Framework, both yet providing only voluntary principles.

The EU's proposal for TTIP. The EU's proposal for the chapter on services, investment and e-commerce in TTIP only includes provisions on data privacy in the field of *financial* services. This clause would have introduced a positive obligation for the Parties to 'adopt' safeguards: not only for the protection

[96] Art.8.81 EUJEPA.
[97] Elaine Fahey and Isabella Mancini, 'The EU as an intentional or accidental convergence actor? Learning from the EU-Japan data adequacy negotiations' (2020) 26 International Trade Law and Regulation 99.
[98] Art.8.63 EUSFTA. In the case of transfers or processing of financial information, EUJEPA provides that nothing restricts the right of the EU and Japan to protect personal data, personal privacy and the confidentiality of individual records and accounts – with the caveat that such right should not be used to circumvent other provisions of the agreement, including cross-border services and investment liberalisation.
[99] Art.8.56 EUJEPA. This requirement pertains to public telecommunications transport networks and should not unduly restrict trade in services.
[100] Art.8.78(3) EUJEPA, emphasis added.
[101] Art.8.54(2) EUSFTA.
[102] Art.8.27 EUSFTA.
[103] Art.8.57(3)-(4) EUSFTA.
[104] Arti.8.57(4) EUSFTA.

of privacy (as in EUSFTA), but also more broadly for the protection of 'fundamental rights, and freedom of individuals, in particular with regard to the transfer of personal data.'[105] On *telecommunications*, just like EUJEPA and EUSFTA, TTIP contains a provision whereby the Parties are to 'ensure confidentiality of electronic communications and related traffic data' in public electronic communication networks or services.[106] Regarding *e-commerce*, the agreement does not express concerns of consumer protection and their personal data, or the need to build trust with e-consumers in the context of online purchases; nor does it refer to international standards for the protection of personal data. Issues relating to the protection of consumers in e-transactions are instead made the object of future cooperation on regulatory issues.[107] Significantly, the TTIP negotiations happened to coincide with the talks for the Privacy Shield and the related adequacy decision in July 2016.[108] As in the case of EUJEPA, arrangements to transfer personal data were agreed outside trade negotiations.[109]

EU-Canada FTA. Only CETA contains provisions on the protection of personal data in both *financial* and *telecommunications* services. As to the former, an obligation binds the Parties to '*maintain* adequate safeguards to protect privacy.'[110] CETA additionally specifies that financial transfers including *personal* information *should* be in accordance with the laws on personal data protection of the Party where the transfer has originated.[111] The wording suggests that transfers of personal data which originate in the EU should be governed by EU rules.[112] Some have observed that the initial wording of 'shall' has been substituted during the legal scrubbing with 'should', which could lead to think that the obligation is recommended but not strictly mandatory.[113] On *telecommunications*, CETA departs from all the other FTAs in that it includes a positive obligation not only to protect confidentiality, but also to 'take' appropriate measures to protect 'the privacy of users of public telecommunications transport services'.[114] The caveat that these measures should not be applied in a manner that would constitute a disguised restriction on trade leaves a wide room for interpretation.[115] Finally, on *e-commerce*, the relevant provision only provides that the Parties '*should* adopt or maintain' laws for the protection of

[105] Art.5-33(2) Chapter V, Section VI European Union's proposal for TTIP chapter on services, investment and e-commerce. European Commission, 'Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce' (tabled for discussion with the US in the negotiating round of 12 -17 July 2015 and made public on 31 July 2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf> (EU TTIP proposal on services).
[106] Art.5-27, Chapter V, Section V, EU TTIP proposal on services.
[107] Art.6-8 EU TTIP proposal on services.
[108] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield [2016] OJ L207/1.
[109] See Chapter 3 of this thesis.
[110] Art.13.15(2) CETA.
[111] Ibid.
[112] See Irion, Yakovleva and Bartl (n 95) 43; Walter Berka, 'CETA, TTIP, TiSA, and Data Protection' in Stefan Griller, Walter Obwexer and Erich Vranes, *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA; New Orientations for EU External Economic Relations* (OUP 2017) 178-179.
[113] Ante Wessels, 'CETA will harm our privacy' *Foundation for a Free Information Infrastructure* (15 April 2016) <https://blog.ffii.org/ceta-will-harm-our-privacy/>.
[114] Art.15.3(4) CETA.
[115] Ibid.

personal information of users engaged in e-commerce; and that they *shall* do so by taking into consideration '*international standards* of data protection of relevant *international organisations* of which both Parties are a member'.[116] Whilst no specific standards or organisations are referred to, potential candidates could be the OECD Guidelines, since both Canada and the EU are parties to them; but it could not be, for instance, the CoE Convention 108, since Canada is not a party to it.[117] As discussed, the latter would provide a more powerful instrument than the Guidelines.

Unlike labour rights, data privacy rights are carved out from the trade agreements altogether, which explains the little scope. Relevant provisions reflect an acknowledgement that liberalisation of services and data flows requires a balancing act with the protection of personal data and privacy. They suggest an understanding of the nexus between personal data flows and international trade that appreciates their mutual interconnection. At the same time, differences among the FTAs are not significantly noticeable and overall reflect little engagement in matters of personal data flows. As discussed in the case of general exception, a series of legal deficiencies may arise. The new generation EU FTAs lack provisions accounting for a proactive protection of data privacy rights in the context of trade. Most developments have occurred alongside, and outside, the trade agreements, as negotiations have taken place for adequacy decisions.[118] Indeed, the scope of fundamental rights is not limited to the FTAs, but may extend to other instruments that are attached to them.

2.3.2. Provisions on Fundamental Rights Beyond the Texts of the FTAs

Beyond the express provisions on labour and data privacy rights in EU FTAs proper, other commitments feature in instruments that are either attached to the trade agreements, or to be read in conjunction with them. Two types of instrument are studied here: the Framework Cooperation Agreements, which are negotiated by the EU External Action Service with a trade partner in parallel to the trade negotiations conducted by the Commission; and the Joint Interpretative Instrument concluded between the EU and Canada, which is a unique exemplar of its kind concluded to appease concerns over CETA and which provides guidance on its interpretation.[119] The aim here is more to appraise the scope of fundamental

[116] Art.16.4 CETA.

[117] Despite the openness of the Convention to non-members of the CoE. See CoE convention 108 (n 20). Canada is not a signatory state, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=B3d9qN88>.

[118] The Privacy Shield with the US has in fact built on a long history of cooperation for the transfers of personal data flows, whereas for Japan the negotiations for adequacy decision was unprecedented and unexpected, but eventually successful. On the other hand, no discussion on personal data has taken place with Singapore. This has not coincided with more safeguards within the text of the agreement. The experience with Japan yet has meant that a similar exercise has recently been contemplated also with Singapore. As for Canada, its partial adequacy decision has not led to adequacy negotiations parallel to the negotiations of the trade agreement. At the same time, CETA provides for a broader range of obligations in relation to data privacy.

[119] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L11/3 (JII).

rights to which the Parties have committed, than providing a full account of these instruments. These instruments help appreciate a broad range of commitments that exist beyond the FTA itself. Above all, they are an additional manifestation of how the nexus between trade and fundamental rights is understood, i.e. how the two agendas intersect.

The Framework Cooperation Agreements

The Framework Cooperation Agreements (FCAs), also called Strategic Partnership Agreements (SPAs), are the political counterparts of the FTAs. They are political agreements whereby the Parties commit to cooperate on a series of issues beyond trade. The FCAs are considered here because, following a new policy adopted in 2009, the human rights conditionality clauses that were typically included in trade agreements have been moved into these political agreements.[120] The two agreements are usually linked via the use of passerelle clauses or by cross-references: the aim is to condition the suspension of the FTA on compliance with the essential elements clause in the FCA. In fact, the link is often not made clear, which makes it difficult for a Party to suspend the trade agreement on the basis of a violation of human rights by the other Party.[121] Whilst no FCA was envisaged during the TTIP negotiations, FCAs were concluded with Canada, Singapore and Japan. From a fundamental rights perspective, the interesting elements of these FCAs and the human rights conditionality clauses include: the relevant standard for the essential elements clause; whether the clause is linked to the trade agreement; and, if the latter is fulfilled, whether such link could effectively lead to the suspension of the trade agreement. These are examined in the FCAs that the EU has concluded with Canada, Singapore and Japan.

Among the seven titles of the EU-Canada SPA, one is specifically dedicated to Human Rights, Fundamental Freedoms, Democracy and the Rule of Law.[122] The Parties reaffirm their commitment to human rights by recalling the 'Universal Declaration of Human Rights and existing international human rights treaties and other legally binding instruments to which the Union or the Member States and Canada are party'.[123] They are said to constitute an 'essential element' of the SPA.[124] Were these rights

[120] Council of the European Union, 'Reflection Paper on Political Clauses in Agreements with Third Countries' (2009); Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 ELR 391. The new policy was an attempt to overcome the unwillingness of some trade partners to have conditionality clauses in the FTAs and the ensuing difficulties arising during the negotiations. See Francesca Martines, 'Humans Rights Clauses in EU Agreements', in Sara Poli (ed) *Protecting Human Rights in the European Union's External Relations* (CLEER PAPERS 2016/5) 53.

[121] Ibid 54.

[122] See Title II in EU-Canada SPA on Human Rights, Fundamental Freedoms, Democracy and the Rule of Law. The other titles are: (I) Basis for Cooperation; (III) International Peace and Security and Effective Multilateralism; (IV) Economic and Sustainable Development; (V) Justice, Freedom and Security; (VI) Political Dialogue and Consultation Mechanisms; and (VII) Final Provisions. See Council Decision (EU) 2016/2118 of 28 October 2016 on the signing, on behalf of the Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L329/43 (EU-Canada SPA).

[123] Art.2(1) EU-Canada SPA.

[124] Ibid.

seriously and substantially violated, CETA could be terminated.[125] Such violation would be 'serious and substantial' when 'its gravity and nature' are as exceptional as 'a coup d'État or grave crimes that threaten the peace, security and well-being of the international community'.[126] Compared with conditionality clauses in previous EU FTAs, this clause is rather unusual: it displays political nature and significance, as opposed to legal.[127] Despite the wide coverage of rights deriving from the legal instruments mentioned, the bar for when human rights can be deemed violated is set very high. Furthermore, unlike previous conditionality clauses, the EU-Canada SPA does not allow to *suspend* the agreement, but only to *terminate* it. Compliance with human rights commitments would therefore hardly be questioned if at stake is the termination, as opposed to suspension, of CETA.[128] The high threshold for violation of human rights, alongside the threat of terminating CETA, risks weakening the very purpose of the conditionality clause.[129]

Similarly to the SPA with Canada, the Partnership and Cooperation Agreement (PCA) with Singapore makes respect of human rights an 'essential element' of it.[130] The relevant standard consists of fundamental human rights flowing from the UDHR and other international human rights instruments to which the Parties are signatory. The non-execution clause provides that the violation of an essential element of the Agreement would constitute a case of 'special urgency'.[131] The latter is further specified in a joint declaration as occurring in 'particularly exceptional cases of systematic, serious and substantial failure' by a Party to comply with its obligations in the essential elements clause. Where such violation occurred, a Party may decide to adopt 'appropriate measures', following a period of consultations that might be held with a view to reach a mutually acceptable solution.[132] 'Appropriate measures' here mean the 'suspension' of obligations under the PCA or under the EUSFTA or specific cooperation agreements under the PCA. Cases of special urgency, including violations of human rights, could in principle lead to the suspension of the SPA and/or the FTA. At the same time, the PCA has been accompanied by a side letter that has the effect of reassuring Singapore that the EU would not

[125] Art.28(7) EU-Canada SPA in accordance with Article 30.9 on Termination in CETA.
[126] Art.28(3) EU-Canada SPA.
[127] Lorand Bartels, 'Human Rights, Labour Standards, and Environmental Standards in CETA' in Griller, Obwexer and Vranes (n 112).
[128] This is furthermore surprising as the EP Resolution on the negotiations of the SPA with Canada referred to the need of safeguards against the abuse of suspension of the agreement, while no reference was made to the need of having provisions allowing solely 'termination'. See Recommendation 1(b) European Parliament resolution of 10 December 2013 containing the European Parliament's recommendation to the Council, the Commission and the European External Action Service on the negotiations for an EU-Canada Strategic Partnership Agreement (2013/2133(INI)) [2016] OJ C468/ 2.
[129] Bartels (n 127).
[130] Art.1(1) EU-Singapore PCA. See Council Decision (EU) 2018/1047 of 16 July 2018 on the signing, on behalf of the Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part [2018] OJ L189/2 (EU-Singapore PCA).
[131] Article 44(4)(b) EU-Singapore PCA.
[132] Article 44(2) EU-Singapore PCA.

evaluate compliance with human rights in Singapore, thus devoiding the conditionality clause of any significance.[133]

The EU has also concluded an SPA with Japan.[134] The latter provides that the Parties shall continue to uphold the 'shared values and principles of democracy, the rule of law, human rights and fundamental freedoms which underpin the domestic and international policies of the Parties'; it then reaffirms the respect for the UDHR and other international HR agreements to which the EU and Japan are parties.[135] Unlike the FCAs with Canada and Singapore, the conditionality clause in the SPA with Japan is not directly presented as an essential element of the agreement, but is made so indirectly.[136] Suspension of the SPA could be triggered in cases of special urgency, defined as serious substantial violations, of exceptional gravity and nature, threatening peace and security, and having international repercussions. A case of special urgency would trigger an immediate consultation by the Joint Committee.[137] Unless a mutually satisfactory solution is reached, the Joint Committee will have to convene at ministerial level.[138] Only if no solution is found at this level, a Party may decide to suspend the provisions of the SPA.[139] No reference is made to the possible suspension of EUJEPA. Instead, the SPA 'shall not affect or prejudice the interpretation or application of other agreements between the Parties', which could well include EUJEPA.[140] In any case, there are no provisions that explicitly provide for the suspension of the trade agreement, in case of violation of the shared values and principles mentioned above, with the threshold for starting consultations on a special urgency being set very high.

The common standard of the essential elements clauses in the FCAs with Canada, Singapore and Japan is the UDHR, alongside the international human rights treaties to which the Parties are already signatory. According to the European Parliament, human rights conditionality clauses would have to include a series of principles and fundamental rights, among which the promotion of democracy; human rights, including minority rights; the rule of law and good governance as a basic pillar of multilateral cooperation; reference to international obligations and undertakings as part of essential elements clause; the promotion of rights contained in the UN Declaration on Human Rights, the ICCPR, the ICESCR,

[133] McKenzie and Meissner (n 53) 841. The letter states 'at the time of signature of this Agreement, they are not aware, based on objectively available information, of any of each other's domestic laws, or their application, which could lead to the invocation of Article 44 of this Agreement', namely the suspension of the PCA. See [Side Letter], in text of the PCA at <http://www.parliament.bg/pub/ECD/145948COM_2014_70_EN_ACTE2_f.pdf> and see Article 50 EU-Singapore PCA stating that Joint Declarations and the Side Letter to the PCA shall form an integral part of the PCA.
[134] Council Decision (EU) 2018/1197 of 26 June 2018 on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part [2018] OJ L216/1 (EU-Japan SPA).
[135] Art.2(1) EU-Japan SPA.
[136] Art.43(4) EU-Japan SPA.
[137] Art.43(5) EU-Japan SPA.
[138] Ibid.
[139] Art.43(6) EU-Japan SPA.
[140] Art.43(8) EU-Japan SPA.

the internationally recognised UN covenants and legal norms of the 'jus cogens'.[141] While it would be important to have them as benchmarks, their placement in parallel political agreements, and the high thresholds to trigger them, calls into question their significance. Most importantly, human rights conditionality clauses are by nature clauses that look *outwards*: they do not have a link to trade and merely represent a "stick and carrot" tool for compliance with basic human rights by the other party. They are far from providing an instrument that can counter present challenges to fundamental rights in the context of international trade.

The CETA Joint Interpretative Instrument

The CETA Joint Interpretative Instrument (JII) is a tangible response by the EU and Canada to public concerns on the impact of CETA on the ability of governments to regulate in the public interest, investment protection and dispute resolution, sustainable development, labour rights and environmental protection.[142] To be sure, the JII does not confer rights as such. Its aim is to provide a source of clear and unambiguous interpretation of CETA.[143] To the extent that this is to be read in conjunction with CETA, the JII may clarify the scope of some of the rights contained therein, or it may contain guarantees whereby relevant standards will not be lowered. For instance, the JII reiterates that CETA does not undermine the ability of the EU, its MSs and Canada to achieve legitimate public policy objectives, including privacy and data protection; it confirms that the Parties will be able to adopt their own laws and regulations to achieve their objectives.[144] The JII also states that CETA does not lower standards, including for labour protection.[145] On this, it specifies that imported goods, service suppliers and investors will have to continue to respect domestic requirements, including rules and regulations.[146] When looking at specific sets of rights, we find that the JII has a section on labour protection but does not address issues of data privacy rights specifically.

As to the scope of labour rights, the JII states that the Parties have committed to ratify and effectively implement the fundamental Conventions of the ILO. This statement resonates with the findings of the analysis of the text of CETA, where the wording was nonetheless qualified as less peremptory than 'shall'. Since by that time Canada had not ratified the Convention on the Rights to Organise and Collective Bargaining Convention (C98), the JII assured that the process for it had been launched.[147] On this, the JII confirms that CETA does not change workers' rights to negotiate, conclude

[141] Recommendation 7(a)-(f) in European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)) [2006] OJ C290E/107.
[142] Point 1 e) JII.
[143] Point 1 e) JII.
[144] Point 1 e) and 2 JII.
[145] Point 1 d) JII.
[146] Ibid.
[147] Point 8 b) JII.

and enforce collective agreements and to take collective action.[148] The JII also attests that the Parties cannot relax their labour laws to encourage trade or attract investment. Were this commitment violated, remedies would apply regardless of whether the violation negatively affects an investor's profit or expectations.[149] Not only the Parties are expected not to relax their labour laws; they also commit to *improving* their laws and policies in order to provide high levels of protection[150] – to an extent echoing the EU's proposal for TTIP. The JII makes clear that the Parties aim to encourage trade 'in a way that benefits workers and in a manner supportive of labour protection measures'.[151] These guarantees appear to have a stronger inward look at domestic issues and laws on labour rights that might appease backlash to globalisation and free trade. While these guarantees may still risk remaining words within a text, the JII in fact refers to a framework for cooperation on trade-related labour issues, the involvement of the ILO and a sustained dialogue with civil society.[152] Chapter 5 will turn to the institutional architecture of EU FTAs for this to happen and benefit labour rights.

What matters for this chapter is to appreciate the kind of commitments that the Parties have undertaken and what this tells us about their understanding of the nexus between trade and fundamental rights. The provisions within the texts of the FTAs, the human rights conditionality clauses of the FCAs and the guarantees of the JII for CETA challenge the stance adopted here according to which there is little about fundamental rights in trade agreements. It is undeniable that major additions have been made compared to the past. Yet the present context of digitalisation and backlash to globalisation calls for a revised and modernised conceptualisation of the nexus between trade and fundamental rights. Such nexus needs to be understood within this new context and consider the developed nature of the countries concluding FTAs. It is argued that a deep scope for fundamental rights in the new generation EU FTAs would be reflected in provisions that do not necessarily *add* fundamental rights, but which are *qualitatively* geared towards creating an environment that can safeguard their protection in the aftermath of trade liberalisation.

2.4. From a 'Broad' to a 'Deep' Scope for Fundamental Rights

This section makes the case for a 'deep' scope for fundamental rights: a scope that can help ensure that deep FTAs do not undermine or put downward pressures on fundamental rights. The section first highlights the main limitations of the current approach to fundamental rights in EU FTAs (2.4.1). It

[148] Point 8 a) JII.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Point 8 c) JII.

then advances some proposals on additional provisions and dimensions that could be targeted to work towards the fulfilment of a deep scope for fundamental rights (2.4.2).

2.4.1. Limitations of the Current Approach to Fundamental Right in EU FTAs

The approach to fundamental rights in EU FTAs fails to appreciate the potential implications of the deep scope of EU FTAs on fundamental rights. Alternatively, where such an appreciation is made, the tools employed do not go to the core of what could be useful for their protection. The exploration of the scope of fundamental rights in EU FTAs reveals two main approaches which are interesting to compare as they appear to diametrically diverge: one goes towards the direction of 'more' standards on fundamental rights; the other appears to call for the exclusion of fundamental rights from the FTAs altogether. Provisions on labour and data privacy rights therefore require different considerations as to how each approach might be limited.

Starting with labour rights, three considerations can be made. All these considerations flow into the argument that provisions on labour rights fail to address more complex linkages of labour rights and trade. The first consideration concerns the *rationale* of these provisions. The provisions on labour rights seek to guarantee a minimum level of protection by relying on international labour standards and current levels of protection. The sole concern reflected by these provisions appears to be that a trade partner might willingly lower its labour standards to gain unfair competitive advantage. The EU has openly voiced this concern in its negotiations with the UK, confirming such limited understanding of the reason for having labour rights provisions in FTAs.[153] For sure, the inclusion of obligations on core labour standards and the ILO Conventions is welcome and remains necessary. In some cases, the trade partners might not have ratified some of the Fundamental ILO Conventions; and even where the Parties have, what eventually matters is effective implementation.[154] At the same time, fears of social dumping abroad are only a fraction of the wide range of concerns on labour rights in a globalised world. Provisions that mandate the respect of core labour standards do not go to the core of problems related to job insecurity and income inequality.[155] They lag behind in addressing possible adverse effects of trade on labour protection.[156] The rationale for addressing labour rights in FTAs should therefore take into account possible downward pressures on labour rights as a result of further liberalisation of trade.

[153] See for instance European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)) [2019] OJ C162/40; Jeff Kenner, 'Brexit and Labour Standards at the time of COVID-19 – To Converge or to Diverge, that is the Question' *Kluwer Regulating for Globalization Blog* (25 May 2020); Mark Bell, 'Labour Standards and the Future EU-UK Trade Agreement' *Brexit Institute* (10 May 2018) <http://dcubrexitinstitute.eu/2018/05/labour-standards-and-the-future-eu-uk-trade-agreement/>.
[154] Velluti (n 2).
[155] Santos (n 68).
[156] Novitz (n 2) 125.

The second consideration builds on the previous one and argues that, especially in the case of Asian trade partners, the current approach neglects the *developed status of the trade partner*. As it will be elaborated further in the next section, the recognition of this status would be reflected in agreements able to tackle the wider concerns just outlined. Even though EU policy officials recognise that concluding FTAs with developed countries is a totally different matter from PTAs with developing ones, this is not reflected in the way fundamental rights are dealt with. The EU used to include provisions on labour standards in PTAs with developing countries for moral as much as economic reasons. These provisions were underlain by the belief that the EU should export labour rights *through* trade.[157] To do so, a common base was found in minimum standards benefiting from international recognition. This choice served not to encounter accusations of protectionism, or on-the-ground obstacles due to the lack of capacity building. The current approach to labour rights in EU FTAs largely draws from this practice. It does not consider that the trade partners are industrialised countries. The understanding of labour rights in EU FTAs remains attached to the idea that the trade partner might (have) lower standards of protection, hence the need to create a level playing field. It is posited here that the linkage of trade and labour rights in the context of FTAs with developed trade partners is outdated and needs more sophistication. Above all, it requires an introspective look and consideration on the impact that FTAs might have internally, and an outwards look into third (developing/least developed) countries that are not party to the agreement.[158]

The third and final consideration relates to the *compartmentalisation* of labour rights in the chapters on trade and sustainable development. Here is where the FTAs are broadening the range of labour rights, as shown by CETA; or where the provisions on labour rights could be detailed and clarified for purposes of more effective implementation – as shown by the EU's TTIP proposal for the TSD chapter. These are developments to be welcomed, but it is hard to see how the EU could stick to this model when these provisions often meet the dislike of the trade partners. It has recently been commented that the more the EU demands in these chapters, the more it has to give in others.[159] One can also expect the EU Commission to dismiss contentious issues too quickly in order to gain more on the economic side, while claiming tight-hands domestically.[160] In addition, *more extensive* standards might encounter criticism of EU imperialism or illegitimate "Global North" standard-setting to the

[157] Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a conflicted trade power' (2006) 13 Journal of European Public Policy 906.

[158] All the FTAs include a "review clause" whereby the Parties commit to assess the impact of the implementation of the FTA on sustainable development: this could be a means to review the impact on labour rights, but it would only be an ex-post evaluation. See Art.12.14 EUSFTA, Art.16.11 EUJEPA, Art.22.33(3) CETA (although not called as such but essentially the same wording) and Art.14 TTIP.

[159] Luisa Santos (Business Europe), remark at at 'EU Trade Policy After Covid-19' (Webinar, 28 May 2020), notes of the author <https://ecipe.org/blog/eu-trade-policy-post-covid/>.

[160] Sieglinde Gstohl, presentation at EUTIP Advanced Training Course 4 (Brussels, 14-15 May 2018) notes of the author. This was already the case during the EUJEPA negotiations, where the European Parliament managed to secure an addition on trade and sustainable development to which the Commission had already renounced. See Magdalena Frennhoff Larsén, Parliamentary Influence Ten Years after Lisbon: EU Trade Negotiations with Japan' (2020) JCMS.

expense of developing countries that cannot keep up with the resulting standards.[161] Besides these observations, the compartmentalisation of labour rights in a self-standing chapter may just be window-dressing to provide legitimacy to the FTA, without appreciating the relevance of labour rights throughout its text.[162] As it will be discussed below, other provisions and chapters in EU FTAs require more attention.

Turning to data privacy rights, different considerations apply as to how the current approach might be short-sighted. In fact, it is noteworthy that, unlike the case of labour rights, the relevance of data privacy rights to e-commerce, telecommunications and financial services has to some extent been appreciated in the corresponding chapters. One can therefore not say that the approach to data privacy rights is short-sighted. Still, it is argued here that the approach of the EU FTAs under analysis is flawed. Above all, there exists no international standard that can serve as an object for specific positive obligations. The data privacy frameworks provided by the OECD and APEC rely on an economic, as opposed to a more normative, approach; their inclusion would provide suboptimal standards for data privacy rights.[163] EU trade agreements have addressed data protection by leaving it 'outside' and by introducing exceptions. Until recently, the provisions in EU FTAs have drawn from the general exception under the GATS, which yet implies a necessity test requiring a high threshold to be relied upon.[164] This means it may be difficult to make use of that exception. Above all, provisions on general exceptions pose the difficult task of distinguishing between protection of personal data and 'digital protectionism'.[165]

The general exceptions leave wide discretion to the Parties to an FTA as to the levels of protection they want to attach to the personal data of their citizens. As far as the EU is concerned, the adequacy decisions are one way of allowing personal data to be transferred and processed outside the EU. Adequacy decisions can be negotiated regardless of whether a trade agreement is being negotiated, but their conclusion inevitably unleashes the economic potential of digital trade following the conclusion of an FTA. Adequacy decisions can nonetheless be controversial: they are a unilateral act; they require periodic reviews and are subject to withdrawal; and most importantly, they imply a comparison of two legal systems in order to assess whether a trade partner provides a level of protection

[161] Kalypso Nicolaidis, Keynote Speech at online conference 'The EU as a Good Global Actor' (City Law School, 19 June 2020). See Elaine Fahey and others, 'The EU as a Good Global Actor' (2020) City Law School Research Paper No 2020/04.
[162] Novitz (n 2).
[163] Svetlana Yakovleva, 'Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?' (2018) 17 World Trade Review 477.
[164] Art.XIV GATS. See Svetlana Yakovleva and Kristina Irion, 'Pitching trade against privacy: reconciling EU governance of personal data flows with external trade' (2020) 10 International Data Privacy Law 201; Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International 2003); Jan Wouters and Dominic Coppens, 'GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization' in Kern Alexander and Mads Adenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers 2008) 205-264.
[165] See Susan Aaronson, 'Redefining Protectionism: The New Challenge in the Digital Age' (2016) IIEP Working Paper.

that is 'essentially equivalent' to the one of the EU.[166] The standard of reference is the *EU* standard, or more specifically the GDPR. Findings of adequacy might fall short of meaning equivalence in practice.[167] Such exercise might be additionally problematic if concluded quickly in order to meet more pressing interests of reaping the economic benefits of free flow of data in the context of an FTA.[168] In the absence of an adequacy decision, companies that want to process EU citizens data will have to do so via specific arrangements: these are typically criticised for placing an economic burden on companies that need to exchange personal data. As the growth of digital trade feeds on global data flows, alternative mechanisms could be envisaged and commitment to the protection of personal data included *in* trade agreements.

2.4.2. Alternative Provisions for Labour and Data Privacy Rights

So far, this chapter has given an overview of the commitments on labour and data privacy rights in the new generation of EU FTAs, and their main limitations. Making a step forward, to indicate what is missing and what should be there, proves a significant methodological challenge. This section advances some normative considerations on how we should think of labour and data privacy rights in the context of FTAs between developed countries, and against a backdrop of digitalisation and backlash to globalisation. The ambition is not to project the perfect solution, nor to provide for an exhaustive account. The interface of labour rights and trade has only been recently addressed by the literature on broader themes of social justice and inclusion;[169] whilst the relationship with data privacy rights has not been fully formed, neither doctrinally nor normatively.[170] For the purpose of this chapter, the focus is on the *scope* for fundamental rights in EU FTAs, whereas the following chapters will look at other dimensions where fundamental rights should be taken into consideration.

Starting with labour rights, the main proposition is that a 'deep' scope would not necessarily include more extensive standards of labour rights. Instead, the targets would be other chapters of the FTAs that might adversely impact labour rights. At the basis of this proposition lies a stance on *which narrative*, among the ones identified by Nicolas Lamp on the winners and losers of globalisation, helps address labour rights best.[171] Different narratives find different diagnoses and solutions for downward pressures on labour rights. What Lamp names the 'establishment narrative' is in fact not interested in labour rights and believes in trade-adjustment mechanisms to support so-called "low-skilled" workers.[172] While necessary, this is possibly only an *ex-post* solution, in the light of the effects of trade.

[166] See for instance Case C- 362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.
[167] Fahey and Mancini (n 97).
[168] This was the case of EUJEPA and might be the case of the UK soon.
[169] Shaffer (n 14).
[170] Yakovleva and Irion (n 164).
[171] Nicolas Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements' (2020) 30 EJIL 1359.
[172] Ibid 1374.

It does not call into question international trade law per se. By contrast, the 'critical narrative' emphasises the distributional consequences of FTAs on the factors of production on a global scale. It argues that the relative immobility of the factors of production means their bargaining power is weakened vis-a-vis the owners of capital.[173] One consequence is that workers will find it harder to resist wage reductions, demand stronger protections for health and safety at work or equal treatment.[174] Furthermore, as trade agreements facilitate the mobility of capital, it is more difficult for States to tax it, resulting in a higher burden of taxation on labour.[175] Against this backdrop, other chapters and provisions, in addition to the ones on core labour standards, are becoming the target of labour rights advocates.[176] Among these targets are investment, services, tax policy and rules of origin.

Investment chapters allow the transfer of capital between the Parties to an agreement. Foreign direct investment, in particular, allows 'globalising' production, via direct foreign affiliates or by means of intermediate inputs. The result is that labour demand elasticities increase,[177] which has the effect of reducing domestic workers' power to bargain, as it becomes easier for employers to replace them with foreign workers.[178] The corollary to this observation is not that FTAs should not contain investment chapters. Rather, these chapters should acknowledge their relationship with labour – just as the relationship between data privacy rights and e-commerce has been acknowledged – and incorporate safeguards accordingly. The latter could take the form of commitments to ensure i.a. collective bargaining, workers' right to information and consultation within the undertaking, and dialogue with social partners. They could also introduce obligations for investors to respect instruments such as the OECD Guidelines for Multinational Enterprises.[179] Another aspect of the investment chapters that has been criticised is Investor-State Dispute Settlement. Proposals for its replacement have already materialised in the Investment Court System in CETA. A thorough discussion of this issue goes beyond the scope of this chapter. Suffice it to say that concerns regarding investors protection are linked to the

[173] Ibid 1378.
[174] Eddy Lee and Marion Jansen, 'Trade and Employment Challenges for Policy Research' (Joint Study by the Secretariat of the ILO and the Secretariat of the WTO, 2007) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_091038.pdf> (Joint ILO-WTO study). Interestingly enough, while FTAs prioritise the free flow of data and then introduce an exception for the protection of personal data, when it comes to labour rights there is no baseline of free movement of workers that is accompanied by exceptions for the protection of labour rights safeguarding the 'free flow' of workers. While the aim here is not to advocate for such an approach, the divergence is telling of different underlying dynamics.
[175] Lamp (n 171) 1361.
[176] Santos (n 68).
[177] Joint ILO-WTO study (n 174) 43, on the basis of Scheve and Slaughter (2004).
[178] Ibid 45.
[179] See ETUC, 'Declaration of Joint Principles ETUC/AFL-CIO' (10 July 2014) <https://www.etuc.org/en/document/declaration-joint-principles-etucafl-cio-ttip-must-work-peopleor-it-wont-work-all> (ETUC/AFL-CIO Declaration).

impact on domestic regulatory-chill, rather than to labour rights per se, but can nonetheless have an impact on the regulatory framework for the protection of labour rights.[180]

Ever more important for labour rights in the context of digital trade is the liberalisation of services. Questions that law- and policy-makers should pose themselves is how the mobility of services can be balanced with protection of labour rights.[181] Technology increasingly facilitates the tradability of services. A problematic issue in this context is that tasks that can be performed at a distance are more likely to be subject to offshoring. Not only "low-skilled" jobs may be affected, but also "high-skilled" jobs which are high IT intensive or transmittable.[182] The term 'globotics', coined by Richard Baldwin, refers to a mix of 'globalisation' and 'robotics' that will make it easier to outsource services jobs.[183] While workers may decide to move to jobs that cannot be done by 'globots', policy-makers will find it extremely difficult to predict next directions and new forms of employment in the digital era.[184] As trade in services has recently witnessed a dynamic growth, FTAs should take into consideration potential effects on labour and changes in the nature of employment, which might be facilitated not only by digitalisation, but also by further liberalisation of trade in services.[185]

Linked to investment and liberalisation of trade in services is the issue of tax policy. Unlike investment or services, tax policy is not a trade discipline and does not enjoy a chapter in FTAs; in fact, it is often carved out.[186] The discussion here does not relate, therefore, to how new chapters of FTAs can have an impact on labour rights. Rather, it suggests considering trade policy as a tool to counter erosions of governments' ability to provide social protection resulting from harmful tax competition, the use of tax havens and tax evasion.[187] As Gregory Shaffer puts it, 'enhanced social welfare policies are not rendered impossible by globalization, but the current system supports the free flow of capital, goods, and services that make these policies more difficult to pursue.'[188] Trade agreements play a role in this dynamic: as much as they facilitate free movement of capital, they could be used as a tool to address its consequences for labour.[189] Shaffer suggests to condition trade liberalisation on separately negotiated tax agreements, which could be incorporated by referring to the FTAs, and vice versa. This suggestion is in line with arguments asserting that trade and tax agreements cannot be reconciled, but

[180] See Henner Gött, 'An Individual Labour Complaint Procedure for Workers, Trade Unions, Employers and NGOs in Future Free Trade Agreements' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018).
[181] Question by Prof. Robert Finbow the 2nd Civil Society Forum CETA (12 November 2019) (n 1), notes of the author.
[182] Joint ILO-WTO study 30.
[183] See James Crabtree, 'The Globotics Upheaval by Richard Baldwin – white-collar disruption' *Financial Times* (23 January 2019).
[184] Joint ILO-WTO study 30.
[185] Rules on cross-border provision of services have already been found to have competitive and divisive effects within the EU, see Debeuf (n 5).
[186] See for instance Art.28.7 CETA.
[187] Shaffer (n 14).
[188] Ibid 21.
[189] The first-best option would be international cooperation, which has nonetheless lagged behind on the matter. Ibid.

coordinated.[190] As a baseline, one would wish that Parties to a trade agreement included commitments to cooperate on such issues, with a view to pave the way to international cooperation.

Rules of origin are another discipline in trade agreements that are increasingly targeted by labour rights advocates. Rules of origin determine the amount of domestic labour that a product needs to 'contain' for it to qualify for a preferential tariff: the more lenient the rules of origin – in the sense of less domestic content required for it to fall under the preferential tariff – the easier for companies to source inputs from 'lower cost countries'.[191] Rules of origin prevent "leakage", i.e. that preferential tariffs extend to goods mostly produced in countries that are not party to the agreement.[192] Some have argued that, while concessions can be made, governments should find ways to support the sector(s) that would be hit.[193] To this end, chapters on rules of origin could include i.a. commitments to conduct impact assessments. Yet beyond concerns and metrics of *quantity* of labour, provisions on rules of origin could focus on the *quality* of labour, above all labour rights. For instance, the US–Mexico–Canada Agreement (USMCA) introduces a 'Labor Value Content', in an annex to the rules of origin chapter, where one of the requirements relates to the wage per hour.[194] In fact, this provision has been controversial for reflecting US concerns over the labour market in Mexico. However, it provides an example of possible considerations that can be made in this context.[195] Another example is the provision, in USMCA, that the Parties should ban 'the importation of goods [made] with forced or compulsory labor'.[196] Provisions of this kind would fit well the chapters on rules of origin. This is extremely important also in the context of global supply chains, and for the rights of the workers not only in the countries that are party to an agreement, but also in third countries.

It is worth noting that these new targets mostly reflect concerns about the rights of workers *at home*, and less about the rights of 'distant others' – workers in third countries that are not party to an agreement. The main proposition here is that in the context of FTAs between developed countries, one may conceive the linkage with labour rights by considering the rights of workers in developing countries in a context of transnational supply chains. Industrialised countries that conclude an FTA should ensure that their own companies respect the labour rights of workers abroad to the highest level possible, the baseline being the respect of core labour standards. One conceptualisation of the nexus between labour

[190] Yariv Brauner, 'International Trade and Tax Agreements May Be Coordinated, but Not Reconciled' (2005) 25 Virginia Tax Review 251.
[191] Santos (n 68).
[192] Ibid.
[193] Ibid.
[194] For a discussion, see Franz Ebert and Pedro Villarreal, 'The Renegotiated "NAFTA": What Is In It for Labor Rights?' (EJILTalk! 11 October 2018).
[195] Similar considerations could be incorporated in the chapters on government procurement, which could include commitments not to disregard workers' rights. The issue of public procurement is not analysed further here. See ETUC/AFL-CIO Declaration (n 179); Santos (n 68).
[196] Art.23.6 USMCA. Agreement between the United States of America, the United Mexican States, and Canada 12/13/2019 text <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

rights and trade agreements between developed countries should thus focus on European and trading partners' companies' conduct in third countries, rather than on a worldwide mission for human rights promotion. Trade agreements could include provisions on human rights due-diligence, which should be accompanied by commitments to assist domestic capacity building. Recent developments on due-diligence legislation at the EU level seem to go towards this direction.[197] Regarding the FTAs under analysis, most of them include a few provisions on corporate social responsibility, but these are usually hortatory, besides being very vague, and overlook controversies and ambiguities of the concept of CSR itself.[198]

Turning to data privacy rights, some of the main limitations of the general exception under the GATS have already been addressed by incorporating the new EU Commission's proposal on data flows in all new FTAs. Since January 2018, the EU's position has been to include horizontal provisions on data protection in cross-border data flows that apply to the entire body of the trade agreement.[199] They can be said to counter the burden of the necessity test, and strengthen the exception. These provisions can be understood as bringing together the exceptions for each discipline, as they introduce a horizontal blank exception for restrictions on personal data flows.[200] What is interesting for the present discussion is that they confirm the approach whereby data privacy rights are non-negotiable and carved out from trade agreements. While the exception allows maintaining each Party's level of protection, the result is not the creation of a level playing field on the basis of a common standard, unlike labour rights for instance. In the case of the negotiations with Japan, the main additions to the Japanese legal framework that have been introduced to achieve 'equivalence' only apply to *EU* citizens' personal data, and not to Japanese citizens. The protection of personal data remains up to the level to which the data subject is entitled. As there exists no international standard, it is difficult to envision an alternative to this.

The general exception removes the possibility for the Parties to jointly work towards mechanisms to ensure that exchanges of data do not compromise data privacy rights. This is regrettable given the transnational dimension of cross-border data flows, new challenges to personal data and the need for concerted action and common standards. These include subject areas such as the ones mentioned in the FTAs (e-commerce, financial services and telecommunications), but also

[197] Interview with EU official; Benjamin Fox, 'New human rights laws in 2021, promises EU justice chief' *Euractiv* (30 April 2020), <https://www.euractiv.com/section/global-europe/news/new-human-rights-laws-in-2021-promises-eu-justice-chief/>.

[198] For instance, Art.20 TTIP.

[199] See European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf>. Despite being an extremely important development in the linkage between trade agreements and data protection, it represents the most recent approach, and as such is not reflected in the agreements under analysis. Similarly, it is also too early to investigate the implications of the currently negotiated Trade in Services Agreement (TiSA), in which 21 WTO members, including the EU, Canada and the US, are likely to discuss these controversial issues.

[200] Svetlana Yakovleva and Kristina Irion, 'Toward Compatibility of the EU Trade Policy with the General Data Protection Regulation' (2020) 114 AJIL Unbound 10.

cybersecurity and the Internet of Things.[201] It is posited here that, as a first step, FTAs need to positively recognise the importance of respecting data privacy rights in the objectives and across other dimensions of trade agreements. Whilst trade agreements might not necessarily be the place that most would advocate for including provisions on the protection of personal data, it is important to acknowledge that data flows today underpin global trade. Once it is recognised how data privacy rights are salient to data flows, and data flows to trade, trade agreements would need to ensure mechanisms to address these linkages.

Most importantly, trade agreements should provide mechanisms for continuous cooperation, not only with a view to international cooperation, but also on what could be *i.a.* new challenges to data privacy rights in the context of digital trade between the Parties to an agreement. Digital trade chapters are becoming an increasingly contentious issue of present trade negotiations. Cooperation would allow taking into consideration, i.a., what different actors have to say on new emerging technologies, trade and data privacy rights. As it will be discussed in the following chapters of the thesis, new and different levels of trade agreements can boost the fundamental rights dimension of EU FTAs: from the negotiation stage, where different actors can voice their concerns and demands in relation to linkages of trade and fundamental rights (Chapter 3); to new chapters on regulatory cooperation mechanisms, which can work as platforms for continuous cooperation and development of new standards (Chapter 4); and finally, institutional mechanisms for the implementation of the agreement, which can provide mechanisms for monitoring and continuing revision of FTAs that can operate in line with fundamental rights (Chapter 5).

2.5. Conclusion

The EU, as a global actor in trade and fundamental rights, cannot probably do more, but can do better. The ambitious scope of the new generation EU FTAs has not necessarily equated with an ambitious scope for fundamental rights appreciating how international trade might affect them. On labour rights, a clear regional divide emerges. In relative terms, 'less ambitious' provisions in EUSFTA and EUJEPA limit the scope of labour rights to national and core labour standards. By contrast, 'more ambitious' provisions in CETA and in the EU's TTIP proposal reveal unprecedented commitments over a broader scope for labour rights, which yet appear extrinsic and additional to the FTA. By contrast, when it comes to data privacy rights, the FTAs largely pull any standard out from the text of the agreement and reveal an appreciation of their mutual interconnection. Despite these differences in approach, provisions on labour and data privacy rights are subject to a series of limitations in their own way. The former have been said to be narrow-sighted and compartmentalised in the TSD chapters; to neglect the developed

[201] See Henry Farrell and Abraham Newman, 'Linkage Politics and Complex Governance in Transatlantic Surveillance' (2018) 70 World Politics 515.

nature of the trade partner and aims of labour protection in the context of trade liberalisation. The latter do not always compel the Parties to proactively protect personal data in the context of digital trade.

The new generation EU FTAs under analysis have been concluded with other industrialised countries spanning North America and Asia, and encompass a wider range of disciplines with far-reaching consequences. Their framing within the broader context of digitalisation and backlash to globalisation, and new challenges for fundamental rights, leads to the argument that provisions on fundamental rights within FTAs need not necessarily be *quantitatively* more. Instead, their protection in EU FTAs requires a 'deep' scope for fundamental rights that can *qualitatively* appreciate how international trade, and more specifically new disciplines within FTAs, might affect them. Further reflection and research on how this could be so is needed. This chapter has provided some examples of alternative provisions that would allow a deeper scope to coexist with fundamental rights, and mutually sustain each other. On labour rights, new targets include investment, liberalisation of services, rules of origin and tax policy. Here, provisions should appreciate potential adverse impacts on labour rights and include commitments that prevent and monitor such potential impact. On data privacy rights, the Parties should commit to proactively protect data privacy rights and include mechanisms to cooperate on side-issues that might implicate them in the context of digital trade. Above all, data privacy rights should be recognised in the objectives and across other dimensions of trade agreements.

Addressing fundamental rights in trade agreements does not only concern the disciplines within the text of the FTA. As the remaining chapters of the thesis show, the 'scope' of FTAs is only one level where these two agendas can intersect. It is pivotal that trade agreements, since their negotiations until their implementation, do not jeopardise fundamental rights and in fact provide venues for the latter to be discussed and challenges to be addressed. The next chapter considers the *negotiations* of the new generation of EU FTAs as a level where discussions over fundamental rights might have arisen and had an impact over the content examined in this chapter. Chapter 3 thus takes a step back and provides a picture of the behind-the-scenes to the text of the agreement. As trade agreements have broadened and deepened their scope over a wide range of issues, they have unprecedentedly raised the stakes of a wide range of actors. Among such a broad range of actors, the focus is on the European Parliament and civil society, the main actors with a direct link to citizens. The chapter will explore how they have engaged during the trade negotiations and what they have demanded in relation to labour and data privacy rights.

Chapter 3 – Actors representing citizens in EU trade law-making: 'more' but overshooting fundamental rights

3.1. Introduction

In a speech in June 2015, the then Commissioner for Trade Cecilia Malmström declared to have put 'transparency and discussion about all issues and citizens' concerns at the centre of trade policy' and to be 'engaging with civil society groups, campaigners and the wider public more than ever.'[1] At the time of this statement, DG Trade was in the process of negotiating TTIP amid widespread opposition from civil society actors and the public at large. This opposition did not go unnoticed and galvanised, in turn, engagement by institutional actors at the EU level, above all the European Parliament, but also the Ombudsman, the Committee of the Regions and the European Economic Social Committee. All asserted their role as champions of citizens' interests. National parliaments and (even regional) governments also became increasingly defiant to the trade negotiations, and not just with the US but also with Canada. Most literature depicts such unprecedented mobilisation as forming part of a post-Lisbon era of EU trade negotiations responding to demands of wider engagement, and contributing to a more legitimate trade law-making. What is missing from these conclusions, however, is a comparison of the engagement of different actors across trade negotiations and an examination of the substantive proposals they advanced.

This chapter adds to this literature by exploring *the extent to which these new vocal actors have contributed to more deliberation around fundamental rights during the EU trade negotiations with North American and Asian trade partners*. The focus is on the actors with a direct link to EU citizens and that can be expected to voice social concerns and advocate for fundamental rights. Among these actors, both institutional and non-institutional actors have been vocal. Regarding the former, the focus here is on the European Parliament, which is the only EU institution that represents citizens at the EU level and which enjoys a formal role in treaty-making. As to non-institutional actors, the focus is on civil society – the main protagonist of this unprecedented mobilisation, but also the major absentee in the law of EU treaty-making. Because civil society encompasses a broad and heterogeneous set of actors, this chapter employs 'a concept of civil society that is intellectually and politically relevant to

[1] Cecilia Malmström, Speech: TTIP and Italy (Rome, 22 June 2015) <https://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153542.pdf>.

the context at hand'[2] and uses it to refer to non-business actors, such as NGOs, public interest groups, trade unions and grassroots movements.

The contribution of the European Parliament (EP) and civil society actors to fundamental rights is examined by way of two subquestions: to what extent have they triggered positive shifts towards democratic treaty-making practices that could allegedly benefit deliberations on fundamental rights? And to what extent have they advanced fundamental rights discourses? The assumption is that, insofar as these new vocal actors also defend fundamental rights, they can benefit fundamental rights discourses and their consideration within the trade negotiations. The 'deepness' of fundamental rights is thus explored here *by proxy* of vocal actors, which are considered to be 'deep' when they also advocate for fundamental rights. This chapter starts with an overview of how the EP and civil society have challenged EU treaty-making across trade negotiations (3.2); it then turns to the substantive proposals that the EP and civil society actors have put forward for labour rights (3.3) and data privacy rights (3.4). The chapter argues that the 'widening' of the actors of trade has not coincided with a 'deepening' of the actors (3.5). It contends that the overall picture is one of inconsistent engagement across trade negotiations, which is reflected in a fragmented contribution to understandings of fundamental rights in trade.

3.2. Trade Negotiations with North American vs. Asian Trade Partners

This section examines the engagement and contribution to positive shifts in practices by the European Parliament (3.2.1) and by civil society actors (3.2.2) across trade negotiations with North American and Asian trade partners. It finds a series of inconsistencies that are reflected in the substantive contribution fundamental rights, addressed in the next section.

3.2.1. The European Parliament: a story of inconsistent engagement

The Treaty of Lisbon has enhanced the role of the European Parliament in international treaty-making by vesting it with the right to be informed throughout the negotiating process and by placing the Common Commercial Policy under the ordinary legislative procedure, hence requiring the EP's consent.[3] Article 218 TFEU, which prescribes the procedure for international treaty-making, still excludes the EP from the initial phase, when the Commission provides recommendations to the Council.[4] The Commission can start negotiating once the Council gives it authorisation[5] and adopts the

[2] Jan Aart Scholte, 'Civil Society and Democratically Accountable Global Governance' (2004) 39 Government and Opposition 211, 213.
[3] Art.207(2) TFEU, Art. 218(6)(a)(v) TFEU.
[4] Art.207(3) TFEU, Art.218(3) TFEU.
[5] Art.218(2) and (3) TFEU.

negotiating directives.[6] During the negotiations, the EP is to be 'immediately and fully informed'.[7] The Council then needs the consent of the EP before adopting a decision for the conclusion of the agreement.[8] Increasingly, the EP appears to challenge the inter-institutional balance of EU treaty-making by demanding for itself prerogatives going beyond what is provided under Article 218 TFEU. The enhanced role of the EP can be said to improve the democratic dimension of treaty-making.[9]

This section compares the EP's engagement and impact across trade negotiations, with a view to capture positive changes in treaty-making practices. Table 3.7 below provides a preliminary overview of the number of resolutions adopted by the EP on different trade negotiations. The EP's resolutions are a useful *quantitative* metric showing the EP's engagement and willingness to express its views. The total number of resolutions in the last column suggests that the EP did not engage to the same degree across trade negotiations with North American and Asian trade partners. A closer look indeed reveals a story of inconsistent engagement. The analysis that follows shows that in some cases the EP *did* try to assert its role during the negotiations, albeit only modestly and unsuccessfully (CETA), or it was extremely vocal and achieved some tangible results (TTIP); in other cases, it was totally silent (EUSFTA), or it did try to influence the negotiations before they would start, but then largely remained silent until the end of the negotiations (EUJEPA and latest EU-US talks). This inconsistency is presented next.

[6] Art. 207(3) TFEU.

[7] Art.207(3) TFEU, Art.218(10) TFEU, additionally confirmed by case law i.a. Case C-425/13 *Commission v Council* ECLI:EU:C:2015:483.

[8] Art.218(6) TFEU. The Council will first have to adopt a decision authorising the signing of the trade agreement, upon a proposal by the Commission (Art.218(5) TFEU). The negotiations of the Anti-Counterfeiting Trade Agreement are a case in point in which the EP refused to give its consent on the basis of fundamental rights concerns. European Parliament, Legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement (2011/0167(NLE)) OJ C 349E.

[9] The Framework Agreement concluded with the Commission in 2010 provides such an example of adds-on to Article 218 TFEU (Framework Agreement on relations between the European Parliament and the European Commission OJ L304/47, Annex III, points 1-3). At the time of its conclusion, this Agreement received much opposition by the Council, which argued that it would have altered the institutional balance by giving the EP prerogatives not provided by Article 218 TFEU and having 'an effect contrary to the interests of the Council' (Council statement – Framework Agreement on relations between the European Parliament and the Commission [2010] OJ C287/1). This controversy shows the tension between practices towards a more transparent and democratically accountable EU external action on the one hand, and the aim of ensuring diplomatic negotiations proceeding in secret, on the other. See Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014).

Resolutions /Trade Partner	Prior to adoption of mandate	Specifically on FTA	Final, giving consent	Total
Singapore	0[10]	0	1[11]	1
Canada	1[12]	1[13]	1[14]	3
US (TTIP)	3[15]	3[16]	n/a	6
Japan	2[17]	1[18]	1[19]	4
Latest EU-US talks	1 + failed attempt	n/a[20]	n/a	0

Table 3.7 – EP Resolutions adopted at different stages of trade talks.[21]

[10] The number excludes two resolutions on EU-ASEAN relations, despite Singapore being part of ASEAN. See European Parliament resolution of 8 May 2008 on trade and economic relations with the Association of South East Asian Nations (ASEAN) (2007/2265(INI)) [2008] OJ C271E/38 (EP Resolution on trade and economic relations with ASEAN); European Parliament resolution of 15 January 2014 on the future of EU-ASEAN relations (2013/2148(INI)) [2014] OJ C482/75 (EP Resolution on EU-ASEAN relations).

[11] European Parliament legislative resolution of 13 February 2019 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore (TA/2019/0088) [2019].

[12] European Parliament resolution of 5 May 2010 on the upcoming EU-Canada Summit on 5 May 2010 [2010] OJ C81E/64 (EP Resolution on EU-Canada Summit).

[13] European Parliament resolution of 8 June 2011 on EU-Canada trade relations [2011] OJ C380E/20 (EP Resolution on EU-Canada Relations).

[14] European Parliament legislative resolution of 15 February 2017 on the draft Council decision on the conclusion of 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 (2016/0205(NLE)) [2017] OJ C252/348 (EP Resolution consenting to CETA).

[15] European Parliament resolution on improving EU-US relations in the framework of a Transatlantic Partnership Agreement (2005/2056(INI)) [2006] OJ C298E/226 (EP Resolution on EU-US relations); European Parliament resolution of 26 March 2009 on the state of transatlantic relations in the aftermath of the US elections (2008/2199(INI)) [2009] OJ C117E/198 (EP Resolution on the state of transatlantic relations); European Parliament resolution of 17 November 2011 on the EU-US Summit of 28 November 2011 [2011] OJ C153E/124 (EP Resolution on the EU-US Summit).

[16] European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America (2013/2558(RSP)) [2013] OJ C55/108 (EP Resolution on EU negotiations with the US); European Parliament resolution of 13 June 2013 on the role of the EU in promoting a broader Transatlantic Partnership (2012/2287(INI)) [2013] OJ C65/120 (EP Resolution on promoting a broader Transatlantic Partnership); European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) [2015] OJ C265/35 (EP Resolution on TTIP).

[17] European Parliament resolution of 11 May 2011 on EU-Japan Trade relations [2011] OJ C377E/19; European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan (2012/2651(RSP)) [2012] OJ C332E/44.

[18] European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan (2012/2711(RSP)) [2012] OJ C72E/16 (EP Resolution on EU trade negotiations with Japan, October 2012).

[19] European Parliament legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (2018/0091(NLE)).

[20] Except European Parliament non-legislative resolution of 28 November 2019 on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the Allocation to the United States of a Share in the Tariff Rate Quota for High-Quality Beef referred to in the Revised Memorandum of Understanding Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union (2014) (2019/0142M(NLE))

[21] The number exclude the resolutions on Strategic Partnership Agreements and on the Investment Agreements.

The Negotiations with North American trade partners

Canada. In the negotiations of CETA, the EP attempted to be involved – albeit eventually with no success – and became more vocal only once the negotiations politicised because of TTIP.[22] The EP demanded to be informed throughout the negotiating process.[23] The Commission, however, recommended a change to the negotiating directives without waiting for the EP's position on the matter.[24] The finalised text of the agreement was given to the EP only a few weeks before its publication.[25] Overall, no tangible changes in terms of democracy-enhancing law-making practices can be attributed specifically to the EP. It has been observed that the negotiations of CETA remain a case of very little transparency, internally among the institutions, as well as with the wider public.[26] Most contestation came from civil society groups and national parliaments, once the negotiations were already concluded. At that stage, the EP only endorsed this mobilisation; by then, little could be made to change transparency practices and/or access to documents.[27] Even though CETA came to be politicised as much as TTIP, and despite the opposing Opinion of the Committee on Employment and Social Affairs,[28] the EP finally consented to the agreement.[29]

United States. It was during the negotiations of TTIP that the EP mobilised the most to challenge the negotiating practices. The EP sought to be regularly informed and to increase transparency and public access to documents, and eventually brought the amount of information available to it to an unprecedented level.[30] The EP above all demanded to have access to the negotiating mandate. The Council, however, relied on the international relations exception under Regulation 1049/2001 to deny disclosure.[31] The Council eventually decided to disclose the mandate following the leaks by individual MEPs,[32] but most importantly after the Court's finding in *Council v In 't Veld*, which set important

[22] Christilla Roederer-Rynning, 'Parliamentary assertion and deep integration: the European parliament in the CETA and TTIP negotiations' 30 Cambridge Review of International Affairs 507.
[23] EP Resolution on EU-Canada Summit (n 12).
[24] EP Resolution on EU-Canada Relations (n 13); European Commission, 'Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment' (20 December 2010).
[25] Panagiotis Delimatsis, 'TTIP, CETA, and TiSA Behind Closed Doors' in Stefan Griller and others (eds) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).
[26] Ibid 228; Sonja Puntscher Riekmann, 'The Struggle for and against Globalization: International Trade Agreements and the Democratic Question' in Stefan Griller and others (n 25) 291.
[27] Roederer-Rynning (n 22).
[28] Opinion of the Committee on Employment and Social Affairs for the Committee on International Trade on the draft Council decision on the conclusion of 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 (8 December 2016).
[29] EP Resolution consenting to CETA (n 14).
[30] Katharina Meissner, 'Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP' (2016) 21 European Foreign Affairs Review 269, 284.
[31] Article 4(1)(a) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.
[32] European Parliament, 'EU-US trade deal: 14 EP committees have their say' (23 February 2015) <https://www.europarl.europa.eu/news/en/headlines/priorities/ttip/20150220STO24366/eu-us-trade-deal-14-ep-committees-have-their-say>.

boundaries to institutional discretion and secrecy of international relations.[33] The publication of the TTIP mandate can be welcomed as a shift towards positive practices, arguably contributing to greater legitimacy and democracy.[34]

The EP also demanded that *all* MEPs be given access to consolidated documents, since by the time only 30 MEPs were allowed to scrutinise confidential documents.[35] These demands were successful: they were embedded in an operational arrangement between the INTA Committee and DG Trade which extended access to all MEPs.[36] Under such agreement, readings rooms were also set up for MEPs, including at the national level, for national parliaments. The EP took up a significant monitoring role, getting the Commission to inform the INTA Committee before and after each negotiating round, and even setting up special monitoring groups.[37] The amount of opinions, hearings and questions to the Commission by MEPs – not only from the INTA, but also other Committees, such as the LIBE and AFET – are reflective of an intense interest in the TTIP negotiations, particularly if compared to other trade negotiations.[38]

Some scholars have observed, however, that the EP's mobilisation was only galvanised in the aftermath of politicisation and civil society groups' contestation, making the EP emerge as a latecomer and a rather reactive actor.[39] In fact, some of the political groups within the EP were able to act as outlets for civil society concerns, by amplifying and taking charge of their demands.[40] The EP also interacted with other institutionalised actors. For instance, it called on the Commission to implement the Ombudsman's recommendations on transparency, and to strengthen its engagement with stakeholders.[41] Overall, the EP attempted to stretch its legal entitlements and to engage with civil society and other

[33] Vigjilenca 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: Data, Privacy and Trade Law* (Springer 2018). The TTIP negotiations also happened to coincide with a series of cases initiated and successfully defended by the Dutch MEP Sophie in 't Veld on access to documents and transparency in the context of the SWIFT Agreement negotiations with the US (see Elaine Fahey, 'EU Foreign Relations Law: Litigating to Incite Openness of EU Negotiations' (2014) 4 European Journal of Risk Regulation 553). The disclosure of the Council's mandate in October 2014 notably followed the Court's finding in the last of these cases, Case C-350/12 P *Council v In 't Veld* ECLI:EU:C:2014:2039.

[34] Recital (2) and Article 1(c) (n 30).

[35] James Organ, 'EU Citizen Participation, Openness and the European Citizens Initiative: the TTIP Legacy' (2017) 54 CMLR 1713, 1727.

[36] European Commission, 'Operational Arrangements for access to TTIP-related Documents between INTA Committee and DG TRADE as endorsed by the College of Commissioners' (2 December 2015).

[37] Lore Van Den Putte and others, 'The European Parliament as an international actor in trade: from power to impact', in Stelios Stavridis and Daniela Irrera (eds), *The European parliament and its international relations* (Routledge 2015) 56.

[38] Davor Jancic, 'Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures' (2015) 17 Cambridge Yearbook of European Legal Studies 334, 346; Roederer-Rynning (n 22).

[39] Roederer-Rynning (n 22).

[40] Alasdair Young, 'European trade policy in interesting times' (2017) 39 Journal of European Integration 909; Gabriel Siles-Brügge, 'Transatlantic investor protection as a threat to democracy: the potency and limits of an emotive frame' (2018) 30 Cambridge Review of International Affairs 464.

[41] EP Resolution on TTIP (n 16) recommendations (i) and (iv).

institutionalised actors, both resulting in positive shifts in practices of treaty-making which could arguably enhance the democratic quality of trade law-making.

Following the failure of TTIP, the revived EU-US trade talks also witnessed an active EP, yet a very divided one. The EP did not manage to agree on a position before the adoption of the mandate, despite having demanded the Council to wait until the EP had taken a position.[42] While being a prerogative that goes beyond the EP's rights, the EP's demand is a desirable step forward as the EP would otherwise be excluded from this initial stage. By contrast, during the EU-Singapore negotiations, the Council decided to extend the mandate to include investment,[43] without seeking or waiting for the EP's opinion on the matter, yet also without raising any objection by the EP.[44] Still, a comparison of the information granted to the EP during the TTIP negotiations suggests that the EU-US talks are a step back: the EP regretted not being informed about the content of the joint EU-US Statement;[45] and demanded the Commission to be kept informed at all stages of the negotiations.[46] Notwithstanding the experience with the TTIP negotiations, one can hardly conclude that informing the EP throughout the negotiating process is an institutionalised practice by now. Rather, it appears to depend on the politicisation of trade negotiations and the EP being vocal.

The Negotiations with Asian trade partners

Singapore. In the negotiations of the EU with Singapore, the EP was largely passive and silent, with no blatant examples of assertion of its rights in treaty-making.[47] The EP adopted no resolution specifically on the EUSFTA or the EU-Singapore Investment Protection Agreement (EUSIPA), demonstrating little interest in the negotiations.[48] At least up until 2013, the EU-Singapore negotiations did not provoke any

[42] In the context of the latest EU-US trade talks, the EP demanded the Council not to endorse the negotiating Directives before the EP had taken a position. Except that the EP failed to adopt the resolution because of internal disagreement among the political groups. The Council eventually approved the mandate, and if this decision came late, it was only because of the French Government resistance to that, in the reminiscence of TTIP. See Procedure File 2019/2537(RSP) Opening of negotiations between the EU and the US - Status: Rejected <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2019/2537(RSP)>.

[43] The mandate was for the ASEAN negotiations (not Singapore specifically). See Council of the European Union, 'Council extends mandate for free trade talks with ASEAN' (18 October 2013) at <https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/139054.pdf>

[44] There is no record of the EP having objected to the Council's decision. While a monitoring group on the EU-Singapore FTA had been set up, and one may expect that it was at least informed about that decision, there is no document from the EP stating its position on the matter. European Commission, 'Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore' (18 April 2018) COM(2018) 196 final, 5.

[45] European Parliament Motion for a Resolution of 8 March 2019 to wind up the debate on the statement by the Commission pursuant to Rule 123(2) of the Rules of Procedure on the recommendations for opening of trade negotiations between the EU and the US <https://www.europarl.europa.eu/doceo/document/B-8-2019-0163_EN.html> point 1.

[46] Ibid 14.

[47] Lachlan McKenzie and Katharina Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832, 841-843.

[48] Prior to the start of the negotiations with Singapore, the EP had adopted a resolution on the trade and economic relations with the ASEAN countries, which comprise a wide variety of countries with different levels of development. Singapore is the "developed country" exception within the region. The EP referred to the imminent entry into force of the Treaty of Lisbon as providing certainty on the EP's consent requirement; it called on the Commission to circulate the mandate more

clash with the EP.[49] Out of the total eighteen questions addressed on the EU-Singapore FTA, only one raised concerns about the agreement.[50] The first EP resolution specifically on the EU-Singapore trade negotiations is the one whereby the EP gave consent to EUSFTA.[51] Unlike the resolutions on TTIP, the final recommendations by the INTA Committee were not accompanied by opinions by other committees,[52] which corroborates observations about the EP's lack of interest in this context.

Japan. The EP tried to influence the negotiations with Japan from the outset, except that it adopted no resolutions once the negotiations had started, and in fact remained quiet until it gave the final consent.[53] The EU-Japan negotiations are the first case where the EP adopted a resolution *prior to* the adoption of the mandate, requesting the Council not to approve the launching of the negotiations until the INTA Committee had taken its position.[54] The EP soon after *did* adopt a resolution, following which the Council then adopted the negotiating directives.[55] The EP's assertion led to placing its contribution at the agenda-setting stage, rather than at a later stage – a practice that is unforeseen under EU international relations law but which can provide more democratic input to the process at the outset. However, the EU-Japan negotiations did not benefit from the changes brought about the TTIP negotiations in terms of openness and access to documents. The EP was only partially informed about the state of play of the negotiations,[56] as shown by some MEPs' demands to be updated on the outcomes of the rounds[57] and their attack on the lack of transparency of the negotiations.[58] MEPs also criticised that DG Trade did

widely among the MEPs and to regularly consult the EP during the negotiations. See EP Resolution on trade and economic relations with ASEAN (n 10) point 52. A second resolution, in 2014, also focused on the EU-ASEAN relations, see EP Resolution on EU-ASEAN relations (n 10).

[49] See Jacques Pelkmans and others, 'Workshop: Trade and economic relations with ASEAN' (Report for INTA Committee, July 2013) <https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433718/EXPO-INTA_AT(2013)433718_EN.pdf>, 70.

[50] Pointing at the obsolescence of the ASEAN impact study of 2009, see Anne-Marie Mineur (GUE/NGL), Question for written answer E-007624-17 to the Commission <https://www.europarl.europa.eu/doceo/document/E-8-2017-007624_EN.html>.

[51] European Parliament (n 11).

[52] For EUSFTA, see Committee on International Trade, 'Recommendation on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore' (n 11).

[53] European Parliament (n 19). During the trade negotiations, the EP adopted resolutions on the parallel political agreement, see European Parliament resolution of 17 April 2014 containing the European Parliament's recommendation to the Council, the Commission and the European External Action Service on the negotiations of the EU-Japan Strategic Partnership agreement (2014/2021(INI)) OJ C443/49.

[54] European Parliament (n 17).

[55] European Parliament (n 18); Council of the European Union, 'Directives for the negotiation of a Free Trade Agreement with Japan (29 November 2012) <https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156051.en12.pdf>

[56] See Parliamentary question by Pascal Arimont (PPE), Question for written answer P-004345-17 to the Commission (29 June 2017) <https://www.europarl.europa.eu/doceo/document/P-8-2017-004345_EN.html>

[57] See Parliamentary question by Francisco José Millán Mon (PPE) Question for written answer E-015936-15 to the Commission (17 December 2015) <https://www.europarl.europa.eu/doceo/document/E-8-2015-015936_EN.html>; Parliamentary question by Adam Szejnfeld (PPE), Question for written answer P-012117-15 to the Commission (21 August 2015) <https://www.europarl.europa.eu/doceo/document/P-8-2015-012117_EN.html>.

[58] Parliamentary question by Anne-Marie Mineur (GUE/NGL), Question for written answer E-012674-15 to the Commission (9 September 2015) <https://www.europarl.europa.eu/doceo/document/E-8-2015-012674_EN.html>; Parliamentary question by Pascal Arimont (n 56).

not publish any text, position papers, or similar, in the first four years of negotiations, after which only partial access was granted.[59] Unlike the negotiations of TTIP, no reading rooms were eventually set up for MEPs to scrutinise the negotiating documents.[60] However, since the start of the negotiations, the EP adopted no further resolutions on the EPA, with the exception of the one giving its consent. Here, only the EP committees on the environment, public health and food safety, and on agriculture and rural development gave their opinions.[61] This suggests little interest by other committees that had otherwise been vocal for TTIP and CETA, namely the Committee on Civil Liberties and the Committee on Employment and Social Affairs.

A comparison of the EP's engagement in trade negotiations with North American and Asian trade partners does not lead to a clear-cut picture. Rather than the trade partner, a better explanatory factor as to the EP engagement could be the politicisation of trade negotiations as a result of civil society mobilisation.[62] Overall, however, the EP engaged *more* in the context of negotiations with Canada and the US, and was less active during the negotiations with Singapore and Japan. The TTIP negotiations provide an example of how the EP asserted its newly-acquired legal rights to be informed and its power of consent in EU treaty-making;[63] it is also a case where the EP asserted a role for itself by going beyond the right to be informed throughout negotiations and demanding powers not envisaged in the Treaties. By contrast, with respect to the Asian trade partners, the EP emerges as a much more silent and acquiescent actor, engaging in little scrutiny and showing little interest. Similar discrepancy in civil society engagement across trade negotiations is presented next.

3.2.2. EU Civil Society: the unprecedented mobilisation against TTIP (and CETA)

Unlike the EP, civil society actors do not enjoy a formal role under Article 218 TFEU for treaty-making, but have benefitted from the emergence of several venues to provide their input. Research suggests that these mechanisms mostly work as platforms for information gathering and debriefing by the

[59] Parliamentary question by Bas Eickhout (Verts/ALE), Question for written answer P-005519-17 to the Commission (5 September 2017) <https://www.europarl.europa.eu/doceo/document/P-8-2017-005519_EN.html>.
[60] Parliamentary question by Emmanuel Maurel (S&D), Question for written answer E-004417-17 to the Council (30 june 2017) <https://www.europarl.europa.eu/doceo/document/E-8-2017-004417_EN.html>; Xabier Benito Ziluaga (GUE-NGL) as he accuses the European Union of having negotiated a trade deal in complete secrecy, claiming that national parliaments could not debate or amend it (13 December 2018) <https://twitter.com/xabierbenito/status/1073226012119445504?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1073226012119445504&ref_url=https%3A%2F%2Fwww.europeandatajournalism.eu%2FTools-for-journalists%2FQuote-Finder%2FQuote-Finder-notes%2FThe-EU-has-signed-a-free-trade-agreement-with-Japan>.
[61] Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on International Trade on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (17 October 2018).
[62] Roederer-Rynning (n 22).
[63] Meissner (n 30).

Commission, rather than as outlets to exert a meaningful influence over the negotiations.[64] Civil society actors have indeed challenged the negotiations for the new generation EU FTAs in a number of ways. This section maps this engagement, focusing on the positive shifts in treaty-making practices across trade negotiations. It shows a great disparity between civil society mobilisation in the negotiations with the North American versus Asian trade partners. Tangible changes can only be observed in TTIP and CETA, where mobilisation has been at the highest. If the negotiations with Singapore largely preceded TTIP and passed under the radar, the negotiations with Japan were not subject to the TTIP side effect and raised little to no controversy.

North American trade partners

United States. The negotiations for TTIP marked a peak in civil society engagement and politicisation. From the outset, the lack of information about the negotiations raised a huge amount of aversion among consumer, labour and environmental civil society organisations on both sides of the Atlantic.[65] The "behind-closed-door" trade negotiations prompted a number of organisations to express their interest in monitoring the process closely[66] and to demand the publication of the draft negotiating texts.[67] Together with the EP, civil society put a great pressure on the Commission and the Council to be granted access to the negotiating texts.[68] The inadequate responses by the Council and Commission to the civil society's demands prompted the intervention of the European Ombudsman (EO).[69] The EO took on the case by initiating two own-initiative inquiries, which triggered positive developments in terms of transparency.[70] A tangible outcome in this regard is the Commission's decision to publish the EU's

[64] Maria Laura Marceddu, 'Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin'?' (2018) 21 Journal of International Economic Law 681; Jean-Baptiste Velut, 'What Role for Civil Society in Cross-Regional Mega-Deals? A Comparative Analysis of EU and US Trade Policies' (2016) 55 Revue Interventions économiques; Niels Gheyle and Ferdi De Ville, 'How Much Is Enough? Explaining the Continuous Transparency Conflict in TTIP' (2017) 5 Politics and Governance 16; Andreas Dür and Dirk De Bièvre, 'Inclusion without Influence? NGOs in European Trade Policy' (2007) 27 Journal of Public Policy 79.

[65] Even though more vigorous in the EU, see Alasdair Young, ''Not your parents' trade politics: the Transatlantic Trade and Investment Partnership negotiations' (2018) 23 Review of International Political Economy 345; Leif Johan Eliasson and Patricia Garcia-Duran Huet, 'TTIP negotiations: interest groups, anti-TTIP civil society campaigns and public opinion' (2018) Journal of Transatlantic Studies 1; Dirk De Bièvre, 'The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiations' (2018) 53 The International Spectator 70.

[66] Public Citizen, Letter to Obama alerting TAFTA concerns (11 November 2013) <https://www.citizen.org/wp-content/uploads/public-citizen-letter-to-obama-alerting-to-tafta-concerns.pdf>.

[67] Centre for International Environmental Law, Letter to Ambassador Michael Froman and Commissioner Karel De Gucht (12 May 2014) <https://www.ciel.org/Publications/TTIP_REGCO_12May2014.pdf>; Friends of the Earth, Letter to Commissioner Karel de Gucht (19 May 2014) <http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf>.

[68] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[69] European Ombudsman, Letter to the Commission (28 July 2014) <https://www.ombudsman.europa.eu/en/correspondence/en/54633#_ftn1>. See also Meissner (n 30).

[70] Following the Ombudsman's report, Cecilia Malmstrom announced key developments in the transparency of TTIP. See Organ (n 35) 1725.

textual proposals and position papers, and to design a transparency initiative, thus making TTIP a unique case of positive shifts towards unprecedented transparency.[71]

Not only did civil society actors mobilise to obtain more information about the negotiations. They also attempted to halt them altogether by means of the European Citizen Initiative (ECI).[72] During the TTIP negotiations, civil society succeeded in mobilising public opinion and gathering over 3 million signatures for a petition against the conclusion of TTIP (and CETA later).[73] The submission of the petition as a request to register for an ECI marked ordinary citizens' engagement through law, as opposed to street mobilisation.[74] Although the Commission first rejected the application, the organisers of the initiative brought an action to the General Court of the EU, seeking annulment of the decision.[75] The Court found that the Commission's narrow interpretation of 'legal act' constituted a considerable restriction to the recourse to the ECI 'as an instrument of European Union citizen participation' and annulled the decision.[76] Whilst the ECI sought to *reject* TTIP as a whole – hence contributing little to shifts in treaty-making practices – it can still be deemed an instance of citizens' enhancement as actors of EU trade law-making.[77]

The mobilisation of civil society against the lack of information had an impact on the new mechanisms created for them to scrutinise the negotiations.[78] A major observable development in this regard is the Commission's decision to establish an Expert Advisory Group specifically for TTIP.[79] The Group comprised fourteen members representing business, consumer, labour and health interests.[80] They were being informed throughout the negotiations and also given the possibility to consult EU negotiating texts, raise questions and provide comments.[81] The Group can thereby be understood as a form of institutionalisation of civil society in treaty-making processes. As one of the most praised

[71] Elaine Fahey, 'On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal Order: A Legal Perspective' (2016) 43 Legal Issues of Economic Integration 327.

[72] The ECI is a major novelty of the Treaty of Lisbon (Art.11(4) TEU) having taken effect via Regulation 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L 65/1. The ECI allows citizens to invite the Commission to submit a proposal on matters where they consider 'a legal act of the Union is required for the purpose of implementing the Treaties' (Art.2 Regulation 211/2011).

[73] Eliasson and Huet (n 65).

[74] Fahey (n 71).

[75] Case T-754/14 *Efler and Others v Commission* EU:T:2017:323.

[76] Ibid para 38. The Commission decided not to appeal the decision and registered the initiative on 10 July 2017. In the meantime, CETA was signed, and TTIP failed, thus devoiding the initiative of its purpose. See European Commission, 'European Citizens' Initiative: Commission registers 'Stop TTIP' Initiative' (17 July 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1872>.

[77] Some scholars believe that the ECI cannot bring legislative output, Anastasia Karatzia, 'The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking' (2017) 54 CMLR 177; Organ (n 35).

[78] Abazi (n 33) 49.

[79] European Commission, 'Expert group to advise European Commission on EU-US trade talks' (27 January 2014) <https://europa.eu/rapid/press-release_IP-14-79_en.htm>.

[80] Ibid.

[81] European Commission, 'Transatlantic Trade & Investment Partnership (TTIP) Advisory Group: Terms of Reference' (27 January 2014) <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=11459&no=1>.

experiments by civil society actors themselves, the Advisory Group represents an embrace of civil society groups as actors of EU external trade.[82] The negotiations of TTIP are now widely recognised by civil society as the marking point of shifts in the Commission's treaty-making practices, particularly in terms of transparency and access to documents.[83]

Despite the progress of TTIP, the latest EU-US trade talks sparked similar criticism by the civil society actors. Some of them have referred to the 'return of the TTIP ghosts' and criticised the behind-closed-door meetings with big business lobbyists.[84] A number of civil society organisations and groups signed a statement with the slogan 'no TTIP through the backdoor'.[85] Yet despite a few articles here and there, the engagement of civil society in this context is not comparable to the mobilisation against TTIP and CETA. Civil society actors did not reach out to the EP as an interlocutor for their concerns, nor have they mobilised "through law". One must also concede that, so far, the trade talks between the EU and the US have progressed little: they have coincided with other pressing concerns for EU external relations, above all the US turn to protectionism, Brexit and a pandemic, all accounting for the lack of momentum.[86]

Canada. Unlike TTIP, the negotiations with Canada did not spark mobilisation from the outset, and could initially proceed by and large with little public scrutiny.[87] Contestation of CETA should be understood as a side effect of politicisation of TTIP, which took place when CETA negotiations had almost terminated. *A posteriori*, the negotiations of CETA have been described as amongst the least transparent of the latest EU trade negotiations.[88] When the contestation of TTIP spilled over to CETA, a comparable degree of transparency demands arose.[89] Yet the fact that civil society actors started being vocal at a later stage is also reflected in the way they engaged. The purpose of their engagement was not to influence the negotiations – which had by then come to an end – but to block the provisional

[82] Interviews with civil society actors.
[83] Ibid.
[84] Corporate Europe Observatory, 'TTIP reloaded: big business calls the shots on new EU-US trade talks' (21 February 2019) <https://corporateeurope.org/en/international-trade/2019/02/ttip-reloaded-big-business-calls-shots-new-eu-us-trade-talks>.
[85] SeattleToBrussels Network, 'Health, environment and climate are not negotiable' (20 February 2020) <http://s2bnetwork.org/ttip-backdoor/>; European Public Services Union, 'EU-US trade talks mustn't lower standards!' (24 February 2020) <https://www.epsu.org/article/eu-us-trade-talks-must-not-lower-standards>.
[86] Sabine Weyand, speech at 'EU Trade Policy After Covid-19' (Webinar, 28 May 2020) <https://ecipe.org/blog/eu-trade-policy-post-covid/>, notes of the author.
[87] Roederer-Kinning (n 22) 515.
[88] Delimatsis (n 23) referring to the responses to a Questionnaire, 'Questionnaire on a Comprehensive Economic Agreement with Canada' (7 May 2009) that is not available online anymore, but which the author has obtained via email from AskEU.
[89] Ronny Patz, 'Just the TTIP of the Iceberg? Dynamics and Effects of Information Leaks in EU Politics' (2016) 7 European Journal of Risk Regulation 242; Christoph Herrmann, 'Transleakancy' in Christoph Herrmann, Bruno Simma and Rudolf Streinz (eds), *Trade policy between law, diplomacy and scholarship. Liber amicorum in memoriam of Horst G. Krenzler* (Springer 2015) 39.

application of CETA and its ratification at a later stage. In doing so, civil society leveraged mobilisation of other actors, including citizens, national courts and national parliaments.[90]

By mobilising public opinion, civil society groups triggered citizens' action through law. In a lawsuit submitted to the German Federal Constitutional Court, around 125,000 citizens and MPs demanded to block the provisional application of CETA.[91] While not successful, some have considered the reservations to be 'a partial victory'.[92] A series of further developments show that such contention put a great political pressure on parliaments and governments, who in turn challenged CETA via judicial scrutiny.[93] Examples include the refusal of the Walloon Parliament in Belgium to consent to CETA;[94] the request by members of the French Parliament to the French Constitutional Council of a ruling on the compatibility of CETA with constitutional law;[95] and Belgium's request to the ECJ on the compatibility of CETA with EU law.[96]

The impasse created by the Wallonia case is particularly relevant for the tangible outcome that it produced. As discussed in Chapter 2, at a time when the CETA negotiations had long terminated, the EU and Canada adopted the Joint Interpretative Instrument (JII). With the latter, they provided a series of guarantees to the Walloon parliament and to the public more broadly.[97] As part of a compromise, the Belgian federal government would then request an Opinion to the CJEU, on the compatibility of the Investment Court System (ICS) with the EU Treaties, including fundamental rights.[98] Although the Court found no incompatibility, the evolution of this process remains a notable instance of unprecedented challenge to EU external trade law and policy, in this case by a MS, on behalf of a *region*, supposedly acting in support of fundamental rights. The JII also played an important role in the subsequent ruling by French Constitutional Council: the JII was arguably decisive for the dismissal of

[90] As some Member States still have to ratify the agreement, European and Canadian civil society organisations have sent letters to EU national parliaments, see Amis de la Terre, Letter sent to the National Assembly (2 July 2019) <http://www.amisdelaterre.org/IMG/pdf/courrier_parlementaires_ceta_an_020719-4.pdf>; the letter was backed by Canadian NGOs in an open letter, see Council of Canadians, 'French Politicians should not ratify CETA' (15 July 2019) <https://canadians.org/update/french-politicians-should-not-ratify-ceta> and by some Canadian and Quebecois politicians, see Global News, 'Letter from Canadian and Quebecois politicians from across political parties who join us in asking French politicians to not ratify CETA' <https://globalnews.ca/news/5502729/ceta-open-letter/>.

[91] Sonja Riekmann, 'The Struggle for and against Globalization: International Trade Agreements and the Democratic Question' in Griller and others (n 25) 288.

[92] Ibid; Bundesverfassungsgericht (German Federal Constitutional Court), Order of the Second Senate of 7 December 2016, 2 BvR 1444/16 <http://www.bverfg.de/e/rs20161207_2bvr144416en.html>.

[93] Joris Larik, 'Prêt-à-ratifier: The CETA Decision of the French Conseil constitutionnel of 31 July 2017 Case Note: The CETA Decision of the French Conseil Constitutionnel' (2017) 13 European Constitutional Law Review 759.

[94] Guillaume Van der Loo and Ramses A Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54 CMLR 735.

[95] Conseil constitutionnel (French Constitutional Council), Decision 2017-749 DC (31 July 2017). See Larik (n 93).

[96] More specifically of the Investment Court System contained in the agreement. See Opinion 1/17: Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU [2017] OJ C369/02.

[97] See Chapter 2 for a discussion on this.

[98] On the compromise, see Sieglinde Gstöhl and Dirk De Bièvre, *The Trade Policy of the European Union* (Red Globe Press 2017). See also Walloon Parliament, Motion déposée en conclusion du débat sur l'Accord économique et commercial global (AECG-CETA) (28 October 2016).

incompatibility, raising doubts as to whether the Court would have reached the same conclusion in its absence.[99]

Finally, some have argued that it was precisely the combination of civil society mobilisation against Investor-State Dispute Settlement (ISDS) and the demands by some governments, chiefly Germany and France, that triggered the Commission to change its stance on the arbitration system for investment protection.[100] During the legal scrubbing process, when the text was already finalised, the EU proposed and obtained the agreement by Canada to substitute ISDS with the ICS. One can wonder whether such a change would have occurred without pressure by the governments and civil society mobilisation. Even though both civil society and the MSs became acquainted with the change only *ex post facto*, it still sets a significant precedent for how EU trade agreements are negotiated and concluded, and how they evolve as a result of the involvement of other actors.[101] As shown next, no such tangible changes or mobilisation have occurred during the negotiations with Singapore and Japan, which missed to raise any interest by civil society actors.[102]

Asian trade partners

Singapore. In the EU-Singapore negotiations, civil society actors stand as major absentees in spite of the fact that the trade talks touched upon many controversial issues that would have become the target of harsh criticism of both TTIP and CETA a few years later. Despite the lack of documents being made available, no EU position papers or reports of the negotiating rounds have been published, not even retrospectively.[103] It is therefore striking how civil society groups have not denounced the blatant lack of information and documents (un)available on the EU-Singapore trade negotiations: no reports, articles or publications can be found in the websites of some of the typically most active organisations.[104] Only

[99] Under French Constitutional law, if an international agreement is found incompatible, it cannot be ratified. See Larik (n 93) who additionally argues that the JII also contributed to this finding.

[100] De Bièvre (n 65) 79.

[101] Hannes Lenk, 'An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada' (2016) 1 European Papers 665.

[102] See respectively Deborah Martens and others, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) 23 European Foreign Affairs Review 41; and Hitoshi Suzuki, 'The new politics of trade: EU-Japan' (2017) 39 Journal of European Integration 875.

[103] Only the text of the agreement is available under "Singapore" in "transparency in action" website <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>; and no documents on position papers or reports at "more documents on Singapore" <https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=709&link_types=&dis=20&sta=1&en=20&page=1&langId=EN>.

[104] Interestingly enough, all the contributions by civil society on EUSIPA date 11 February 2019, namely a few days prior to the expected EP's final vote. See Friends of the Earth Europe, 'EU-Singapore investment deal protects the rich and powerful' (11 February 2019) <https://www.foeeurope.org/EU-Singapore-deal-protects-rich-110219>; European Trade Union Confederation (ETUC), 'ETUC position on Singapore Investment Protection Agreement' (11 February 2019) <https://www.etuc.org/en/circular/etuc-position-singapore-investment-protection-agreement-eusipa>; SOMO, 'The EU-Singapore Investment Protection Agreement' (11 February 2019) <https://www.somo.nl/the-eu-singapore-investment-protection-agreement/>; StopISDS, 'MEPs take note: EU-Singapore deal could hinder fight against fraud and corruption'

recently have different civil society groups mobilised to campaign, yet they have done so only in relation to the Investment Protection Agreement (EUSIPA), and not to its trade counterpart (EUSFTA).[105] Civil society actors appear to have presented their views only once the agreement had been signed, and a few days prior to the expected EP's final vote.[106] Against the disappointment created by the EP's consent to both EUSFTA and EUSIPA, calls have been made onto the national parliaments, to 'step up where MEPs have failed'.[107] However, the separation of the agreements means that national parliaments will need not to give consent to EUSFTA, but only to EUSIPA. The EU-Singapore negotiations are therefore a case of absent mobilisation by civil society groups, with no examples of demands for more transparency or actions through law.

Japan. Just as the trade negotiations with Singapore, the EU-Japan negotiations for the EPA stand out for the little civil society mobilisation. Hitoshi Suzuki has spoken of the 'Japanese case' to refer to the EU-Japan trade negotiations as an 'exception' to the recent mobilisation in the context of TTIP and CETA.[108] Despite some early contestation from producers' pressure groups in Japan, the negotiations remained exposed to a 'participation deficit' by civil society organisations, in Europe as much as in Japan.[109] It is now commonly agreed that the EUJEPA negotiations went largely unnoticed: they did not politicise and did not undergo public scrutiny.[110] No campaigns and opposition protests were carried on.[111] This was despite the little transparency of the whole process;[112] the initial uncertainty as to whether the agreement would have contained ISDS; and their overlap with the TTIP politicisation. One may also argue that precisely because all the attention was on TTIP, fewer resources were left to scrutinise the negotiations for EUJEPA.[113] Some scholars have observed that the EU-Japan negotiations

<https://stopisds.org/meps-take-note-eu-singapore-deal-could-hinder-fight-against-fraud-and-corruption/>; Transnational Institute, 'EU-handelsverdragen met Singapore en Vietnam strijdig met SER-meetlat' (14 October 2018) <https://www.tni.org/en/node/24423>; Institut Veblen, Foodwatch and Fondation Nicolas Hulot, 'Risque pour les droits humains: l'accord commercial UE-Singapour inquiète les ONG' <https://www.bilaterals.org/?risque-pour-les-droits-humains-l>. Similarly, twitter has been invaded by #stopEUSIPA hashtags (albeit only since 8 February 2019) and by a sole #stopEUSFTA. Author's query, see <https://twitter.com/search?q=%23stopeusipa&src=typed_query>.

[105] Ibid.

[106] Ibid.

[107] StopISDS (n 104)

[108] Suzuki (n 102).

[109] Interest groups particularly in the motorcars, electronics and agricultural sectors, see ibid 880.

[110] Marc Bungenberg and Angshuman Hazarika, 'The European Union's trade and investment policy in Asia: new challenges and opportunities in a changing global environment' (2017) 15 Asia European Journal 377, 393; Evelyn Coremans and Katarina Meissner, 'Putting power into practice: Administrative and political capacity building in the European Parliament's Committee for International Trade' (2018) Public Administration 1, 13; David Kleimann, 'Negotiating in the Shadow of TTIP and TPP: The EU-Japan Free Trade Agreement' (June 2015) Policy Brief German Marshall Fund of the United States; Suzuki (n 102); Sébastien Jean, 'Japan-Europe, the unnoticed megadeal' (26 October 2017, CEPII le blog) <http://www.cepii.fr/blog/bi/post.asp?IDcommunique=570>.

[111] Eliasson and Huet (n 65) footnote 2.

[112] Kleimann (n 110).

[113] Interview with a civil society actor.

gained more attention when the possibility of an agreement with the US had vanished.[114] Only later did civil society groups start to adopt position papers, yet most of them date 2017, namely one year before the conclusion of the negotiations.[115] Compared to the mobilisation against TTIP and CETA, these remain rather low profile and late forms of engagement. The late mobilisation of civil society coincides with the first leak of the agreement in 2017[116] and the Commission's publication of its position papers in 2017,[117] which may lead to believe that scrutiny by civil society was not possible prior to this publication. The earliest report of the negotiations available on the Commission website only goes back to the 15th negotiating round, which took place in the spring of 2016.[118] Reports of earlier rounds have not been published.[119] In this respect, the EU-Japan negotiations represent a retrogress on transparency

[114] Michael Frenkel and Benedikt Walter, 'The EU-Japan Economic Partnership Agreement: Relevance, Content and Policy Implications' (2017) 52 Intereconomics 358, 361.

[115] Young (n 65) saying no papers by civil society by 2016; Suzuki (n 102) saying no position yet in 2017. See, for instance, GUE/NGL report, 'Making sense of JEFTA' (November 2017) <http://s2bnetwork.org/wp-content/uploads/2018/03/JEFTA_report_final_-.pdf>; Fern, 'The EU-Japan Free Trade Deal: a threat to the fight against illegal timber?' (Briefing Note, September 2018) <https://www.fern.org/fileadmin/uploads/fern/Documents/Fern-Japan-FTA-threat-illegal-timber-briefing.pdf>. One exception, ETUC has probably been among the first to mobilise, reach out to their Japanese counterparts, make a joint action in 2015 and adopt a joint statement in 2018. In the view of the EU-Japanese Summit, the Japanese Trade Union Confederation (JTUC-RENGO) sent a letter to the Japanese government to ask that the EPA includes commitments to ensure i.a. compliance with core labour standards. See Japanese Trade Union Confederation, 'RENGO and ETUC Release Joint Statement on EU-Japan FTA Negotiations' (29 February 2016) <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=370&dir=2016/02>; Japanese Trade Union Confederation, 'RENGO calls for job creation and better working conditions through Japan-EU EPA: RENGO & ETUC Joint Action' (29 May 2015) <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=362&dir=2015/05>; Japanese Trade Union Confederation, 'Letter of Request concerning the Japan-EU Summit' (27 May 2015) <http://www.jtuc-rengo.org/updates/pdf/20150529.pdf>; European Trade Union Confederation and Japanese Trade Union Confederation, 'ETUC - JTUC-RENGO Joint Statement on EU-Japan EPA negotiations' (9 July 2018) <https://www.etuc.org/sites/default/files/document/file/2018-07/Joint%20ETUC-RENGO%20Statement_0.pdf> (ETUC - JTUC-RENGO Joint Statement). In September 2018, a group of NGOs has asked the EP not to give consent to EUJEPA until more progress had been made on the trade and sustainable development chapter, also reminding them of the necessity of their vote for the conclusion of the agreement. See Eurogroup for Animals, 'NGO coalition asks the European Parliament to pause free trade agreement with Japan' (21 September 2018) <https://www.eurogroupforanimals.org/news/ngo-coalition-asks-european-parliament-pause-free-trade-agreement-japan>; Seattle To Brussels Network, 'European letter on the EU-Japan FTA to members of national parliaments' (22 May 2018) <http://s2bnetwork.org/european-letter-on-the-eu-japan-fta-to-members-of-national-parliaments/>.

[116] Greenpeace Netherlands, 'JEFTA Leaks' <https://trade-leaks.org/jefta-leaks/>.

[117] The Commission's publication of its position papers is quite late from a number of perspectives: not only because of the late stage of the negotiations, but also given the Commission's commitment to transparency in 2014; its adoption of transparency guidelines in 2015; and its publication, in January 2015, of the position papers of the parallel TTIP negotiations, precisely as part of its transparency initiative. See respectively, European Commission, 'Opening the windows: Commission commits to enhanced transparency' (25 November 2014) <https://europa.eu/rapid/press-release_IP-14-2131_en.htm>; European Commission, 'The EU-Japan agreement explained' <https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/agreement-explained/>; European Commission, 'European Commission publishes TTIP legal texts as part of transparency initiative' (7 January 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>.

[118] European Commission, 'Report of the 15th EU-Japan FTA/EPA negotiating round Brussels, 29 February - 4 March 2016' <https://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf>

[119] To the author's knowledge. See European Commission, 'EU-Japan Economic Partnership Agreement (EPA) - Meetings and documents' <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2042> and "more documents on Japan" <https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=127>.

when compared to TTIP, and resemble 'the trade policy *modus operandi* of the pre-Lisbon Treaty era.'[120]

The trade negotiations with Singapore and Japan did not witness forms of engagement through law, unlike the negotiations of TTIP or CETA. Such inconsistency in civil society mobilisation is held to have had repercussions on their contributions in matters of fundamental rights in the context of trade negotiations. As will be shown next, however, even when civil society groups asserted their role as actors of EU external trade, their substantive input has not always coincided with more contributions on fundamental rights, suggesting little deepening of actors of EU treaty-making. The next sections turn to the substantive proposals advanced by the EP and civil society actors in relation to labour rights (3.3) and data privacy rights (3.4).

3.3. Proposals on Labour Rights during the negotiations of EU FTAs

The new generation of EU FTAs provide a new setting to understand the relationship between labour rights and trade, in a context of 'deep' trade agreements, backlash to globalisation and developed countries as trade partners. In light of the discussion on what could be a 'deep' scope of fundamental rights in EU FTAs in Chapter 2, what follows examines how the EP and EU civil society have respectively contributed to this discussion.

3.3.1. The European Parliament's contribution to Labour Rights

This section explores the EP's substantive suggestions on labour rights across trade negotiations with Canada, the US, Singapore and Japan. The EP resolutions are useful to examine how the EP approached labour rights *qualitatively*. Table 3.8 is an attempt to taxonomise some of the recurrent issues related to labour rights raised by the EP across trade negotiations. Albeit under different configurations and formulations, the issues are the following: commitments to core labour standards; ratification and/or implementation of the (non-)Fundamental ILO conventions; inclusion of a trade and sustainable development (TSD) chapter, where labour rights are typically included; establishment of mechanisms to monitor the implementation of and/or compliance with TSD chapters; and calls to carry out (*ex ante*) sustainability impact assessments (SIA) evaluating the impact of FTAs on socio-economic issues.[121]

[120] Kleimann (n 110).

[121] These issues have additionally been raised by the EP, see European Parliament Resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (2009/2219(INI)) [2010] OJ C99E/31 (EP Resolution on human rights). Since no specific resolutions are available on Singapore, the ones on ASEAN are used as a reference point here.

	Core labour standards	Fund. ILO conventions	Non-fund. ILO conventions	Other instruments/ CSR	TSD chapter	Monitoring implementation of TSD chapter	SIA
Singapore	✓	✓	✗	✗	✗	✗	✗
Canada	✓	✗	✗	✓	✓	✗	✓
US (TTIP)	✓	✓	✓	✓	✓	✓	✓
Japan	✓	✓	✗	✗	✓	✓	✓
US (latest)	✗	✗	✗	✓	✗	✗	✗

Table 3.8 – Selected issues relating to labour rights raised by the EP in its resolutions per trade negotiations.

An exploration of the EP's contribution to labour rights across trade negotiations reveals that a lowest common denominator can be found in the advocacy for the inclusion of core labour standards and the fundamental ILO Conventions providing these standards.[122] This is the case of the EP resolutions for the trade relations with ASEAN: the references to child labour appear to reveal specific concerns related to developing countries; beyond these references, the resolutions do not add significantly to the traditional formulations of labour rights in trade agreements, i.e. calls for binding clauses on core labour standards, and the ratification and/or implementation of the core ILO Conventions.[123] The analysis suggests that, beyond this bottom line, it is difficult to depict a clear, coherent picture of what the EP considers to be fundamental in relation to labour rights in an FTA with other developed countries. Its demands vary greatly across trade partners. What emerges is an inconsistent mix of different issues, suggesting that, from a range of issues, only a combination thereof could make it to the final resolution.[124]

A limited degree of overlap can be found in the EP's recommendations on the negotiations for CETA and EUJEPA, far less ambitious than those on TTIP. With Canada, the EP urged an 'ambitious approach to sustainable development', yet did not elaborate on the contours of such ambition. Its demands were circumscribed to legally binding social standards, with a specific focus on workers'

[122] With the exception of the latest EU-US trade talks, for which the EP has adopted no specific resolution. For the other EP Resolutions, see EP Resolution on EU-Canada Relations (n 13); EP Resolution on TTIP (n 16); EP Resolution on trade and economic relations with ASEAN (n 10); EP Resolution on EU-ASEAN relations (n 10); EP Resolution on EU trade negotiations with Japan, October 2012 (n 18).
[123] EP Resolution on trade and economic relations with ASEAN (n 10); EP Resolution on EU-ASEAN relations (n 10).
[124] For an example that could provide a useful reference point outlining some of the broader issues the EP would like to see included in EU FTAs, see EP Resolution on human rights (n 121).

health in mining asbestos,[125] and the promotion of corporate social responsibility.[126] Also with Japan, the EP asked the Council to include a 'robust and ambitious' TSD chapter in the mandate.[127] Besides labour rights standards, the EP called on the Commission to carry out impact assessments: for CETA, it referred to a sustainability impact assessment, which should have assessed i.a. socioeconomic consequences;[128] for EUJEPA, by contrast, the EP omitted to specifically mention the *sustainability* impact assessment, but it did call for an evaluation of the impact on EU jobs and growth.[129] Finally, only for CETA the EP referred to 'workers' rights' as one of the subject matter where the right to regulate should have applied.[130] This reference to workers' rights can be understood as a legacy of the contestation of TTIP, during which this issue was addressed. Finally, during the EU-Japan negotiations, the EP called for the establishment of a civil society forum to monitor the implementation of the TSD chapter.[131] Despite some common ground, no consistent or clear picture emerges from these demands, which, overall, are arguably modest.

Against this backdrop, questions arise as to the EP's contribution, or added value, regarding labour rights in trade agreements. For instance, when considering the case of Japan, the negotiating directives eventually incorporated the EP's demands.[132] However, these elements are quite common to the negotiating directives, and the reference to Corporate Social Responsibility (CSR) commitments in the mandate – not addressed by the EP in its resolution – raises questions as to the merits of the EP on these matters. Furthermore, the EP's demands in these cases say little about the relationship of labour rights and trade in a context of (backlash to) globalisation and deep trade agreements. The EP's limited demands during the negotiations with Singapore, Canada and Japan can be better appreciated when compared to the EP's resolutions for TTIP.

TTIP is the only case where the EP provided an extensive number of recommendations on labour rights which went significantly beyond the formulations in the other resolutions. As for other trade negotiations, the EP demanded the inclusion of a TSD chapter with the eight fundamental ILO conventions as well as rules on CSR, but added the ILO's Decent Work Agenda and the OECD Guidelines for Multinational Enterprises and human rights.[133] The EP also recommended that labour provisions be enforceable and subject to the dispute settlement mechanism applying to the whole

[125] EP Resolution on EU-Canada Relations (n 13) recommendation 6.
[126] Ibid recommendation 8.
[127] EP Resolution on EU trade negotiations with Japan, October 2012 (n 18) recommendation 14. In this demand, the EP went slightly beyond a mere reference to core labour standards, by also implicating the Priority ILO Conventions for industrialised countries.
[128] EP Resolution on EU-Canada Relations (n 13) recommendation 9.
[129] Ibid point 17.
[130] Ibid recommendation 12.
[131] EP Resolution on EU trade negotiations with Japan, October 2012 (n 18) point 14.
[132] See Council of the European Union, 'Directives for the negotiation of a Free Trade Agreement with Japan' (29 November 2012, declassified on 14 September 2017).
[133] EP Resolution on TTIP (n 16).

agreement; and that their implementation and compliance be under the scrutiny of monitoring mechanisms that involve social partners and civil society representatives.[134] It also demanded that TTIP guaranteed 'full respect for fundamental rights standards' by means of a 'legally binding and suspensive human rights clause' to be included in the trade agreement.[135] Regarding impact assessments, the EP stressed the importance of conducting an ex-ante SIA assessing TTIP's 'economic, employment, social, and environmental impact', and involving 'all relevant stakeholders, including civil society' in a structured and clear manner.[136] For TTIP, not only were the EP's recommendations extensive, they also reflected a more thorough conceptualisation and understanding of the interaction between labour rights and trade. Above all, they took into account the developed status of the trade partner and the deep nature of the FTA.

The most significant contribution in this regard is the EP's recommendation on ensuring that labour standards are not limited to the TSD chapter, but 'are equally included in other areas of the agreement, such as investment, trade in services, regulatory cooperation and public procurement'.[137] On regulatory cooperation, the EP also demanded 'the highest levels of protection of health and safety' be secured, in line with the precautionary principle laid down in Article 191 TFEU and labour legislation.[138] The EP's approach resonates with the argument of Chapter 2 of this thesis which sees TSD chapters having the effect of compartmentalising labour rights, while neglecting their relevance to other subjects of deep trade agreements. This understanding is also reflected in the EP's call for conducting specific 'comparative in-depth impact studies' for each MS, projecting the job losses and gains in affected sectors; and making EU and MSs' funding take up the adjustment costs. This reflects an acknowledgment of the potential differential impact of a deep FTA across different sectors, and also places the FTA amid discussions on adjustment measures in a context of (backlash to) globalisation. Importantly, the EP advocated for ensuring access to information and consultation to employees of transatlantic companies, by specifically referring to the European Works Council Directive.[139] This recommendation reveals an appreciation of the 'transnational' element of the operation of many companies, which increasingly challenges the effectiveness of national labour laws.

The EP's recognition of the importance of these issues did not emerge in the resolutions on CETA, EUSFTA or EUJEPA, nor in the context of the latest EU-US talks. In the latter case, the EP adopted only one resolution, on the EU-US relations, not specifically on EU-US *trade* talks. A significant recommendation here was for the EU and the US to 'reinforce cooperation and efforts to implement and expand due diligence schemes for enterprises in order to reinforce the protection of

[134] EP Resolution on TTIP (n 16) recommendation (iv).
[135] Contrast with practice of including these clauses in the parallel political agreements, see Chapter 2.
[136] EP Resolution on TTIP (n 16).
[137] Ibid (iii).
[138] Ibid (c)(i)
[139] Ibid (v).

human rights internationally, including in the area of trade in minerals and metals from conflict-affected areas'.[140] Due diligence could be an area where the EU and the US could cooperate, particularly with respect to labour rights – which however are not mentioned in the resolution. The labour component was also absent in the early EP resolutions on TTIP and became prominent at a later stage, when negotiations had politicised and come under public scrutiny.[141] Once again, it appears that rather than the trade partner, the relevant variable triggering EP mobilisation is the politicisation of the trade negotiations: however, it did not occur during the negotiations of EUSFTA and EUJEPA, and it occurred too late for CETA, when the EP could no longer meaningfully influence the content of negotiations.

3.3.2. EU Civil Society's contribution to Labour Rights

The sharp contrast between civil society mobilisation across regional lines is also reflected in the substantive contributions on labour rights. Most demands by civil society regard TTIP and CETA, which are furthermore often considered together.[142] By contrast, very little, if nothing, can be found for EUSFTA and EUJEPA, which yet could have raised the same issues contested in TTIP and CETA.[143] For the trade agreements with the US and Canada, every and each civil society group expressed their views, whether via position papers, reports, articles and similar.[144] However, an analysis of these documents reveals little engagement with labour rights and their relationship to trade: demands have rather stopped at calls for the imposition of sanctions in cases of labour rights violations.

In a spectrum of substantive contributions provided, the least relevant contributions for the interest of this chapter can be attributed to actors that have *rejected* the trade agreements altogether, without providing suggestions on how to make improvements.[145] Most of the campaign movements, as well as main grassroots and non-profit organisations, largely opposed TTIP and CETA in their entirety.[146] This is also the case of EUJEPA and EUSIPA, which were criticised when the negotiations

[140] European Parliament resolution of 12 September 2018 on the state of EU-US relations (2017/2271(INI)) [2018] OJ C433/89, recommendation 91.

[141] Compare EP Resolution on TTIP (n 16) with EP Resolution on EU-US relations (n 15), EP Resolution on the state of transatlantic relations (n 15), EP Resolution on the EU-US Summit (n 15), EP Resolution on EU negotiations with the US (n 16), EP Resolution on promoting a broader Transatlantic Partnership (n 16).

[142] See Corporate Europe Observatory, 'Public services under attack through TTIP and CETA' (12 October 2015) <https://corporateeurope.org/en/international-trade/2015/10/public-services-under-attack-through-ttip-and-ceta>; ETUC, 'European Trade Union calls for a fundamental rethink of Canadian and US trade deals' (17 November 2014) <https://www.etuc.org/en/pressrelease/european-trade-union-calls-fundamental-rethink-canadian-and-us-trade-deals>.

[143] One exception is ETUC on EUSIPA. See ETUC (n 104).

[144] For a (non-exhaustive) list of organisations and groups having engaged, see Heinrich Böll Stiftung, <https://eu.boell.org/en/TTIP-Index>.

[145] See ETUC, 'Civil society groups call on European governments to reject the CETA agreement' (22 September 2016) <https://www.etuc.org/en/pressrelease/civil-society-groups-call-european-governments-reject-ceta-agreement>.

[146] For instance, StopTTIP and CETA initiative, now StopISDS campaign, see StopISDS, 'Our campaign: the five things you need to know' (13 March 2019) <https://stopisds.org/our-campaign-the-five-things-you-need-to-know/>; Corporate Observatory Europe, 'Dangerous Regulatory Duet' <https://corporateeurope.org/sites/default/files/attachments/regulatoryduet_en021.pdf>; Seattle to Brussels Network, 'TTIP –

had already been concluded, albeit to a much lesser extent if compared to the opposition to TTIP and CETA. Overall, when specific issues for opposition were targeted, these did not concern labour rights specifically, and were possibly only indirectly related to them.

Moving along the spectrum, one can distinguish cases where, even though labour rights were not the reason for civil society's rejection of the FTA, concerns in their respect still came through *indirectly*. The two major issues that were targeted, especially during the TTIP and CETA negotiations, include regulatory cooperation and Investor-State Dispute Settlement (ISDS). Regulatory cooperation aroused fears that liberalisation pursued via FTAs would sustain a deregulatory agenda, with a negative impact on issues such as consumer protection, the provision of public services, health and food safety standards, and overall democracy and the right to regulate to pursue public policy objectives.[147] The next chapter addresses these concerns and examines more in depth the potential implications of regulatory cooperation commitments for the protection of fundamental rights. Arguments similar to ones for regulatory cooperation have been voiced against ISDS. The concern was that ISDS would undermine MSs' right to introduce legislation on matters of public policy,[148] and would give a privileged status to investors, without granting the same right to states to sue investors for violating human rights or for other types of violations.[149]

Building on this, another scenario is where civil society actors *did* warn against potential harming effects of TTIP and CETA on labour rights *specifically*, but missed the opportunity to provide their views on how to counter such effects.[150] The 'Stop TTIP' initiative exemplifies this: while condemning the weakening of i.a. 'rules on employment protection, social protection, environmental protection, protection of private life and of consumers', it demanded to cancel the TTIP negotiating mandate.[151] Some civil society actors focused on the impact of ISDS specifically on labour rights and health and safety at work;[152] some also warned that ISDS would open a door for foreign investors to

Why the Rest of the World should Beware' (31 March 2016) <http://s2bnetwork.org/tag/ttip/>; Friends of the Earth Europe, 'TTIP' <https://www.foeeurope.org/search/foee/ttip>.

[147] See Corporate Europe Observatoy, 'CETA: Trading away democracy' (19 November 2014) <https://corporateeurope.org/en/international-trade/2014/11/ceta-trading-away-democracy>; Trade Justice Movement, 'Transatlantic Trade and Investment Partnership (TTIP)' <https://www.tjm.org.uk/trade-deals/transatlantic-trade-and-investment-partnership>; Eliasson and Huet (n 65) footnote 8.

[148] European Public Health Alliance, 'EU-Canada 'CETA' trade deal blazes a trail for TTIP' (13 October 2016) <https://epha.org/eu-canada-ceta-trade-deal-blazes-a-trail-for-ttip/>.

[149] Seattle to Brussels Network, 'Trade activist action guide – Europe' (18 March 2016) <http://s2bnetwork.org/action-guide-europe/>; European Public Health Alliance, 'Paralysis by Analysis: Public Health concerns on Regulatory cooperation in TTIP' (21 March 2016) <https://epha.org/press-release-paralysis-by-analysis-public-health-concerns-on-regulatory-cooperation-in-ttip/>.

[150] Transnational Institute, 'TTIP' <https://www.tni.org/en/collection/ttip>; War on want, 'TTIP' <https://waronwant.org/ttip>; Rosa Luxembourg Stiftung, 'The Transatlantic Trade and Investment Partnership' (February 2014) <https://rosalux.gr/sites/default/files/publications/ttip_web.pdf>; Attac Network, 'What is TTIP' <https://www.attac.org/en/Stories/what-ttip>.

[151] Case T‑754/14 *Michael Efler and Others v European Commission* ECLI:EU:T:2017:323.

[152] See Policy Economic Institute, 'Labor Rights, Manufacturing, and the Transatlantic Trade and Investment Partnership' (3 September 2013) <https://www.epi.org/publication/labor-rights-manufacturing-transatlantic/>; European Trade Union

challenge collective agreements, hence undermining meaningful collective bargaining.[153] Others criticised deregulatory and/or regulatory-chill pressures on labour-related issues, including i.a. labour and social standards, affecting working conditions, health and safety at work, decent remuneration, collective labour agreements and trade unions rights.[154] What follows, though, is that this criticism was not accompanied by suggestions on how to address labour rights in trade agreements.[155]

When specific contributions in relation to labour rights were made, demands revolved around effective enforcement mechanisms for labour rights provisions and the possibility to impose sanctions for violations thereof.[156] Arguably, this is a demand that largely sees trade agreements as instruments to bring about change in a trade partner that violates labour rights, instead of ensuring that the trade agreement itself does not compromise the rights of workers in the third country as much as within the EU. A recurrent argument was also that ISDS would provide a strong dispute resolution mechanism for investors' protection, as opposed to the non-bindingness of the TSD chapters containing the provisions on labour rights.[157] Some civil society actors framed the argument in terms of investors and transnational companies being granted only *rights*, and no *obligations* to respect labour rights.[158] Others also observed how the non-lowering clauses do not include commitments to *improve* wages and labour standards.[159]

The most comprehensive and specific contributions in respect of labour rights on the CETA and TTIP negotiations came from the European Trade Union Confederation (ETUC), the main social partner for workers' representation at the European level.[160] The contributions by ETUC were primarily developed for CETA and TTIP, with very little for Singapore and Japan. For both CETA and TTIP, just

Institute, 'TTIP: fast track to deregulation and lower health and safety protection for EU workers' <https://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/TTIP-fast-track-to-deregulation-and-lower-health-and-safety-protection-for-EU-workers>.

[153] See Trade Union Congress, 'TTIP, social rights and labour standards - speech by Steve Turner, TUC spokesperson on Europe' (16 December 2015) <https://www.tuc.org.uk/speeches/ttip-social-rights-and-labour-standards-speech-steve-turner-tuc-spokesperson-europe>.

[154] Interview with EESC representative.

[155] See Seattle to Brussels Network (n 49) collecting all the arguments that a campaigner against TTIP and CETA could employ.

[156] Trade Justice Movement (n 147); Trade Union Congress (n 153); Trade Union Congress, 'TUC briefing on EU-Canada free trade agreement (CETA)' (18 August 2015) <https://www.tuc.org.uk/research-analysis/reports/tuc-briefing-eu-canda-free-trade-agreement-ceta>.

[157] See Seattle to Brussels Network 'Making sense of CETA' <http://s2bnetwork.org/wp-content/uploads/2018/11/Making-sense-of-CETA-2018.pdf>; Transnational Institute, 'Trading Away Democracy' <https://www.tni.org/files/download/ceta-isds-en_0.pdf>.

[158] The argument is that ISDS cannot be used to hold investors accountable for labour rights violations and domestic institutions do not provide effective remedy, see Corporate Europe Observatory, 'The zombie ISDS' (17 February 2016) <https://corporateeurope.org/en/international-trade/2016/02/zombie-isds>; Trade Justice Movement, 'TTIPing Away the Ladder' <https://www.tjm.org.uk/documents/reports/TTIPing_Away_the_Ladder.pdf>.

[159] Trade Justice Movement (n 147).

[160] It comprises of national trade union confederations as well as ten European trade union federations, among which the European Federation of Public Service Unions (EPSU), in turn representing public service workers across Europe. While having strongly opposed the Global Europe strategy underpinning the new generation EU trade agreements for its aggressive liberalisation agenda, ETUC appears to be willing to steer the negotiations, rather than halting them. Their work during the negotiations involved i.a. a close engagement with their counterparts in Canada, the US and Japan. No record could be found about correspondence or joint initiatives with the Singapore National Trades Union Congress (NTUC).

as other civil society actors, the core demand of ETUC has been to have enforceable mechanisms and sanctions for labour rights violations.[161] Moreover, the majority of the demands that concerned standards were advanced during the negotiations of TTIP. The latter was seen as a possibility to go beyond the 'lowest common denominator approach' and to create 'truly people-centred trade rules'.[162] ETUC called for commitments to ratify and implement specific ILO conventions, i.a. on occupational safety and health, on employment policy, on labour inspection, on tripartite consultation and on the Decent Work Agenda;[163] standards which should have worked as starting points for regular improvements[164] and possibly be made essential elements of the agreement.[165] Only recently ETUC suggested that ratification of core labour conventions be achieved in the course of trade negotiations.[166]

Besides standards, a joint ETUC/ITUC statement called for ongoing SIAs that would consider the social impact of the agreements and the role of social partners in the monitoring phase.[167] For CETA, ETUC provided proposals for the creation of institutional bodies – an Independent Labour Secretariat and a Wages and Standards Working Group – which would have i.a. assessed the impact of CETA on wages, benefits, labour rights and decent work.[168] As we will see in Chapter 5, such bodies were eventually not created. For TTIP, ETUC suggested to give the possibility to civil society actors to bring complaints to an equivalent dispute settlement mechanism as the one provided in the investment chapters.[169] Importantly, elaborate demands by ETUC reflect a sophisticated understanding of the nexus between labour rights and trade agreements. Specific proposals for TTIP and CETA reveal an awareness of the cross-relevance of labour rights to different issues of the deep FTAs, such as services

[161] See ETUC, 'ETUC – CLC joint statement on the Sustainable Development Chapter in CETA' (10 September 2018) <https://www.etuc.org/en/document/etuc-clc-joint-statement-sustainable-development-chapter-ceta-10-september-2018>; ETUC, 'Trade & labour rights: toothless deals need teeth!' (17 December 2012) <https://www.etuc.org/en/pressrelease/trade-labour-rights-toothless-deals-need-teeth>; ETUC, 'ETUC assessment on Commission's non paper on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements' (5 March 2018) <https://www.etuc.org/en/document/etuc-assessment-commissions-non-paper-trade-and-sustainable-development-tsd-chapters-eu> (ETUC non paper on TSD).

[162] In the deliberation for each and every rule, the parties should ask themselves: How will this decision create jobs, promote decent work, enhance social protection, protect public health, raise wages, improve living standards, ensure good environmental stewardship and enshrine sustainable, inclusive growth? If negotiators are not pursuing these goals, the negotiations should be suspended. ETUC, 'Declaration of Joint Principles ETUC/AFL-CIO' (10 July 2014) <https://www.etuc.org/en/document/declaration-joint-principles-etucafl-cio-ttip-must-work-peopleor-it-wont-work-all> (ETUC/AFL-CIO Declaration)

[163] ETUC, 'ETUC position on the Transatlantic Trade and Investment Partnership' (25 April 2013) <https://www.etuc.org/en/document/etuc-position-transatlantic-trade-and-investment-partnership> (ETUC position on TTIP).

[164] ETUC/AFL-CIO Declaration (n 162).

[165] ETUC position on TTIP (n 163).

[166] ETUC non paper on TSD (n 161)

[167] International Trade Union Confederation, 'ETUC/ ITUC Statement Of Trade Union Demands Relating To Key Social Elements Of "Sustainable Development" Chapters In European Union Negotiations On Free Trade Agreements' <https://www.ituc-csi.org/IMG/pdf/TLE_EN.pdf>.

[168] See ETUC, 'Non-paper on introducing an Independent Labour Secretariat to CETA' <https://www.etuc.org/en/non-paper-introducing-independent-labour-secretariat-ceta>.

[169] ETUC position on TTIP (n 163).

liberalisation and public procurement: as described in Chapter 2, these may have an impact on labour.[170] ETUC also demanded that labour issues be 'mainstreamed throughout the agreement' and not circumscribed to the TSD chapter.[171] Further proposals reveal an acknowledgement of the transnational dimension of transatlantic companies. EUTC called for the adoption of 'transatlantic mechanisms' to ensure that workers of transnational corporations are informed, consulted and given health and safety guarantees; and to include commitments to provide temporary workers with equal treatment on i.a. pay, overtime, breaks, rest periods and holidays.[172] However, these proposals were not replicated during the negotiations with Singapore, and only to a lesser extent with Japan.[173]

While different civil society groups' demands have reflected different types of citizens' concerns, most of the contributions that specifically advocated for labour rights only came from ETUC. This seems to be the case not only for the negotiations of TTIP and CETA, where many civil society groups were vocal; but also for the trade negotiations with Japan, where most civil society groups either were absent or mobilised later; and for the Investment Protection Agreement with Singapore, albeit not the Free Trade Agreement or its negotiations, which raised no mobilisation whatsoever.[174] Specific demands in respect of labour rights came from trade unions, via the advocacy of ETUC. For some other civil society groups, the protection of labour rights is usually part of a broader advocacy framework that pursues aims of social justice and democracy, which could be understood as a deepening of actors for fundamental rights in a more general sense, not specifically for labour rights.

[170] On CETA and services, ETUC demands that new services are not subject to 'liberalisation by default' as a result of the so-called negative list of services which are excluded from liberalisation. The trade unions state that 'no sensible government can reasonably make such a commitment' and 'categorically exclude public services from liberalisation'. On public procurement, ETUC demands to 'delete "unconditional" access of foreign firms to public procurement contracts. While open to foreign firms bidding for contracts, the trade unions argue that 'local governments should have the ability to attach social and environmental conditions to their public tenders'. See ETUC, 'European and Canadian trade unions agree: "CETA needs more work"' (4 May 2016) <https://www.etuc.org/en/pressrelease/european-and-canadian-trade-unions-agree-ceta-needs-more-work>; On TTIP and services, trade unions demand 'an exclusion of public services from the negotiations'. On public procurement, trade unions warn that 'the ambition to create a transatlantic public procurement market could undermine fundamental pillars of societies, benefiting global corporations that disregard workers' rights and quality service provision at the expense of local service providers who are rooted in, and responsive to, local communities'. See ETUC/AFL-CIO Declaration (n 162).

[171] ETUC, 'Discussion points by Tom Jenkins' (Chief adviser at ETUC) (2 December 2014) <https://www.etuc.org/en/speech/discussion-points-empl-inta-hearing-employment-and-social-aspects-ttip>. Something which has also been found and discussed in the EP Resolution on TTIP.

[172] ETUC/AFL-CIO Declaration (n 162).

[173] In the latter case, demands have been limited to calls for enforceable labour rights provisions and ratification of ILO Conventions, in particular those not yet ratified by Japan. See ETUC - JTUC-RENGO Joint Statement (n 115); ETUC, 'Japanese and European trade unions unite on trade talks' (1 June 2015) <https://www.etuc.org/en/pressrelease/japanese-and-european-trade-unions-unite-trade-talks>.

[174] See ETUC (n 143).

3.4. Proposals on Data Privacy Rights during the negotiations of EU FTAs

The EU bears a significant weight in the global regulation of data flows and the emerging standards when it comes to trade relations.[175] Chapter 2 tells us that States have a better grasp of the relevance of data privacy rights in the context of trade and the areas that are implicated, such as e-commerce, telecommunications and financial services. Yet Chapter 2 has also highlighted a series of limitations and legal deficiencies. The following sections examine how the EP and civil society respectively have contributed to the discussion on data privacy rights in the latest EU trade negotiations.

3.4.1. The European Parliament's contribution to Data Privacy Rights

When examining the substantive suggestions in the negotiations with Canada, the US, Singapore and Japan, it appears that the EP was a vocal advocate for data privacy rights during the TTIP negotiations, yet less so during the other trade negotiations under scrutiny. In the case of data privacy rights, the EP's inconsistency in engagement can hardly be explained along regional lines, namely North American versus Asian trade partners. Rather, a better explanation for the EP's engagement can be found in the gradual recognition of the salience of data privacy in the context of international trade. At the same time, it is impossible to deny that the EP has a longer history of negotiations with US and Canada when it comes to data protection and can be expected to be better acquainted with the data privacy regime there. However, even when it comes to Asian trade partners, there is inconsistency: for instance, the Committee on Civil Liberties, Justice and Home Affairs (LIBE), responsible for data protection legislation, was silent during the trade negotiations with Singapore, yet it engaged quite notably in the negotiations for an adequacy decision with Japan. For sure, in the trade negotiations with Singapore and Canada – both preceding the negotiations with the US and Japan –, the EP hardly raised any concern relating to data privacy in trade. Unlike the case of labour rights, the overall limited substantive contribution on data privacy rights does not allow to create a taxonomy of specific issues raised in relation to data privacy rights. Table 3.9 below thus summarises whether the EP's resolutions touched upon data privacy rights at all.

[175] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

	Data priacy rights
Singapore	✗
Canada	✗
US (TTIP)	✓
Japan	~
US (latest)	✗

Table 3.9 – Presence of data privacy rights issues in the EP's resolutions per trade negotiations.[176]

Starting from the least contributions, the EP provided no views on data privacy for the EU-Singapore trade negotiations. It would be misleading, however, to conclude that data privacy rights were totally overlooked. During the deliberations for the resolution giving consent to the EUSFTA, individual MEPs *did* raise concerns over data privacy rights and suggested amendments accordingly.[177] However, none of the two amendments suggested made it to the final resolution: the first would have pointed out the 'light-touch' data privacy regime of Singapore;[178] and the second the insufficiency of data privacy safeguards in the commitments on data flows under the chapter on services and e-commerce.[179] The latter amendment would have qualified those commitments as 'incompatible with the EU data protection regime'.[180] The amendment also denounced the notion of e-commerce under the FTA – 'fully compatible with international standards of data protection' – as not sufficient to protect European data protection standards.[181] Finally, it demanded that the entry into force of the e-commerce chapter be put on hold until the achievement of an agreement on data protection 'which raises Singapore standards to the level of EU standards and fully upholds the EU standards'.[182] The final resolution however made no mention of data privacy rights at all.

Also for CETA the EP missed to provide substantive contributions on data privacy rights. Although the EU's adequacy decision for Canada could explain this omission, in fact, it dates to

[176] Compilation by the author based on the EP's Resolutions (n 10-19).
[177] European Parliament, 'Amendments 1-116' (INTA_AM(2018)630464) on Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore (2018/0093M(NLE)) (13 November 2018) <https://www.europarl.europa.eu/doceo/document/INTA-AM-630464_EN.html?redirect>.
[178] Ibid amendment 19
[179] Ibid amendment 77.
[180] Ibid.
[181] Ibid.
[182] Ibid.

2002,[183] and has already raised concerns among scholars as to its obsolescence vis-a-vis the GDPR.[184] More importantly, in light of Canada's participation in the "five-eyes" alliance, in 2013 the EP issued a report where it called for a review of the adequacy of the Canadian data privacy regime.[185] At the time, some commentators warned that the lack of EP's trust in Canadian privacy laws could have resulted in the EP refusing to give its consent to CETA, hence halting the trade negotiations altogether.[186] Retrospectively, it has been argued that had the EU been concerned about Canadian privacy law, it would have addressed it during the negotiations of CETA.[187] It is striking how the EP did not address the issue at all: the resolutions produced during the CETA negotiations, including the one giving consent, do not touch upon data privacy rights; nor are there Opinions by the LIBE Committee. The only exception relates to the reference to the PNR Agreement with Canada, which arguably does not pertain to the realm of trade strictly speaking.[188] It was in the context of the EU-Canada negotiations for the PNR Agreement that the EP, and specifically the LIBE Committee, were most active.[189] Although the EU-Canada PNR negotiations coincided with the CETA negotiations, the data privacy concerns thereof appear to not have spilled over the trade talks.

Moving along the spectrum, in the negotiations with Japan, the EP asserted itself as a guardian of data privacy rights in trade, albeit less than in the preceding TTIP negotiations. The EP did not do so during the negotiations per se, but during the negotiations for the adequacy decision. EUJEPA is indeed a special case insofar as Japanese negotiators insisted on facilitating data transfers; yet having Japan no adequacy decision in place at the time, the trade negotiations had the effect of triggering the initiation of parallel negotiations on an adequacy decision. It is at this stage that the LIBE Committee mobilised. It took up a monitoring and scrutinising role by setting up an ad-hoc delegation to Japan to get acquainted with Japan's legal framework.[190] Following the Commission draft decision on adequacy,

[183] 2002/2/EC: Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act [2002] OJ L2/13.

[184] Teresa Scassa, 'Enforcement powers key to PIPEDA reform' *Policy Options* (7 June 2018) <https://policyoptions.irpp.org/magazines/june-2018/enforcement-powers-key-pipeda-reform/>.

[185] European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)) [2014] OJ C378/104 (EP Resolution on US surveillance) recommendation 45.

[186] Michael Geist, 'European Report Says Canadian Privacy Law Should Be Re-Examined Due to Surveillance Activities' (9 January 2014) <https://www.michaelgeist.ca/2014/01/ep-surveillance-on-pipeda/>.

[187] Ryan Chiavetta, 'Could Canada lose its adequacy standing?' *IAPP* (27 June 2017) <https://iapp.org/news/a/could-canada-lose-its-adequacy-standing/>.

[188] The only exception to the EP's passivity in the case of Canada is the reference to its concerns on the EU-Canada PNR agreement will have to be duly and jointly addressed before the consent can be given in EP Resolution on EU-Canada Summit (n 12).

[189] The LIBE Committee notably submitted the PNR Agreement to the ECJ for an Opinion on its compatibility with the Treaties and the Charter. European Parliament, 'Request for an Opinion pursuant to Article 218(11) TFEU' (30 January 2015). See Case Opinion 1/15 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2017:592 [2017] Opinion of the Court (Grand Chamber).

[190] See European Parliament resolution of 13 December 2018 on the adequacy of the protection of personal data afforded by Japan (2018/2979(RSP)).

and on the basis of the findings of the ad-hoc delegation, the EP adopted a resolution where it expressed a series of concerns regarding the Japanese legal framework for data protection, and committed to continue its monitoring work.[191] The debate preceding the adoption of the final resolution on EUJEPA also encompassed discussions on Japan's protection of personal data.[192] The EP's advocacy for data privacy rights in the context of EUJEPA can be understood as an instance of deepening actors of EU external trade, albeit probably only a limited one: the EP did not contribute to discussions on data privacy rights during the trade negotiations; rather, it did so *from afar*, by engaging as an actor supporting data privacy rights in the parallel data adequacy negotiations.

Finally, the TTIP negotiations are the case where the EP elaborated the most on data privacy rights in trade. In a significant resolution on the TTIP negotiations, the EP stated that the EU 'will not sacrifice' data privacy standards, which are 'non-negotiable'.[193] It recognised that data flows are a backbone of transatlantic trade and the digital economy, but also stressed that liberalisation of data flows, especially in e-commerce and financial services, could compromise the EU's acquis on data privacy.[194] The EP thereby acknowledged the importance of data flows in transatlantic trade and the need to simultaneously preserve the EU's acquis on data privacy. The resolution advanced a concrete proposal, namely the inclusion of a 'comprehensive and unambiguous horizontal self-standing provision', based on Art.XIV GATS, that would exempt the EU legal framework on data privacy rights from the agreement 'without any condition that it must be consistent with other parts of the TTIP'.[195] The EP also expressly made its final consent dependent upon the achievement of a satisfactory solution for the protection of EU citizens' personal data, and on the respect of fundamental rights as per the EU Charter.[196]

The EP's recommendations largely build on two previous resolutions on EU-US trade relations, where similar demands were expressed on ensuring the protection of personal data;[197] but mostly, they reflect the suggestions made by the LIBE Committee.[198] The Opinion of the LIBE Committee on the TTIP negotiations provided a series of specific suggestions on data privacy in trade, *i.a.*: the inclusion of a legally binding suspensive human rights clause; the aforementioned horizontal clause exempting data privacy from the agreement; ensuring compliance with EU data privacy laws in the third country

[191] Ibid.
[192] See European Parliament 'Minutes' on Adequacy of the protection of personal data afforded by Japan (11 December 2018) <http://www.europarl.europa.eu/doceo/document/CRE-8-2018-12-11-ITM-014_EN.html>.
[193] EP Resolution on TTIP (n 16) point N.
[194] EP Resolution on TTIP (n 16) point (xii).
[195] Ibid point (xii).
[196] Ibid point (xiii).
[197] The resolutions were adopted respectively in March 2013 and June 2013. See EP Resolution on US surveillance (n 185) point 74; and EP Resolution on promoting a broader Transatlantic Partnership (n 16) point 8.
[198] Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) [2015].

before personal data are transferred outside the Union; negotiating provisions touching upon the flow of personal data 'only if the full application of EU data protection rules is guaranteed and respected'; and rejecting the US's proposal for e-commerce chapter as a basis for negotiations. The EP Resolution was also preceded, and drew from, the discussions at the INTA-LIBE joint hearing later in June,[199] with contributions by a number of actors, among which the European Data Protection Supervisor.[200]

The case of TTIP suggests that trade negotiations triggered a process of unprecedented recognition of the importance of data privacy in the context of trade, while also prompting the opinion and mobilisation of committees other than INTA. The negotiations witnessed an engagement of actors typically concerned about privacy rights, yet outside the realm of trade.[201] For the purpose of this thesis, it is remarkable that data privacy rights were discussed in resolutions about trade negotiations, and not in resolutions specifically about data privacy: they evidence an acknowledgment of the relevance of data flows and privacy rights to trade, despite most of the arrangements taking place outside the trade negotiations.[202] Even when not mobilising for data privacy *in trade* specifically, the EP's parallel work in matters of personal data protection – via a number of activities and resolutions[203] – elevates the EP's legitimacy. In this case, the EP showed to be an advocate for privacy rights, able to grasp their relevance to trade agreements, and to eventually stand up for their protection.[204] While this could be an instance of deepening of actors, these conclusions appear to stop at the TTIP negotiations. The EP's language on the proposal for TTIP has been repeated in the resolution on the negotiations for the Trade in Services Agreement (TiSA) in 2016,[205] yet not in the resolutions on bilateral trade negotiations with Canada, Singapore or Japan.

The EP did not do so either in the context of the latest EU-US trade talks. The sole resolution adopted by the EP, on the state of EU-US relations,[206] expressed a few concerns as to the data privacy

[199] European Parliament, 'Trade agreements: how to ensure they comply with EU data protection rules' (18 June 2015) <https://www.europarl.europa.eu/news/en/headlines/society/20150617STO67427/trade-agreements-how-to-ensure-they-comply-with-eu-data-protection-rules>.

[200] Giovanni Buttarelli (former European Data Protection Supervisor), 'Trade agreements and data flows' (Joint hearing of the INTA and LIBE committees, European Parliament, 16 June 2015) <https://www.europarl.europa.eu/cmsdata/84472/Mr%20Giovanni%20Buttarelli.pdf>.

[201] Giovanni Buttarelli, 'Less is sometimes more' (18 December 2017) <https://edps.europa.eu/press-publications/press-news/blog/less-sometimes-more_en>.

[202] For instance, the Safe Harbour and Privacy Shield for the US, and the Mutual Recognition Agreement with Japan (Adequacy decision).

[203] European Parliament resolution of 26 May 2016 on transatlantic data flows (2016/2727(RSP)) [2016] OJ C76/82; Committee on International Trade, 'Draft Report towards a digital trade strategy' (2017/2065(INI)) (4 September 2017); European Parliament resolution of 6 April 2017 on the adequacy of the protection afforded by the EU-US Privacy Shield (2016/3018(RSP)) [2017] OJ C298/73; European Parliament resolution of 5 July 2018 on the adequacy of the protection afforded by the EU-US Privacy Shield (2018/2645(RSP)) [2018] OJ C118/133.

[204] Committee on International Trade (n 203), points 1-6.

[205] European Parliament resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI)) [2016] OJ C35/21.

[206] European Parliament resolution of 12 September 2018 on the state of EU-US relations (2017/2271(INI)) [2018] OJ C433/89.

regime in the US: it highlighted the inadequacy of the Privacy Shield to protect the fundamental rights of data subjects, and stressed that the US has no comparable rules to the GDPR; it welcomed calls for the US legislator to move towards an 'omnibus privacy and data protection act';[207] and called on the EU and the US to work on 'a framework for digital trade which respects each side's existing legal frameworks and agreements, data protection legislation and data privacy rules, which is of particular relevance to the services sector'.[208] Tabled by the Committee on Foreign Affairs, the resolution benefited from the Opinion of the INTA Committee but not from the LIBE Committee. It has to be seen whether going forward the LIBE Committee will assert a role for itself as a defender of data privacy rights in the context of EU-US trade talks.

At the moment of writing, the scrutiny of the EP's engagement as a defender of data privacy rights in EU external trade reveals that "deepening" of actors has occurred only in the case of the TTIP negotiations, perhaps only partially in the case of Japan, and not during the negotiations with Canada and Singapore. While the EP emerges as one of the new actors increasingly asserting its voice in EU external trade, and in spite of its acknowledgment of the salience of data to trade, the EP does not systematically advocate for data privacy rights. This finding questions the role of the EP in being a consistent data privacy rights defender. At the same time, it also warns against quick conclusions whereby cases of EP's engagement in EU external trade would always equate with cases of deepening actors of EU external trade, as intended here from a fundamental rights perspective. As shown next, a similar finding applies to civil society actors, which while encompassing a wide range of non-business actors, such as NGOs, public interest groups, trade unions and grassroots movements, have not systematically advocated for data privacy rights.

3.4.2. EU Civil Society's contribution to Data Privacy Rights

When investigating civil society's substantive contribution to data privacy rights, it emerges that, in line with their differentiated engagement across trade negotiations, most proposals were provided on TTIP and to a lesser extent on CETA, whereas extremely little can be found on EUJEPA, and nothing on EUSFTA.[209] When it comes to data privacy rights, the minimum common denominator appears to coincide with a case of absence of engagement. This is despite the fact that the relevant provisions in EUSFTA could be subject to the same demands and critique that civil society actors would have made for TTIP later.[210] A slightly different picture characterises the other Asian partner, Japan. During the

[207] Ibid recommendation 42.
[208] Ibid recommendation 82.
[209] The only exception is the following (quite late in time) individual contribution: Ante Wessels, 'EU-Singapore trade agreement not compatible with EU data protection' *Foundation for a Free Information Infrastructure* (19 April 2019) <http://blog.ffii.org/eu-singapore-trade-agreement-not-compatible-with-eu-data-protection/>.
[210] See reference to international standards in Art.8.57 EUSFTA.

trade negotiations, civil society appears to not have engaged with data privacy rights.[211] Only at a later stage, once the EU and Japan took the path of the adequacy decision, the European Consumer Organisation (BEUC) welcomed the decision of dealing with data privacy outside the realm of trade.[212] Besides BEUC, however, no other reactions from civil society can be found regarding the adequacy talks with Japan.[213]

Moving along the spectrum, a few limited contributions can be found for CETA. Regarding specific demands, only European Digital Rights, one of the main advocacy organisations in this field, can be said to have been vocal. EDRi produced a series of online posts on how CETA would have put the protection of EU personal data at risk.[214] Among the main criticism were: putting the Charter on a de-facto lower level than CETA; having as benchmarks the standards of international organisations, even though Canada is not party to the Council of Europe's Convention 108; and finally the establishment of a Regulatory Cooperation Forum, potentially jeopardising rules on data privacy because of the pressures of big companies lobby groups.[215] At the same time, this criticism came two years after the negotiations were concluded: as such, it called for a negative vote on CETA, without providing suggestions as to what the agreement should have included. The absence of concrete suggestions in CETA can be contrasted with the several substantive contributions regarding data privacy in TTIP.

It is in the context of TTIP that civil society actors contributed the most by providing their views on data privacy rights and trade. Three main demands can be identified for TTIP, which nonetheless still remain the main standpoint of civil society actors at present:[216] (1) that data flows remain outside trade negotiations; (2) that if data flows are discussed, then the FTA should include a solid exception for data privacy; (3) that commitments to ratify international instruments on the protection of personal data are included. Unlike labour rights, these demands are also often advanced in discourses that frame privacy and data protection as fundamental rights recognised under the Charter. Whilst civil society actors do recognise the importance of data flows for the digital economy, they also

[211] The only available (quite late) contribution is by European Digital Rights (EDRi), see EDRi, 'EU-Japan trade agreement not compatible with EU data protection' (10 January 2018) <https://edri.org/eu-japan-trade-agreement-eu-data-protection/>.
[212] See BEUC, 'Analysis of the EU Japan E-commerce Chapter and Recommendations for the technical talks, EU-Japan trade agreement' (11 August 2017) <https://www.beuc.eu/publications/beuc-x-2017-087_lau_beucs_analysis_e-commerce_eu_japan_2017_official.pdf>; BEUC, 'EU-Japan trade deal to be signed: data protection secured, further clarity needed on other issues' (16 July 2018) <https://www.beuc.eu/publications/eu-japan-trade-deal-be-signed-data-protection-secured-further-clarity-needed-other/html>.
[213] Except EDRi (n 211).
[214] See Maryant Fernández Pérez, 'CETA puts the protection of our privacy and personal data at risk' (5 October 2016) <https://edri.org/ceta-puts-protection-privacy-and-personal-data-at-risk/>; EDRi, 'Citizens' rights undermined by flawed CETA deal' (15 February 2017) <https://edri.org/citizens-rights-undermined-flawed-ceta-deal/>; Guest author, 'CETA will undermine EU Charter of Fundamental Rights' (04 May 2016) <https://edri.org/ceta-will-undermine-eu-charter-of-fundamental-rights/>; EDRi, 'Despite large opposition, CETA limps forward in the European Parliament' (24 Jan 2017) <https://edri.org/despite-large-opposition-ceta-limps-forward-european-parliament/>.
[215] Pérez (n 214)
[216] Interviews with civil society representatives.

point out that it is difficult to dissociate data transfers from personal data.[217] They argue that including data flows in trade negotiations implies that data privacy rights would inevitably become 'part of the bargain',[218] and additionally be addressed as 'barriers to trade'.[219] During the negotiations of TTIP, there was overall agreement that FTAs are not the place to deal with data privacy rights or establish new standards.[220] Joint discussions on data privacy standards were not rejected in their entirety; rather, civil society actors demanded that they would take place outside of the trade negotiations.[221] Others suggested that if data privacy laws could be enforced for data located outside national borders, in this case the US, then the data market should not be liberalised.[222]

A further request for data privacy rights was the inclusion of exceptions within the text of TTIP. Many civil society organisations indeed pointed out that, even though none of the TTIP documents expressly referred to discussions on data privacy rights, other sectorial areas of the trade agreement could have implicated them: from e-commerce, to financial services, telecommunications, localisation requirements, interoperability as well as efforts at mutual recognition and harmonisation aiming at i.a. the facilitation of cross-border data flows.[223] General and sectorial exceptions were therefore advanced as a guarantee for those provisions with an impact on cross-border data flows:[224] these provisions should have created only a floor, leaving room for the governments to go beyond and adopt more protective standards.[225] BEUC specifically advocated to 'upgrade' the exception in the GATS, without however specifying the contours of such upgrade.[226] It endorsed the EP's recommendation on including a 'horizontal, self-standing and legally binding provision excluding EU data protection law from TTIP'

[217] BEUC, 'WTO E-commerce recommendations' (29 March 2019) <https://www.beuc.eu/publications/beuc-x-2019-014_wto_e-commerce_negotiations_-_beuc_recommendations.pdf>.
[218] Ibid.
[219] BEUC, 'Data Flows in TTIP' <https://www.beuc.eu/publications/beuc-x-2015-073_factsheet_data_flows_in_ttip.pdf>; Access Now, 'Why you should care about the Transatlantic Trade and Investment Partnership' (28 June 2015) <https://www.accessnow.org/why-you-should-care-about-the-transatlantic-trade-and-investment-partnershi/>; EDRi, 'FOIA request confirms data protection is not a barrier to trade' (2 December 2015) <https://edri.org/foia-request-confirms-data-protection-is-not-a-barrier-to-trade/>.
[220] AccessNow (n 219); BEUC (n 219); BEUC, 'Your chance to shape a good TTIP' <https://www.beuc.eu/publications/beuc-x-2015-056_your_chance_to_shape_a_good_ttip-puzzle.pdf>; EDRi, 'Data protection and privacy must be excluded from TTIP' (8 April 2015) <https://edri.org/data-protection-privacy-ttip/>; EDRi, 'TTIP leaks confirm dangers for digital rights' (2 May 2016) <https://edri.org/breaking-ttip-leaks-confirm-dangers-for-digital-rights/>; EDRi, 'Corporate-sponsored privacy confusion in the EU on trade and data protection' (12 October 2016) <https://edri.org/corporate-sponsored-privacy-confusion-eu-trade-data-protection/>; Trade Justice Movement, 'Digital trade (e-commerce)' <https://www.tjm.org.uk/trade-issues/digital-trade-e-commerce>; Electronic Privacy Information Center (EPIC), 'Comments of the Electronic Privacy Information Center to the Office Of The United States Trade Representative' (10 May 2013) <https://epic.org/privacy/ttip/EPICTTIPCommentsFINAL.pdf> (EPIC Comments on TTIP).
[221] Ibid.
[222] ETUC/AFL-CIO Declaration (n 162).
[223] EPIC, 'Transatlantic Trade and Investment Partnership' <https://epic.org/TTIP.html>.
[224] Ibid; BEUC, 'EU citizens urgently need rock solid data protection safeguards in TiSA and TTIP' (letter to Jean-Claude Juncker, President of the European Commission, 24 October 2016) <https://www.beuc.eu/publications/beuc-x-2016-102_data_protection_safeguards_in_tisa_and_ttip.pdf>.
[225] EPIC Comments on TTIP (n 220).
[226] BEUC (n 224).

and also demanded a horizontal clause stating that EU data protection rules would apply to all products and services given to EU consumers. [227]

Finally, a less common proposal relates to the inclusion of provisions whereby the Parties would commit to ratify international instruments on the protection of personal data.[228] Such an approach, advanced by the Electronic Privacy Information Center, would keep data privacy standards outside of the trade agreement, and rather recommend ratification of the Council of Europe Convention 108 on personal data protection, which is open to non-members of the Council of Europe.[229] This approach can be compared to the one for labour rights, whereby reference is made to the ratification and implementation of ILO conventions. However, two main issues should be highlighted. First, there exists no real international data privacy instrument comparable to the ILO conventions, since Convention 108, the OECD Guidelines on Privacy and the APEC Privacy Framework largely remain regional in their territorial scope. Second, just as the ILO conventions, they would represent suboptimal solutions when compared to the protection afforded by the GDPR, which additionally requires the third country to have an 'adequate', essentially equivalent, level of protection.[230]

The different approaches to data privacy in trade agreements is emblematic of the ongoing experimentation, which in turn reflects a learning process as to where data privacy becomes relevant in an era of digitalisation and digital trade.[231] While civil society could contribute to this learning process, it has not engaged consistently across trade negotiations. Most contributions that warned against harming effects on data privacy rights focused on TTIP. Politicisation of the negotiations can possibly only partly explain this imbalance. Civil society actors themselves observe that, initially, these issues did not feature highly in campaigns on TTIP.[232] The saga of the Safe Harbour Agreement and the concomitant negotiations for a Trade in Services Agreement (TiSA) concurred in this politicisation.[233] Finally, whilst removing data flows from the trade talks was a prominent demand by civil society actors in the context of TTIP, the Commission adequacy negotiations with Japan are to be attributed to the Japanese negotiators and not to civil society or the legacy of TTIP. The emerging picture can be said to reveal little deepening of the actors for data privacy rights in trade.

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[227] Ibid; BEUC, 'Why privacy safeguards in trade deals need urgent improvement' (20 October 2016) <https://www.beuc.eu/blog/why-privacy-safeguards-in-trade-deals-need-urgent-improvement/>.
[228] EPIC (n 223).
[229] Ibid.
[230] Alternative views present instead Convention 108 as a potential global standard for the protection of personal data, see Jörg Polakiewicz, 'International Data Protection Conference Convention 108 as a global privacy standard?' (conference presentation in Budapest, 17 June 2011) <https://rm.coe.int/16806b294e>.
[231] Robert Wolfe, 'Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP' (2019) 18 World Trade Review 63.
[232] Open Rights Group, 'TTIP and Digital Rights' (30 January 2015) <https://www.openrightsgroup.org/about/reports/ttip-and-digital-rights>.
[233] See Access Now, '10 Things You Should Know About the EU-US Trade Agreement' <https://www.accessnow.org/cms/assets/uploads/archive/10%20Things%20You%20Should%20Know%20About%20TTIP-A4-01.pdf>.

3.5. Vocal Actors of EU Trade law-making: 'more' but not necessarily 'deep'

The negotiation stage is pivotal for an issue to find its way onto the trade agreement, be defined and framed.[234] This chapter has shown that when it comes to fundamental rights, this process of definition and framing is still at an embryonic stage. The engagement of a wider range of actors has not led to more discourses around fundamental rights. In only a few cases has this wider engagement resulted in a more sophisticated understanding of the nexus between fundamental rights and trade agreements. This state-of-play substantiates the findings of Chapter 2, where it was argued that the scope of fundamental rights in the new generation of EU FTAs falls short of addressing pressing and new challenges to labour and data privacy rights in the context of globalisation and digitalisation. The exploration of 'deepness' at the level of the *actors* reveals that new vocal actors may have increased in number but have not necessarily 'deepened' - following the present conceptualisation of 'deepness' as an instance where vocal actors also advocated for fundamental rights.

Above all, what emerges is an inconsistent picture of the degree of engagement by the EP and civil society across trade negotiations, with inevitable implications for their contribution to the negotiations. Most contestation erupted in the context of TTIP because of civil society mobilisation, and only afterwards spilled over CETA, when its negotiations had almost come to an end. The politicisation of these trade negotiations prompted the EP to assert a front-line role as a spokesperson for citizens' concerns. Yet the lack of politicisation and salience of the trade negotiations with Singapore and Japan meant that the EP did not engage significantly. In these cases, trade negotiations took place as in the "pre-Lisbon era". This is regrettable in the light of positive changes introduced in treaty-making practices in the context of TTIP. These changes eventually proved to be ephemeral, since they were not followed in subsequent negotiations. The fact remains that mobilisation of a wide range of actors has the potential to lead to responses and tangible impacts on the EU's position in trade negotiations, and in the resulting agreement, as CETA shows.[235] In the context of TTIP, the Commission adopted a new policy on transparency,[236] it granted public and institutional access to documents,[237] and found itself in a situation of having to repeatedly reassure the public that TTIP would have not lowered standards. A first takeaway thus calls for consistency in engagement: the EP and civil society should make sure to contribute and scrutinise closely all trade negotiations, regardless of their controversiality or salience; this is especially so in the light of the finding that engagement by more actors appears to trigger

[234] Oran Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press 1994) 83.
[235] For instance, CETA exhibits positive changes in the content of the agreement itself, as both the ICS and the JII embody tangible adds-on to the initial position.
[236] European Commission, 'Communication to the Commission concerning transparency in TTIP negotiations' C(2014)9052 final (25 November 2014) <https://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9052-EN-F1-1.Pdf>.
[237] Abazi (n 33).

responses and account for shifts in treaty-making practices, if not in the substance of the agreement itself.

This leads to another observation, which concerns the type of contestation: when the EP and civil society engaged, their demands were both procedural and substantive in nature. With respect to the former, the EP and civil society have challenged the secrecy of negotiations and the impossibility to access documents. TTIP is a successful case whereby an unprecedented array of actors challenged and noticeably impacted treaty-making practices.[238] The EP also learned how to leverage its new powers and even asserted others: its request to the Council not to adopt the mandate for EUJEPA before the EP had issued an opinion, albeit eventually not particularly meaningful for the EUJEPA negotiations, certainly set an important precedent for the role of the EP in future trade negotiations.[239] Importantly, the contestation of treaty-making law and practices sheds light on some of the deficiencies of the current state-of-play. To the extent that the majority of civil society now considers the TTIP negotiations as the peak of the EU's efforts to engage with the public at large,[240] lessons can be learned. Challenges to procedures and practices of treaty-making can be informative as to future normative directions of EU trade law-making; they show where demands and needs stand; they enhance our understanding of the law, and its role in creating a legal environment that enables meaningful, democracy-enhancing participation.[241]

Where practices have changed, however, not all have been immune to criticism. Some scholars argue that attempts by the Commission to increase transparency resulted in 'little participative content or democratic value'.[242] This is in line with arguments that, while holding transparency as an essential element to enable democratic deliberation, consider the publication of the negotiating texts 'neither sufficient nor adequate in order to stimulate an informed public debate'.[243] In this discussion, others add that responses under the form of greater access to documents to non-state actors are only an attempt to keep hold of legitimacy.[244] And indeed, the newly-emerged practices of the Commission in TTIP appear to be a reaction to the contestation of TTIP, rather than a long-term commitment to transparency and a more legitimate treaty-making.[245] These practices have not been replicated in other trade negotiations, for instance with Japan;[246] nor have they been applied retroactively to EUSFTA, e.g. by publishing the

[238] Young (n 65) 367.
[239] Magdalena Frennhoff Larsén, 'Parliamentary Influence Ten Years after Lisbon: EU Trade Negotiations with Japan' (2020) JCMS 1.
[240] Interview with civil society representatives.
[241] Julie Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1999) 14 American University of International Law Review 1335.
[242] Organ (n 35) 1715-1716.
[243] Verena Madner, 'A New Generation of Trade Agreements: An Opportunity Not to Be Missed?' in Griller and others (n 25) 313.
[244] Michael Zürn, 'Opening up Europe: next steps in politicisation research' (2015) 39 West European Politics 164.
[245] Deborah Martens and others (n 102).
[246] An exception to this are the current trade negotiations Australia and New-Zealand.

negotiating mandates and reports.[247] While the negotiations with Singapore for the trade agreement largely preceded the contestation of TTIP and CETA, the negotiations with Japan appear to have cast the treaty-making-practice legacy of TTIP into oblivion. The TTIP Advisory Group, an initiative very much welcomed by civil society, also remains a specific instance of the TTIP negotiations, since its legacy, the Expert Group on Trade, is merely consultative and does not envisage access to documents.[248] Among the responses to the procedural demands by the EP and civil society, many appear either not to have been replicated or flawed.

The challenges by the EP and civil society to treaty-making suggest that the Commission should focus on the *quality* – as opposed to merely the *quantity* – of engagement of different actors. Opening up to the inputs of a larger number of actors is not a panacea for the lack of legitimacy of trade agreements. Though the assessment of the Commission's responses goes beyond the scope of this chapter; suffice to say that the proliferation of mechanisms for wider participation, without a clear picture of how these mechanisms interact, or which inputs are followed up (and which are not) and why, runs the risk of diluting, rather than enhancing, participation.[249] Instead, a focus on the *quality* of engagement should redirect towards the design of mechanisms to enable discourses on fundamental rights to be considered during the trade negotiations. For instance, a commitment by the Commission to take into consideration proposals on fundamental rights would provide a better benchmark for legitimate trade law-making. Among others, it could lead to increased accountability: the EP, civil society and the public at large would find it possible to hold the trade negotiators to a normative set of standards, and to determine whether they are fulfilling their responsibilities in the light of those standards.[250] Respect and protection of fundamental rights can provide such standards. For the Commission to be receptive to these discourses and follow-up on them, it is pivotal that the EP and civil society engage and advance proposals accordingly.

Yet when it comes to the substantive contestation, the exploration of the contributions by the EP and civil society actors reveals that they do not systematically emerge as champions of fundamental rights. As far as TTIP and CETA are concerned, some civil society actors have mobilised to halt the

[247] There exists a wide discrepancy and confusion in the documents made available on the online information pages for the trade agreements. Compare, on the one hand, the documents available on Singapore (<https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/>), Japan (<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2042>) and CETA (<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>) and, on the other hand, what had been published for TTIP (https://trade.ec.europa.eu/doclib/press/index.cfm?id=1230) or the available documents for recent negotiations with Australia (<https://ec.europa.eu/trade/policy/in-focus/eu-australia-trade-agreement/>).

[248] The Expert Group was created in 2017 for future EU trade negotiations. See European Commission, Register of Commission Expert Groups, 'Group of Experts on EU Trade Agreements (E03556)' <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3556>.

[249] Interview with civil society representative. EDRi has also voiced this problem, stating that 'while a number of changes have been made to the agreement, none of them address the fundamental flaws that civil society organisations have highlighted'. EDRi, Letter to the European Parliament (13 February 2017) <https://edri.org/files/CETA/civilsocietyletter_cetaplenary_20170213.pdf>.

[250] Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 American Political Science Review 29.

trade agreements in their entirety. These instances are the most distant from what is conceived here to be 'a deepening of the actors' that would contribute to the convergence of trade agreements and fundamental rights. TTIP is the only case that to an extent reflects an appreciation by the EP and some civil society actors of the relevance of labour and data privacy rights in trade in a context of globalisation and digitalisation. While it would be naive to expect that all the proposals on fundamental rights could have made it to the text of the agreement, the politicisation and discussions that took place during the negotiations certainly had an influence on the EU's position. As Chapter 2 has shown, neither the EU's proposal for TTIP nor CETA have been found to be 'deep' in their scope, but they are still the most ambitious amongst the new generation of EU FTAs with other developed countries.

Trade negotiations would benefit greatly from ideas and proposals by the EP and civil society as a result of their appreciation of potential adverse effects on fundamental rights when it comes to ambitious 'deep' trade agreements. To this aim, the EP's scrutiny of the trade negotiations should not rely solely on the INTA Committee; the latter should proactively seek input from the Committee on Employment and Social Affairs and the LIBE Committee, whose opinions have not always accompanied the EP resolutions during the trade negotiations. Regarding civil society, transnational dialogues between European and third-country civil society actors should be enabled *during* and possibly *prior to* the negotiations. At present, as Chapter 5 will show, civil society actors do enjoy bodies for their engagement during the implementation of an FTA. One may argue that these bodies could be used as a venue for civil society to influence the outcome *before* the conclusion of the FTA and its implementation. Horizontal dialogues of this kind would give them the possibility to exchange views on different understandings as to rights, and as to rights in the context of trade, which may be the source of controversies during the negotiations.[251] If the EU is to be a global actor in trade and fundamental rights, it needs discussion and advocates for fundamental rights to inform its trade negotiations.

3.6. Conclusion

There is potential for actors with a direct link to citizens to contribute to fundamental rights at the negotiation stage: by enhancing the democratic legitimacy of the treaty-making process, arguably enabling discourses on fundamental rights; and by providing substantive views as to the normative relationship between fundamental rights and trade. Yet with the exception of the TTIP negotiations, the negotiations of the new generation EU FTAs have not unleashed this potential. On the one hand, cases of contention *did* lead to tangible and unprecedented changes in treaty-making practices which have

[251] On the importance of horizontal dialogues, see Lore van Den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6 Global Labour Journal 221; Colleen Sheppard, 'Equality Through the Prism of Legal Pluralism' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer 2012) 139.

enhanced the democratic quality of treaty-making. On the other hand, the EP and civil society engaged inconsistently, depending on either the trade partner or the degree of politicisation of trade negotiations. It was with TTIP, and subsequently with CETA, that most tangible changes in treaty-making can be observed, which neither occurred nor applied to the negotiations with Singapore and Japan. The one-shot instance of TTIP had hardly any replication.

The inconsistent engagement across trade negotiations is reflected in a fragmented contribution to fundamental rights. Trade negotiations where mobilisation was the lowest, i.e. Singapore and Japan, correspond to cases where fundamental rights in trade were hardly addressed. By contrast, mobilisation by different actors *did* enable discourses on fundamental rights. Only for TTIP did the EP provide thorough recommendations on labour rights, and that the LIBE Committee mobilised to provide its opinion on data privacy. Civil society tended to aim at halting the trade negotiations entirely, rather than to provide suggestions. It was mostly trade unions that advanced comprehensive proposals on labour rights, albeit mostly for TTIP and CETA. Likewise, data privacy advocates started being vocal with the TTIP negotiations. Regarding CETA, the JII discussed in Chapter 2 is the clearest manifestation of fundamental rights concerns being added to the agreement at a later stage, as a result of the politicisation of TTIP.

Overall, the EP and civil society have not uniformly advanced fundamental rights claims. As the only EU institution that represents citizens' interests and has a formal role in trade negotiations, the EP should scrutinise closely all trade negotiations, regardless of their public salience and contestation, and provide substantive proposals. As regards civil society actors, they have on-the-ground knowledge that should be deployed to advance concerns on fundamental rights and trade. It is pivotal that voices underpinning the emergence of FTAs embrace fundamental discourses beyond the radar of trade officials and industry interests. Different actors could in principle contribute to fundamental rights in the EU's trade agenda: by calling for democracy-enhancing mechanisms and practices which are assumed to have beneficial effects for democratic deliberation and on fundamental rights; and by advancing different understandings as to the normative relationship between fundamental rights and trade.

This should not be the case only at the negotiation stage. The new generation EU FTAs create new levels of governance, via regulatory cooperation chapters, that make these FTAs "living agreements". Their content can be amended and cooperation on a range of regulatory matters be pursued. Civil society actors have fiercely criticised these mechanisms. Drawing on this chapter, one may say that the EP and civil society actors from both sides should in fact engage in these mechanisms and advance proposals on issues of fundamental rights and trade. Chapter 4 examines the regulatory cooperation chapters: not only does it address the concerns voiced by civil society, but it also considers the contribution that regulatory cooperation could make to fundamental rights and the extent to which these issues inform regulatory cooperation activities.

Chapter 4 – Embedding Fundamental Rights in Regulatory Cooperation

4.1. Introduction

In 2010, the European Council called on to 'secure ambitious Free Trade Agreements (…) and deepen regulatory cooperation with major trade partners'.[1] Later in 2015, the EU chief negotiator for TTIP stated that closer regulatory cooperation between the EU and the US would help project their 'shared values more globally' and contribute 'to the development of future global rules and standards'.[2] Famously, aims of regulatory cooperation with the US via TTIP received great opposition from civil society.[3] Academic literature also warned against regulatory cooperation, while not necessarily dismissing the process altogether.[4] Regulatory cooperation has eventually raised ambivalent sentiments, either criticising its impact on democratic regulatory processes, or praising its potential as a global laboratory for standard-setting.[5] However, existing accounts have not studied regulatory cooperation specifically from a fundamental rights perspective, which prompts similar ambivalent thoughts: little is known about ways in which these new mechanisms could adversely impact the protection of fundamental rights, or the extent to which they could in fact provide a venue for setting global rules in their respect. This chapter undertakes this exploration.

As one of the new 'deep' features of the latest EU FTAs with other developed economies, regulatory cooperation is investigated here in its relationship with labour and data privacy rights. The central question of this chapter is: *how do fundamental rights intersect with regulatory cooperation mechanisms, descriptively as much as normatively?* Whilst the FTAs are too recent to allow identifying empirical instances of adverse effects on fundamental rights, this chapter urges to cast attention on ensuring that regulatory cooperation – only recently included in trade agreements – emerges in a way that does not jeopardise fundamental rights. On the one hand, commitments on regulatory cooperation in the FTAs with Canada, Singapore and Japan reflect the scale of the EU's ambitions in trade. On the other hand, it is less clear how these commitments could make the EU a global actor in trade *and*

[1] European Council, 'Conclusions' (EUCO 21/1/10, 16 September 2010) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116547.pdf>.
[2] European Commission, 'TTIP Round 8 – final day press conference, comments by EU Chief Negotiator Ignacio Garcia Bercero' (5 February 2015) 3; Marise Cremona, 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (Guest Editorial) (2015) 52 CMLR 351.
[3] Corporate Europe Observatory, 'Regulatory cooperation' (1 February 2017) <https://corporateeurope.org/en/2017/02/regulatory-cooperation>.
[4] Jonathan Wiener and Alberto Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory' (2015) 78 Law and Contemporary Problems 103.
[5] Ibid.

fundamental rights. This chapter engages in a discussion of what a 'deepening' of fundamental rights would mean at the level of regulatory cooperation.

The chapter is structured as follows. The first section presents the meaning and relevance of regulatory cooperation as a new 'deep' feature of the new generation EU FTAs (4.2). The second section examines the place of fundamental rights in the text of the regulatory cooperation chapters in the FTAs, and then explores ways in which regulatory cooperation may be problematic for fundamental rights (4.3). The final section provides normative explorations of how regulatory cooperation could promote fundamental rights (4.4). The chapter argues that regulatory cooperation should be understood beyond its usefulness in removing non-tariff barriers to trade, and be conceived as a mechanism for joint cooperation on regulatory issues of global relevance related to fundamental rights in the context of trade, such as those discussed in Chapter 2, and not be rejected altogether. Under a series of conditions and adequate institutional frameworks, regulatory cooperation could work as a platform for regulatory matters pertaining to fundamental rights and trade, with the aim of enhanced protection.

4.2. Regulatory Cooperation: a 'deep' feature of the new generation EU FTAs

This section first explains what is meant by Regulatory Cooperation and its relevance for global standard-setting and the role of the EU therein (4.2.1). It then compares the newly introduced commitments on regulatory cooperation in the FTAs with the US, Canada, Singapore and Japan (4.2.3). It is found that, albeit less intrusive than usually claimed to be, these new commitments are likely to evolve into more institutionalised forms over time. Because of this possibility, it is necessary to ensure that they emerge in a way that is consistent with, and not detrimental to, fundamental rights.

4.2.1. Conceptualising Regulatory Cooperation: A Laboratory for Global Rules

Regulatory Cooperation is an undefined and over-inclusive concept that does not denote a specific type of activity. It encompasses a panoply of mechanisms, and its manifestations and aims are diverse. This explains the difficulty of circumscribing it and the existence of more or less precise and comprehensive definitions. Policy-makers have referred to regulatory cooperation without making distinctions between different types; and scholars have provided various, and at times divergent, definitions: some have focused on the aims and the degree of efforts in regulatory alignment in the activities pursued;[6] others

[6] Junji Nakagawa, 'Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges' in Julien Chaisse and Tsai-Yu Lin (eds), *International economic law and governance: Essays in honour of Mitsuo Matsushita* (OUP 2016).

on the methods and the procedural side;[7] others on the institutional structure underpinning it.[8] The definition that is used here understands regulatory cooperation as a set of formal and/or informal procedural mechanisms at various levels of law-making (inter-, trans- and sub-national) aimed at bridging regulatory divergences. Following this definition, forms of regulatory cooperation can involve a broad range of actors and levels of regulatory activity. Image 1 provides an overview of typologies of regulatory cooperation: it shows that these activities can range from voluntary and informal endeavours, such as exchanging information and dialogues, to more institutionalised mechanisms, as could be mutual recognition agreements (MRAs) and efforts at regulatory alignment.

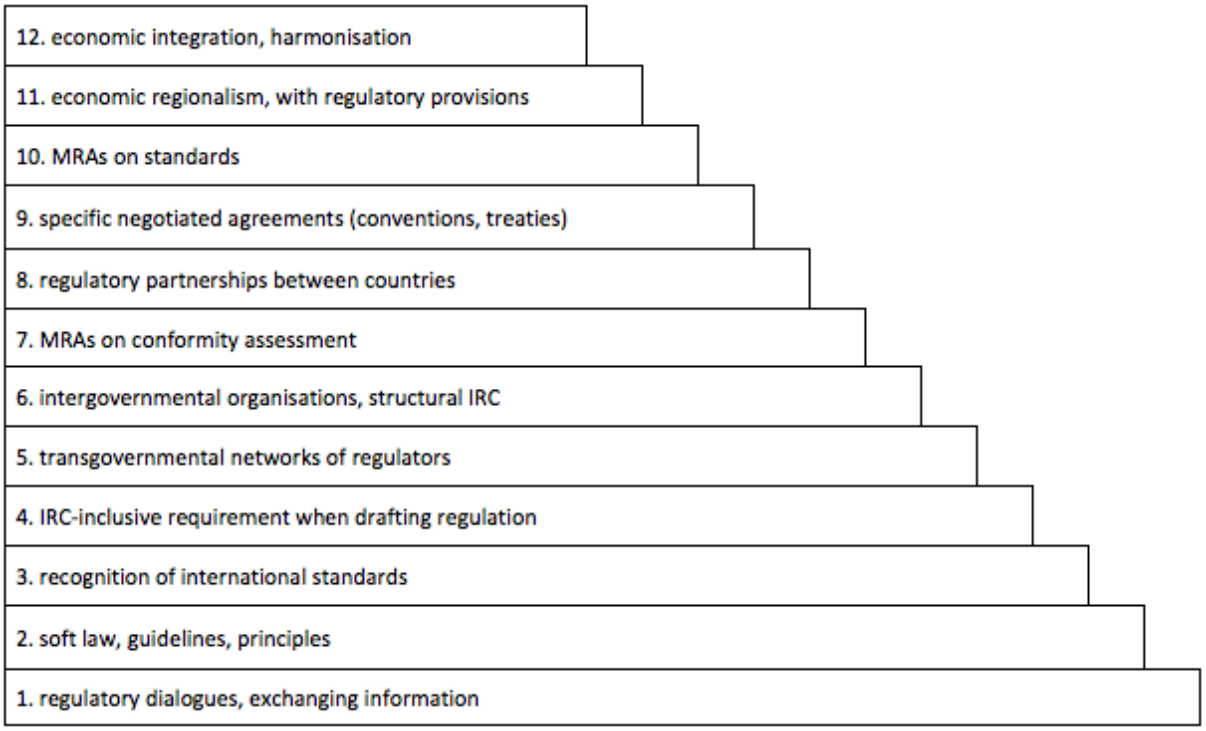

Figure 4.1 – The ladder of Regulatory Cooperation.[9]

To provide some examples, the ILO typifies endeavours of international regulatory cooperation on labour standards at the *international* level. The OECD and the WTO are further examples of standard-setting through international and intergovernmental organisations.[10] At the *bilateral* level, regulatory

[7] Tamara Takacs, 'Transatlantic Regulatory Cooperation in Trade' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014); Joana Mendes, 'Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation' (2016) IILJ Working Paper 2016/5 MegaReg Series 22; Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2016) 23 Constellations 58.

[8] Debra Steger, 'Institutions for Regulatory Cooperation in New Generation Economic and Trade Agreements' (2012) 39 Legal Issues of Economic Integration 109.

[9] Source: Chase and Pelkmans, adapted and extended from OECD (2013). Peter Chase and Jacques Pelkmans, 'This time it's different: Turbo-charging regulatory cooperation in TTIP' (CEPS Special Report No 110, June 2015).

[10] Regulatory cooperation may also imply the participation of domestic regulatory agencies in international standard-setting bodies, where they can contribute to the development of standards, in turn incorporated domestically. United States Government Accountability Office, 'International Regulatory COOPERATION Agency Efforts Could Benefit from

cooperation can take the form of different types of exchanges and cooperative activities between the regulatory agencies of the two countries. These interactions can range from sharing information and best practices, to mutual recognition agreements and regulatory cooperation partnerships.[11] Recent developments in regulatory practices have also seen the emergence of a series of hybrid regulatory cooperation activities, shifting the locus of regulatory activity away from the international and bilateral levels.[12] Public-private bodies, private transnational regulation[13] and trans-governmental networks of regulators[14] are all examples of regulatory activity that escape traditional taxonomies of regulatory cooperation. The image of the ladder also does not necessarily capture the use of bilateral FTAs to engage in a variety of regulatory cooperation activities *as a result of* the inclusion of regulatory cooperation chapters *within* the FTAs, which is what the EU has sought. The resulting picture is one of mushrooming *loci* of regulatory interactions.

This state-of-play has consequences for how, where and by whom new global rules are made. According to scholars of administrative law and trans-border networks of domestic regulators, studying mechanisms of regulatory cooperation helps capture new hybrid trends in transnational regulation and global standard-setting.[15] Studying the operation of these mechanisms has a bearing on how we understand global governance.[16] As interactions take place at a transnational level, regulatory cooperation mechanisms have been said to give rise to a 'global administrative space';[17] and to have the potential to evolve into 'new forms of governance'.[18] The discussions during the TTIP negotiations confirm these observations. At the time, the regulatory cooperation chapter negotiated by the EU and the US would have allowed regulators from both sides to make changes to the agreed texts.[19] Scholars referred to the chapter as giving rise to a 'living agreement' and a 'global policy laboratory'.[20] Such

Increased Collaboration and Interagency Guidance' (August 2013) Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives.

[11] Chase and Pelkmans (n 9).

[12] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15.

[13] Jeffrey Dunoff, 'Mapping a Hidden World of International Regulatory Cooperation' (2015) 78 Law and Contemporary Problems 267; Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76 Law and Contemporary Problems 117.

[14] E.g. International Laboratory Accreditation Cooperation.

[15] Dunoff (n 13).

[16] David Bach and Abraham Newman, 'Domestic drivers of transgovernmental regulatory cooperation' (2014) 8 Regulation & Governance 395.

[17] Dunoff (n 13).

[18] Scott Jacobs, *Regulatory co-operation for an interdependent world: issues for government* (OECD publishing 1994).

[19] 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, 628; Cremona (n 2) 352-353.

[20] Wiener and Alemanno (n 4).

regulatory activity, taking place in a sort of transnational space beyond the State, was said to open the way to new kinds of regulatory governance.[21]

It is argued here that the EU should play a normative role in these emerging laboratories for global rules. While the typical purpose of regulatory cooperation has been to address non-tariff barriers to trade, other regulatory issues that pertain to fundamental rights and trade should become the object of these mechanisms. This is even more relevant in the context of growing concerns regarding the possibility that global rules for international trade, including on labour and privacy standards, will be set by others.[22] At a minimum, the EU should set precedents for best practices: it should ensure that regulatory cooperation takes place in a way that is legitimate and conducive to regulatory outcomes that do not undermine fundamental rights. For sure, the EU is already a regulatory power that makes other countries vulnerable to its Brussels Effect.[23] Trade agreements are also commonly deemed to work as platforms for ongoing cooperation on issues considered to go beyond trade.[24] The incorporation of regulatory cooperation within the new generation EU FTAs yet provides an additional layer: regulatory cooperation becomes a tool to nudge 'legal' integration, or convergence, between the EU and its trade partners. The recent commitments on regulatory cooperation reveal a renewed effort by the EU to shape global standards with strategic developed economies in North America and Asia, and be at the forefront of globalisation.

4.2.2. Regulatory Cooperation Commitments in the new generation EU FTAs

Regulatory cooperation represents a 'deep' component of the new generation of EU FTAs and reflects the EU's new search for deeper integration via trade. The inclusion of regulatory cooperation commitments in the latest generation of EU FTAs serves the objectives of the strategy underpinning them: "Global Europe: Competing in the World" conceived trade agreements as strategic vehicles to externalise and globalise the EU's regulatory standards.[25] Regulatory cooperation emerged as a fitting

[21] Kalypso Nicolaidis, 'Regulatory cooperation and managed mutual recognition: elements of a strategic model', in George Bermann, Matthias Herdegen and Peter Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (OUP 2001).

[22] Above all China, see Bertram Boie, Julien Chaisse and Philippe Gugler, 'International investment framework – the regulatory fragmentation challenge in a changing world economy' in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 445; Thomas Cottier, 'The Changing Structure of International Economic Law and the Future of Regulatory Cooperation' (speech at University of Birmingham's Institute of European Law conference "Transatlantic Perspectives", 28 June 2018).

[23] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

[24] Sabine Weyand, speech at 'EU Trade Policy After Covid-19' (Webinar, 28 May 2020), notes of the author <https://ecipe.org/blog/eu-trade-policy-post-covid/>.

[25] European Commission, 'Global Europe: Competing in the World' COM(2006)567 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0567&from=EN>.

tool to shape and drive globalisation through trade.[26] Although the Strategy emphasised the EU's commitment to multilateralism, it envisaged bilateral FTAs to go 'further and faster in promoting openness and integration'.[27] To this end, it aimed to achieve regulatory convergence by tackling non-tariff barriers, typically the main impediment to trade. As the WTO has fallen short of working as a forum for negotiations on these issues, the EU has resorted to bilateral FTAs.[28] The new generation EU FTAs with Canada, the US, Singapore and Japan all include provisions envisaging some form of regulatory cooperation.

While regulatory cooperation is not new to EU external relations, its incorporation in the new generation EU FTAs is. The EU's historical engagement in regulatory cooperation with third countries has nonetheless left two significant footprints to the present. The first is the regional divide that has traditionally characterised such engagement. The EU's regulatory cooperation with its North American trade partners has undergone much longer and institutionalised relations compared to its Asian partners.[29] With the latter, the EU has mostly relied on political dialogues and exchanges.[30] This is reflected in the different degree of ambition of the FTAs with the US and Canada on the one hand, and the FTAs with Singapore and Japan on the other. Only TTIP and CETA were said to represent unprecedented attempts at more institutionalised regulatory cooperation and deeper integration.[31] The second legacy relates to the failures that these historical efforts have typically led to and is reflected in the voluntary nature of new regulatory cooperation commitments. These are presented next. It is argued that, albeit much less ambitious than usually claimed to be, provisions on regulatory cooperation could still develop into systematised forms of cooperation and thus require scrutiny as to their implications for fundamental rights.

Starting with the regional divide, the new generation EU FTAs exhibit a great disparity in their regulatory cooperation commitments. The latest EU proposal for regulatory cooperation in TTIP would have been the most ambitious in terms of aims of regulatory convergence, followed by CETA. The two can be contrasted with the more modest commitments in EUSFTA and EUJEPA. Regarding TTIP, negotiations for a regulatory cooperation chapter signalled a unique momentum to create a permanent

[26] European Commission, 'Reflection Paper on Harnessing Globalisation' (10 May 2017) <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf>.
[27] European Commission (n 25) 8.
[28] Nakagawa (n 6) 410.
[29] On transatlantic regulatory cooperation, see Mark Pollack and Gregory Shaffer, *Transatlantic Governance in the Global Economy* (Rowman & Littlefield Publishers 2001); Takacs (n 7); Rebecca Steffenson, *Managing EU-US Relations: Actors, Institutions and the New Transatlantic Agenda* (Manchester University Press 2005).
[30] On cooperation with Singapore and Japan, see Lay Hwee Yeo, 'Political Cooperation Between the EU and ASEAN: Searching for a Long-Term Agenda and Joint Projects' in Paul Welfens and others (eds), *EU - ASEAN: Facing Economic Globalisation* (Springer 2009); Simon Nuttall, 'Japan and the European Union: Reluctant partners' (1996) 38 Survival 104; Marie Söderberg, 'Introduction: where is the EU–Japan relationship heading?' (2012) 24 Japan Forum 249; Yuichi Hosoya, 'The evolution of the EU-Japan relationship: towards a 'normative partnership'?' (2012) 24 Japan Forum 317; Toshiro Tanaka, 'EU-Japan Relations' in Thomas Christiansen and others (eds), *The Palgrave Handbook of EU-Asia Relations* (Palgrave Macmillan 2013).
[31] Steger (n 8) 118 and 129.

mechanism of continuous exchanges between regulators from both sides of the Atlantic.[32] TTIP would have created what some have called a 'multilevel postnational marketplace',[33] or a 'supranational instance of functional market integration'.[34] Activities to cooperate on regulatory matters would have had the objective of promoting 'regulatory compatibility' between the EU and the US.[35] The Parties could have achieved this capability via a range of means: from the development of common principles, to mutual recognition of equivalence, or even harmonisation of regulatory measures.[36] To this end, TTIP stated that the Parties would have had to periodically update each other on any development related to their upcoming regulatory measures.[37] They should have also pursued and kept under periodic review ongoing regulatory cooperation.[38] In this context, regulatory authorities of each side could have proposed initiatives on regulatory measures to deepen existing cooperation.[39] Natural and legal persons of both Parties could have also submitted proposals.[40]

Compared to TTIP, the regulatory cooperation chapter in CETA contains a wider array of activities to be pursued.[41] They nonetheless seem to remain cautious in terms of regulatory convergence objectives. The aim of 'regulatory compatibility' in TTIP is formulated in a loser form in CETA: here, as part of a provision on one of the activities to be pursued, the text indicates that the Parties '*examine*' 'possibilities for greater convergence'[42] and 'opportunities to minimise unnecessary divergences in regulations'.[43] As in TTIP, ways to minimise such divergence include mutual recognition and 'harmonised, equivalent or compatible' solutions.[44] Both TTIP and CETA contain provisions whereby the Parties commit to take into consideration the other Party's measures when they develop new regulatory measures or amend existing ones.[45] Both also include commitments to notify the other Party on an envisaged regulatory measure.[46] As anticipated in Chapter 3, these plans for regulatory cooperation in TTIP and CETA were harshly opposed by civil society – something which did not happen in the case of EUSFTA and EUJEPA.

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[32] Alemanno (n 19) 135; Alberto Alemanno, 'The democratic implications of the Transatlantic Trade and Investment Partnership' (FEPS Policy Brief, July 2016) 3.
[33] Marija Bartl and Elaine Fahey, 'A postnational marketplace: negotiating the Transatlantic Trade and Investment Partnership' in Fahey and Curtin (n 7).
[34] Ibid.
[35] Article x5(1) EU Textual Proposal for Regulatory Cooperation in TTIP. European Commission, 'TTIP- EU proposal for Chapter: Regulatory Cooperation' (tabled for discussion with the US and made public on 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf> (TTIP).
[36] Ibid.
[37] Art.x.4(1) TTIP.
[38] Ibid.
[39] Art.x4(1) and Art.x5(2) TTIP.
[40] Art.x.5(2) TTIP.
[41] Art.21.4(a)-(s) CETA.
[42] Art.21(4)(f) CETA, emphasis added.
[43] Art.21(4)(g) CETA, emphasis added.
[44] Art.21(4)(g)(ii) and (iii) CETA.
[45] Art.x4(2)(b) TTIP and Art.21.5 CETA.
[46] Art.x4(2)(a) TTIP and Art.21.4(f) CETA.

Compared to TTIP and CETA, the regulatory cooperation commitments in the FTAs with Singapore and Japan are less elaborate. EUSFTA is the only trade agreement that does not contain a self-standing chapter on regulatory cooperation. Instead, specific provisions are included in the chapters on TBT,[47] non-tariff barriers to trade in renewable energy generation,[48] services, establishment and e-commerce,[49] intellectual property,[50] and trade and sustainable development.[51] In these cases, the activities envisaged are mostly limited to dialogues, exchanges of information and views,[52] or cooperation at the international level.[53] Even when cooperative initiatives are envisaged, they are either not specified or limited to the examples above.[54] On the other hand, the FTA with Japan does contain a chapter on regulatory cooperation.[55] At a first glance, EUJEPA appears to draw on the text of TTIP and CETA: the Parties, in order to promote regulatory compatibility, shall consider the promotion of i.a. guidelines and mutual recognition.[56] Unlike TTIP, however, the text does not mention aims of harmonisation by means of regulatory cooperation. EUJEPA provides that each Party 'may propose' a regulatory cooperation 'activity' by presenting a proposal.[57] Yet when it comes to the specific activities to be undertaken for regulatory cooperation, these are limited to 'early information on planned regulatory measures'.[58] The text of the regulatory cooperation chapter additionally includes a series of safeguards allowing the Parties not to engage in those activities. These safeguard clauses are nonetheless not a uniqueness of EUJEPA alone.

The lack of historical engagement in regulatory cooperation with Singapore and Japan, and the legacy of failures in EU regulatory cooperation with the US and Canada,[59] are reflected in FTAs commitments that remain voluntary in nature. Contrary to the ambitious rhetoric of the EU and its trade partners to address non-tariff barriers to trade, the commitments to cooperate on regulatory matters have

[47] Art.4.4 EUSFTA.
[48] Art.7.7 EUSFTA.
[49] Art.8.48 EUSFTA.
[50] Art.10.32 EUSFTA.
[51] Art.12.4 EUSFTA. See also Art.12.10 EUSFTA on Cooperation on Environmental Aspects in the Context of Trade and Sustainable Development.
[52] Art.4.4(2)(d) and (f), Art.7.7(2), Art.8.48(2) and (3), Art.8.61(1) and (2), Art.12.4(f) and Art.12.10 EUSFTA.
[53] Art.8.48(3)(b) EUSFTA.
[54] See e.g. Art.12.4(f) and 4.4(2) EUSFTA.
[55] Chapter 18 EUJEPA.
[56] Art.18.13(a) EUJEPA. Plus, a qualification is made, i.e. 'to avoid unnecessary duplication of regulatory requirements such as testing, qualifications, audits or inspections', which seems to limit the reach of these activities to strictly trade-related issues.
[57] Art.18.12(1) EUJEPA.
[58] Art.18.6 EUJEPA, in conjunction with Art.18.12(4) EUJEPA.
[59] John Peterson and Alasdair Young, 'Trade and Transatlantic Relations: Old Dogs and New Tricks' in Sophie Meunier and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at Fifty* (OUP 2007); Bernard Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization' (2015) 18 Journal of International Economic Law 609; Stephen Woolcock and others, 'The Transatlantic Trade and Investment Partnership: Challenges and Opportunities for Consumer Protection' (CEPS Report No 112, 2015).

been eventually diluted in a number of ways.[60] This is particularly noticeable in CETA and EUJEPA, but also in the proposal for regulatory cooperation in TTIP and the proposals during the current, much more modest, EU-US trade talks. First, under CETA, EUJEPA and the EU proposal for TTIP, regulatory cooperation activities are largely non-binding and voluntary.[61] This means that one Party is not obliged to engage in regulatory cooperation with the other requesting Party.[62] Second, a common feature is the reaffirmation of each Party's regulatory autonomy, reflecting concerns of regulatory space: these are, for instance, provisions on the right to regulate and similar safeguard clauses recognising that the Parties are not restrained in their powers to pursue their public policy objectives.[63] While common to FTAs, their inclusion in the chapters on regulatory cooperation can be understood and explained against the broader context of contestation by civil society and demands to safeguard domestic regulatory space.[64] Given the late engagement in CETA, this resulted in additional safeguards in the Joint Interpretative Instrument.[65] Finally, the regulatory cooperation commitments in the new generation EU FTAs do not bind the Parties to achieve specific *outcomes* or adopt certain *standards*. The Parties only commit to a range of *activities*. In light of this, some have argued that the regulatory cooperation commitments of the new generation EU FTAs do not truly seek regulatory alignment.[66] Overall, it appears that much is left to the discretion of the Parties as to what to engage in and to what extent. The commitments to undertake such activities are present, but they are not binding. Only the implementation will reveal the extent of engagement by the Parties in practice.

Similarly, the latest talks between the EU and the US on regulatory cooperation have shown much less ambition. While TTIP was meant to include a horizontal chapter and regulatory cooperation over nine different sectors, the current EU-US talks have excluded discussions on sensitive regulatory issues altogether.[67] Instead, they have focused on two less contentious agreements: one on the removal of tariffs for industrial goods, and one on conformity assessment for the recognition of testing

[60] Davor Jančić, 'Democratic Legitimacy of Enhanced Regulatory Cooperation in TTIP' in Luca Pantaleo, Wybe Douma and Tamara Takas, *Tiptoeing to TTIP: What kind of agreement for what kind of Partnership?* (2016) CLEER PAPERS 2016/1, 25.

[61] Art.21.2(6) CETA and Art.18.12(6) EUJEPA. Point 3 of the EU-Canada Joint Interpretative Instrument also reaffirms the voluntary nature of cooperation, see Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (2017) OJ L 11/3 (JII).

[62] Even though in most cases it is expected to provide an explanation for not being willing to do so, see Art.21.2(6) CETA and Art.18.12(6) EUJEPA.

[63] See Art.21.2(4) and Art.21.5 CETA; Art.x1(3) and (4) TTIP and 'All provisions of the Regulatory Cooperation Chapter will be applied in full respect of the right to regulate to achieve public policy objectives – decisions on regulations will be made by regulatory and legislative bodies or institutions. Each side will remain fully sovereign in setting the levels of protection it deems appropriate.'; Art.18.1(2), (3), (4) and (5) EUJEPA.

[64] Billy Melo Araujo, 'Regulating through Trade: The Contestation and Recalibration of EU Deep and Comprehensive FTAs' (2018) 31 Pace International Law Review 377.

[65] See Art.2 and Art.3 JII (n 61) and discussion in Chapter 2.

[66] Elizabeth Golberg, 'Regulatory Cooperation - A Reality Check' (2019) M-RCBG Associate Working Paper Series No 115.

[67] Such as agriculture for the EU and public procurement for the US, see European Commission, 'Note for the TPC/INTA EU-US Relations: Interim Report on the work of the Executive Working Group' (30 January 2019) <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157651.pdf>.

procedures. The EU and the US have recently fully implemented an MRA on pharmaceutical inspections, which yet relies on the recognition of procedures, as opposed to standards.[68] Instead, potential for EU-US regulatory cooperation would lie in areas where harmonisation and standards do not yet exist.[69] A prominent field where the EU and the US are willing to make efforts for the development of common standards is cybersecurity and connected devices.[70] However, the history of their regulatory relations suggests that differences in regulatory approaches, particularly in the field of privacy, could still represent an important impediment to cooperation. At the same time, the US and the EU are crucial trade partners to each other, and their efforts at closer regulatory rapprochement evidence their understanding as to the need for it. Their revamped trade talks on regulatory cooperation after – and despite – the failure of TTIP further corroborate this state of affairs.[71]

In spite of their voluntary nature, new regulatory cooperation commitments and endeavours could flow into more systematised forms of cooperation which warrant the scrutiny of potential adverse effects on fundamental rights. Above all, the inclusion of regulatory cooperation in the FTAs, as opposed to other modalities *outside* the trade agreement, can have a stronger long-term impact than if it remained in the political realm.[72] Furthermore, while the Parties are not obliged to enter into regulatory cooperation with each other, they would certainly have the possibility to do so. And even when activities took the form of mere exchanges of information, regulators from both sides would be able to build mutual trust, which is often recognised as one of the main elements for the success of regulatory cooperation.[73] Regulatory cooperation is indeed a long-term project, which requires sustained commitment to engage in such exchanges. For as long as the process may take, there is much potential for it to catalyse more sophisticated and ambitious activities whereby the Parties would seek regulatory alignment.[74]

Greater convergence, as aimed by TTIP and CETA, has been resisted by civil society on arguments that it would limit domestic regulatory capacity.[75] It is argued here that greater convergence may defy this criticism if pursued to achieve enhanced protection. For instance, it has been observed that, being the EU and the US high-income and democratic economies, regulatory cooperation between them would be able to enhance social objectives and 'similar levels of consumer, worker, environmental

[68] See European Commission, 'Progress Report on the implementation of the EU-U.S. Joint Statement of 25 July 2018' <http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158272.pdf>.
[69] See European Commission, 'EU-US call for proposals for regulatory cooperation activities' (2019) <http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157722.pdf>.
[70] European Commission, 'Progress Report' (n 68).
[71] European Commission, 'Call for proposals' (n 69).
[72] Michèle Rioux and Christian Deblock, 'CETA: An Innovative Agreement with Many Unsettled Trajectories' (EU-Canada Network Policy Brief, 2019); Marija Bartl, 'TTIP's Regulatory Cooperation and the Future of Precaution in Europe' (2016) Amsterdam Law School Research Paper No 2016-07.
[73] Hoekman (n 59) 613.
[74] Golberg (n 66).
[75] See Corporate Europe Observatory, 'TTIP: Regulatory Cooperation - a Threat to Democracy' (29 January 2015) <https://corporateeurope.org/en/international-trade/2015/01/ttip-regulatory-cooperation-threat-democracy>.

and prudential safety' while providing a 'robust, evidence-based and transparent regulatory system'.[76] At a minimum, regulatory cooperation should emerge in ways consistent with fundamental rights. To the extent that regulatory cooperation activities aim at greater convergence, it is pivotal to ensure that the latter does not come at the expense of fundamental rights; and instead, explore ways to jointly address challenges to fundamental rights in a context of trade liberalisation.[77] This is even more so since regulatory cooperation would occur between developed countries spanning from North America to Asia, likely to set standards that others will find difficult to disregard. On the one hand, the inclusion of regulatory cooperation within FTAs has been said to be motivated by aims of global standard-setting and values projection. On the other hand, it is not clear what kind of global standards or values the Parties should (or can) pursue via regulatory cooperation. In light of this discussion, the next section turns to the exploration of the place of fundamental rights in the regulatory cooperation chapters of EU FTAs.

4.3. Studying Regulatory Cooperation in its Intersection with Fundamental Rights

This section explores how labour and data privacy rights are dealt with, if at all, in the regulatory cooperation chapters of the new generation EU FTAs (4.3.1); and then considers how regulatory cooperation activities may be problematic for fundamental rights (4.3.2).

4.3.1 Omissions of Fundamental Rights in the Regulatory Cooperation Chapters

Fundamental rights are not expressly addressed or ensured protection in the Regulatory Cooperation chapters of the new generation of EU FTAs. Nonetheless, underlying considerations with respect to fundamental rights can be found in two types of provisions: the so-called 'non-lowering clauses', whereby the Parties commit to maintain current (or high) levels of protection, and provisions on the 'right to regulate', whereby the Parties reaffirm (or recognise) their prerogative to introduce measures to achieve public policy objectives. The non-lowering clauses are usually considered to be unenforceable,[78] whereas the provisions on the right to regulate have been considered one way in which fundamental rights can be ensured protection:[79] Parties could rely on them to justify the adoption of

[76] Chase and Pelkmans (n 9) 25-26.

[77] 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).

[78] Billy Melo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality' (2018) 67 International & Comparative Law Quarterly 233, 240; Jan Orbie and others, 'The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru' (2017) 5 Politics and Governance 6, 8.

[79] Vincent Depaigne, 'Protecting fundamental rights in trade agreements between the EU and third countries' (2017) 42 ELR 562.

measures that are necessary to protect certain rights, without having to fear that those measures will become an object of a trade dispute.

With the exception of EUSFTA (where regulatory cooperation activities are envisaged in specific provisions of the agreement), the regulatory cooperation chapters of CETA, TTIP and EUJEPA include provisions on the right to regulate: albeit at times formulated under the form of exception, they all have the same aim of reaffirming the Parties' right to adopt measures to achieve their public policy objectives.[80] The reason why these provisions are included lies in the concerns that efforts at closer regulatory cooperation with aims of regulatory alignment will involve a 'sensitive political balance'. [81] This balance implies a trade-off between, on the one hand, the economic gains of trade liberalisation flowing from less regulatory divergence, and on the other hand, the maintenance of sovereign power and regulatory space.[82]

When looking specifically at the regulatory cooperation chapters of the FTAs, it appears that the EU's approach in the proposal for TTIP is equivalent to the one in EUJEPA: both contain provisions stating that the Parties shall not be affected in their ability to define or regulate their levels of protection to pursue their public objectives in a series of areas.[83] These grounds are detailed in a non-exhaustive list and allow to examine whether they would encompass fundamental rights. In the case of TTIP and EUJEPA they do include matters related to labour rights, such as occupational health and safety;[84] labour conditions;[85] social protection and social security;[86] as well as to personal data.[87] In CETA, the relevant provision states that the Parties are not prevented 'from adopting different regulatory measures

[80] Provisions on the right to regulate can also be found in the chapters on investment as well as on trade and sustainable development, including in EUSFTA, and can be understood as additional safeguards in this sense. With respect to labour rights, the TSD chapters of TTIP, CETA, EUSFTA and EUJEPA all refer to 'levels of labour protection' as grounds on which the Parties are recognised the right to adopt or modify their laws or policies. The provisions are all followed by a recognition that those laws and policies have to be consistent with internationally recognised standards. See Art.23.2 CETA; Art.3(1) TSD chapter of EU proposal for TTIP; Art.12.2 EUSFTA; Art.16.2(1) EUJEPA. Unlike labour protection, privacy and data protection are not expressly mentioned among the grounds of the provisions on the right to regulate. Yet to the extent that data protection and privacy can be considered part of legitimate policy objectives, more general provisions could apply. In the chapters on investment and services, usually also including e-commerce, the provisions on the right to regulate refer to 'legitimate public policy objectives'. In the EUSFTA the latter are not specified, but in CETA, TTIP and EUJEPA they are presented as encompassing – but not being limited to – objectives of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. From this list, consumer protection could include the protection of personal data and privacy, especially in the context of e-commerce users. The Parties would thus be free to introduce measures, for instance, for the protection of personal data in cross-border services and e-transactions. See Art.23.2 CETA; Art.12.2 EUSFTA; Art.8.1(2)(h) EUJEPA. Unlike the other trade agreements under consideration, EUJEPA expressly states 'areas of personal data and cybersecurity' as grounds to which the right to regulate would apply.

[81] Mark Pollack, 'The Political Economy of Transatlantic Trade Disputes' in Ernst-U Petersmann and Mark Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (OUP 2003).

[82] Ibid.

[83] See Art.x1(3)(a) TTIP and Art.18.1(2) and (3) EUJEPA.

[84] Art.x1(1)(b)(i) TTIP; Art.18.1(2)(c) EUJEPA.

[85] Art.x1(1)(b)(i) TTIP (using 'working' as opposed to 'labour' conditions); Art.18.1(2)(d) EUJEPA.

[86] Art.x1(1)(b)(iv) TTIP; Art.18.1(2)(g) EUJEPA.

[87] Art.x1(1)(b)(v) TTIP; Art.18.1(2)(h) EUJEPA.

or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party.'[88] Even though the grounds are not explicitly listed, the EU-Canada Joint Interpretative Instrument expressly states that CETA preserves the ability of the Parties to achieve their own public policy objectives such as i.a. the protection and promotion of public health, social services, safety, public morals, social or consumer protection, privacy and data protection.[89] CETA is also typically referred to as an agreement with a great amount of provisions on the right to regulate, exceptions and exceptions to the exceptions throughout its text aimed at preserving regulatory space.[90] The CJEU recently confirmed, in Opinion 1/17, that CETA is to be interpreted as not restraining the regulatory autonomy of the Parties.[91]

While the right to regulate should remain a safety net in this context, it is arguable to what extent the reaffirmation of this right is enough to safeguard fundamental rights. Provisions on the right to regulate emerge as the only mechanism to this aim. However, the safeguard of fundamental rights is not positively stated in the text of the agreement. Rather, it stems from the reaffirmation of the Parties' regulatory autonomy and regulatory space, for the Parties can disentangle, or outdistance, from their commitments within the trade agreement and introduce regulatory measures to pursue public policy objectives. However, the provisions on the right to regulate imply no positive obligation to regulate nor a "proactive" protection of fundamental rights. Instead, they are rather artificial and leave discretion to the Parties. The right to regulate thus remains a rather defensive, and not absolute, guarantee. In the light of this, it is debatable how the right to regulate could provide sufficient guarantees to the protection of fundamental rights.

Furthermore, recognising that the Parties are not to be restrained in their ability to introduce certain measures *domestically* does not capture cases where regulatory cooperation activities are undertaken *at the transnational level* because the Parties are intentionally willing to do so: here, potential negative repercussions on the enjoyment of certain rights could be neglected. Regulatory authorities themselves have expressed concerns that regulatory cooperation may lead to compromises, and that convergence be reached at a suboptimal level.[92] Some scholars also argue that mechanisms of regulatory cooperation could lead to more subtle pressures onto the agenda-setting stage, within a

[88] Art.21.5 CETA. See also Art.21.2 CETA 'Without limiting the ability of each Party to carry out its regulatory, legislative and policy activities, ...'.
[89] Point 2 JII (n 61).
[90] See Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 Journal of International Economic Law 641; Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA' in Erich Vranes and others, *Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations* (OUP 2017).
[91] Opinion 1/17 *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2019:341, Opinion of the Court (Full Court), paras 150-155.
[92] Neil Esner, 'Facilitating Earlier Information Sharing and Cooperation Between the U.S. Department of Transportation and the EU' in Daniel Pérez and others, *Regulatory Cooperation: Lessons & Opportunities US-EU Final Report* (Regulatory Studies Center, The Georgetown University Washington, 2016) 21-22.

context that privileges the removal of trade barriers over other public policy objectives.[93] Instead, it is argued here that it should be possible to add express commitments to consider fundamental rights in the context of regulatory cooperation, especially within the objectives of regulatory cooperation. The latter should be considered as a mechanism to cooperate with another country to seek *upwards* convergence of standards and practices. Such a perspective would provide an alternative to the current approach which excludes and refrains from any discussion on fundamental rights altogether.

The fact that the provisions on the right to regulate are the only means by which fundamental rights are addressed in the regulatory cooperation chapters reflects a very limited appreciation of the nexus between regulatory cooperation and fundamental rights, as well as their mutual relevance. Understanding regulatory cooperation merely as a mechanism to reduce the costs of regulatory divergences has favoured an approach that pulls out fundamental rights from regulatory cooperation altogether, leaving their safeguard to the discretion of the single States. What could then be called an "omission" of fundamental rights in regulatory cooperation chapters leads to a mismatch between, on the one hand, the inclusion of regulatory cooperation chapters for further liberalisation, and on the other, the objectives of EU external trade under Article 21 TEU. As endeavours to deepen trade via regulatory cooperation appear to be accompanied by a very narrow understanding of fundamental rights therein, questions arise regarding how these mechanisms might adversely impact fundamental rights.

4.3.2. Ways in which Regulatory Cooperation may adversely impact Fundamental Rights

The inclusion of regulatory cooperation in the EU trade agreements is a recent phenomenon. As a result, it is difficult to refer to specific cases where regulatory cooperation has adversely affected fundamental rights. However, in the light of the preceding discussion, regulatory cooperation still requires scrutiny. The considerations that follow can therefore be only hypothetical: by relying on an analysis of the text of the agreements, this section makes speculations as to how regulatory cooperation could jeopardise fundamental rights. The aim is to warn against the main flaws of regulatory cooperation from a fundamental rights perspective. The section thus sheds light on some of the problems that could arise and elements on which attention should be, in order to prevent potential adverse effects on fundamental rights. This investigation is more compelling as civil society and the public at large have extensively criticised the regulatory cooperation chapters.

One of the main critiques towards regulatory cooperation activities is that they impinge upon governments' traditional areas of domestic regulation, while exposing governments to big business lobbyists. What takes the name of 'regulatory capture by businesses' is considered at the origin of races-

[93] Ferdi De Ville and Gabriel Siles-Brügge, 'Why TTIP is a game-changer and its critics have a point' (2017) 24 Journal of European Public Policy 1491.

to-the-bottom and deregulatory spirals in a number of sectors.[94] Civil society has denounced endeavours to set global standards via regulatory cooperation, for these activities are liable to lead to 'low cost' global standards with high costs for society.[95] Because the new generation EU FTAs have been concluded recently, it is not possible to point at instances where EU regulatory cooperation activities had an observable impact on fundamental rights. However, past US-Canada regulatory cooperation activities provide examples of such downward pressure on the levels of protection for standards in worker safety, chemical labelling and rail safety, which indicate hindering effects of regulatory cooperation to adopt more ambitious regulations domestically.[96] Similarly, some have linked the watering down of a EU Commission's proposal for a new regulation on pesticides to the pressures of industry and the US during the negotiations of TTIP.[97] It is also a voiced concern of regulators that, particularly in the context of trade, regulatory cooperation activities could lead to lower levels of protection than are appropriate.[98] Furthermore, some scholars expect regulatory cooperation to delay, or even hinder, the future adoption of new regulations,[99] especially when it comes to protecting public health or the environment.[100] Against this backdrop, the next sections focus on three elements that may be problematic for fundamental rights: the objectives of regulatory cooperation in the context of trade; the subject matter on which regulatory cooperation activities could occur; and the legitimacy deficits it generates.

4.3.2.1. The Objectives of Regulatory Cooperation in Trade Agreements

The objectives of the regulatory cooperation chapters are indicative of how the Parties understand the purpose of regulatory activities. In international trade, regulatory cooperation has been typically pursued to address 'unnecessary' regulatory divergences and non-tariff barriers to trade that are

[94] Corporate Europe Observatory (n 75).
[95] Trade Justice Movement, 'Written evidence to the Joint Committee on Human Rights Inquiry on Human Rights in International Agreements' (January 2019) <https://www.tjm.org.uk/documents/briefings/TJM-response-to-JCHR-inquiry-on-human-rights-in-international-agreements-Jan19.pdf>; and Corporate Europe Observatory, 'Regulatory cooperation': big business' wishes come true in TTIP and CETA' (February 2017) <https://corporateeurope.org/sites/default/files/attachments/ceo_regulatory_cooperation_06.1.pdf>.
[96] Stuart Trew, 'International regulatory cooperation and the public good: how 'good regulatory practices' in trade agreements erode protections for the environment, public health, workers and consumers' (PowerShift and Canadian Centre for Policy Alternative, April 2019) <https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf>.
[97] Stéphane Horel, 'A Toxic Affair: How the Chemical Lobby Blocked Action on Hormone Disrupting Chemicals' (Corporate Europe Observatory Report, 2015).
[98] Daniel Pérez and others, 'Regulatory Cooperation: Lessons and Opportunities US-EU Final Report' (Regulatory Studies Center, The Georgetown University Washington, 2016).
[99] De Ville and Siles-Brügge (n 93).
[100] Lobby Control, 'Submission on regulatory cooperation activities in the Regulatory Cooperation Forum (RCF) under CETA' (2018) <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156687.pdf>; and Max Bank and others, 'More cooperation for less regulation' (2016) <https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/08_more_cooperation_for_less_regulation.pdf>.

expected to create costs in trade exchanges.[101] It is pivotal to ensure that objectives of regulatory cooperation in EU FTAs are not confined to aims of trade and investment liberalisation, so that the implementing bodies can embrace fundamental rights considerations with a view to enhancing their protection. Not only are the objectives indicative of how the Parties understand the purpose of regulatory cooperation. The objectives also reflect what the Parties expect from the actors that will be involved in the implementation of the chapter. By specifying the objectives, the Parties to an FTA define the scope of the public interests that regulators should pursue.[102] The regulators involved in regulatory cooperation activities – not least the actors of the committees created under these chapters – understand their mandate and role in terms of these objectives. With the exception of the FTA with Singapore that does not contain a chapter as such, the other FTAs under investigation can be examined in this respect.

Overall, the objectives of the regulatory cooperation chapters in TTIP, CETA and EUJEPA reflect a balancing exercise of, on the one hand, normative considerations linked to the pursuance of public policy objectives; and, on the other hand, economic concerns linked to the elimination of unnecessary divergent regulatory requirements, in order to nudge convergence and facilitate trade. For instance, one of the objectives of the regulatory cooperation chapter in TTIP is to contribute to the Parties' activities to achieve a high level of protection in issues that include public health, health and safety, working conditions, consumers, social protection, social security and personal data.[103] In CETA, these issues are limited to the protection of 'human life, health or safety'.[104] In both TTIP and CETA, these objectives are counterbalanced with aims of 'trade and investment facilitation' and increased convergence.[105] The goal is to avoid 'unnecessary differences in regulation' and costs related to duplicative requirements.[106] Such juxtaposition begs the question of hierarchy and compatibility of aims.[107] Similarly, the latest trade talks between the EU and the US have witnessed a rhetoric of 'maintaining – if not enhancing – levels of protection' counterbalanced by the primary objective of 'reducing costs'.[108] The task given to the Executive Working Group for the EU-US regulatory agenda is, accordingly, the identification of areas for Regulatory Cooperation that 'facilitate transatlantic trade',

[101] Costs involved by heterogeneity and behind-the-border measures include for instance information costs, specification costs, conformity assessment and customs procedures costs. See OECD, 'International Regulatory Co-operation: Adapting rulemaking for an interconnected world' (Policy brief, October 2018). Non-tariff barriers to trade might additionally amount to cases of 'regulatory protectionism', whereby imported products are discriminated against by means of regulations for reasons that are not for the pursuance of a legitimate public policy objective. See Alan Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 6 The University of Chicago Law Review 1.
[102] Mendes (n 7) 22.
[103] Art.x.1(1)(b) TTIP.
[104] Art.21.3(a) CETA.
[105] Art.21.3(c) CETA; Art.x1(1) TTIP 'whilst facilitating trade'; Art.18.1(1)(1)(b) EUJEPA.
[106] Ibid.
[107] Arguably, regulatory cooperation activities should balance objectives of high level of protection of public policy objectives, on the one hand, and trade and investment on the other; yet it is questionable to what extent they would be contemporarily achievable aims, or whether trade-offs would be involved.
[108] European Commission, 'Interim Report' (n 67).

'ease trade' and 'slash costs'.[109] These objectives corroborate the concerns of those who warned against narrow phrasings that limit the objectives of regulatory cooperation to the enhancement of trade and investment.[110]

A slightly different approach can be found in EUJEPA. The latter shares with TTIP and CETA the aim of enhancing bilateral trade and investment.[111] This is to be done by (a) promoting an effective, transparent and predictable regulatory environment; and (b) promoting compatible regulatory approaches and reducing unnecessarily burdensome, duplicative or divergent regulatory requirements.[112] EUJEPA yet differs from TTIP and CETA in the balancing act with normative considerations. The public policy objectives that in TTIP are said to be achieved *via* regulatory cooperation, in EUJEPA are carved out from regulatory cooperation activities altogether. EUJEPA reaffirms that nothing in the Agreement will prevent the Parties from defining or regulating their levels of protection in order to pursue i.a. occupational health and safety, labour conditions and personal data.[113] These public policy objectives are made the object of provisions on the right to regulate. Regulatory cooperation is not intended as a tool to achieve these objectives, but as a potential threat to them. This understanding of regulatory cooperation hence justifies the safeguard clause. As discussed, similar clauses exist in TTIP and CETA. Unlike the latter, however, EUJEPA misses express provisions that recognise the normative functions of regulatory cooperation. In EUJEPA (and possibly to a lesser extent in CETA and TTIP), regulatory cooperation appears to stop at the objective of reducing trading costs of non-tariff barriers to trade and divergences in technical standards. Against this backdrop, more ambitious aims for fundamental rights promotion are likely to be left aside.

There is an inherent discursive challenge in advancing regulatory cooperation for fundamental rights within the trade regime. The challenge lies in the attempt to change the conception and nature of regulatory cooperation itself in international trade. Here, regulatory cooperation is usually understood as a mechanism to reduce the costs deriving from regulatory divergences. The need to cooperate in regulatory matters is usually imbued with the rhetoric of 'cutting the red tape'. By contrast, reasons to cooperate less often also encompass aims of 'enhanced protection'. The most effective regimes on regulatory cooperation have found resonance in the former aim, while efforts at the latter have generally been non-existent.[114] In this context, scholars have identified 'a structural disregard' of the interests of weaker and less politically powerful groups and less well-organised individuals.[115] As trade agreements

[109] Ibid.
[110] Marija Bartl and Kristina Irion, 'The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun' (25 October 2017) <https://ssrn.com/abstract=3099390>.
[111] Art.18.1 EUJEPA.
[112] Ibid.
[113] Art.18.1(1)(2) EUJEPA.
[114] Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness' (2014) 108 American Journal of International Law 211, 211-213.
[115] Ibid.

have now expanded the subject matter over which such regulatory cooperation activities would apply, there is a potential for regulatory cooperation to tackle not only technical standards, but also other broader issues *affecting*, and *affected by*, trade.

4.3.2.2. The Subject Matter of Regulatory Cooperation

Activities to cooperate on regulatory matters cover a range of issues that are worth examining in their relation with fundamental rights. Focusing on labour and data privacy rights, the aim here is to understand whether the regulatory cooperation chapters envisage regulatory activities on these rights; and should this not be the case, consider potential instances of "diagonal encroachment", namely where regulatory cooperation discussions could *tangentially* touch upon them.[116] One main methodological challenge thus arises regarding cases where, particularly in data privacy rights, regulatory cooperation would not apply, but could indirectly touch upon (and affect) rights protection. Since the implementation of these chapters is still to be seen, only hypotheses and scenarios can be sketched out.[117] When looking at the EU trade agreements with Canada, Japan and the EU's proposal for TTIP, a mixed picture emerges: while regulatory cooperation on labour standards is at times envisaged, data protection is never expressly mentioned as forming part of the subject matter of regulatory cooperation activities.

Labour rights. Unlike the prospect provided by the latest EU proposal for cross-border flows of data which would categorically exclude regulatory cooperation activities on data protection,[118] there is no evidence of such an approach with respect to labour rights. The regulatory cooperation chapter in CETA expressly applies to 'trade and labour'.[119] Also in EUJEPA labour rights could be a matter of regulatory cooperation activities. The scope of its regulatory cooperation chapter is wider than any other FTA: by referring to 'any matter covered by the agreement', and with the agreement being quite comprehensive, the chapter could virtually apply to regulatory measures on labour standards, including matters of health and safety at the workplace, decent work, social protection and promotion of social dialogue. However, despite the wide coverage, there are several safeguard clauses that limit this apparent broad scope, as well as modest commitments as to the degree of cooperation pursued. With respect to the EU proposal for TTIP, labour issues could arguably fall under the 'other areas or sectors' where regulators of both Parties may find common interest.[120] The precondition is for the regulatory authorities of each Party to

[116] Bartl and Irion (n 110).
[117] Anne Meuwese, 'Constitutional aspects of regulatory coherence in TTIP: an EU perspective' (2015) 78 Law and contemporary problems 153.
[118] European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf> (EU Commission proposal on data flows).
[119] Art.21.2 CETA.
[120] The provisions of the Chapter are said to apply to 'specific or sectoral provisions concerning goods and services' and 'any other areas or sectors' covered by the Agreement that 'has or is likely to have a significant impact on trade or investment between the Parties'. See Art.x3(1)(a) and (b) EU proposal on Regulatory Cooperation in TTIP (2016).

have determined common interest.[121] This means that it is for the relevant regulatory authorities in both the EU and the US to identify and agree upon areas which could benefit from – and which could then become the object of – regulatory cooperation activities. Issues related to labour rights could be such areas, but it is probably unlikely.

Data Privacy rights. Whether data privacy could become subject matter of regulatory cooperation activities is much less an issue of express provision and more of indirect encroachment.[122] In the context of data flows that could be liberalised as a result of liberalisation of services, many demand that data privacy is not compromised.[123] Chapter 2 has shown how financial services, telecommunications and e-commerce are areas where data privacy rights are most likely to be affected. In CETA, the scope of the regulatory cooperation chapter is said to encompass i.a. 'cross-border trade in services'.[124] As data privacy rights are closely related to data flows, cooperation on regulatory matters pertaining to cross-border trade in services does not totally exclude tangential encroachment of data privacy rights.[125] At its first meeting, the CETA Regulatory Cooperation Forum adopted a plan which envisages closer cooperation in the fields of cybersecurity and the Internet of Things, both closely interlinked with data privacy rights.[126] Furthermore, there seems to be a common willingness to engage in collaborative action in areas that are still not regulated, particularly in the field of emerging technologies,[127] which could potentially enmesh data privacy rights. In the EU's proposal for TTIP, it is unclear the extent to which data privacy would be excluded by the scope of the chapter.[128] The provision on cooperation on regulatory issues in e-commerce states that the parties 'shall maintain a dialogue on regulatory issues raised by electronic commerce' which would include 'the protection of consumers'.[129] In any case,

[121] Art.x3(1)(b) EU proposal on Regulatory Cooperation in TTIP (2016).
[122] Even though the wide provisions in the regulatory cooperation chapters of both TTIP and EUJEPA hint that data protection could fall under the subject matter as much as labour issues, see Art.18.18(1) EUJEPA.
[123] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) [2015] OJ C265/35 (EP Resolution on TTIP), point (xii) 'to ensure that the EU's acquis on data privacy is not compromised through the liberalisation of data flows, in particular in the area of e-commerce and financial services, while recognizing the relevance of data flows as a backbone of transatlantic trade and the digital economy'. See also BEUC, 'WTO E-commerce recommendations' (29 March 2019) <https://www.beuc.eu/publications/beuc-x-2019-014_wto_e-commerce_negotiations_-_beuc_recommendations.pdf>.
[124] Art.21.2 CETA.
[125] In addition, the 'i.a.' suggests that regulatory activities could also be undertaken over issues beyond those expressed in the relevant provision.
[126] See European Commission, 'Report' on the 1st Meeting of the CETA Regulatory Cooperation Forum on 14 December 2018 (2019) <https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157679.pdf>.
[127] See Government of Canada, 'Consultations on the Canada-European Union Comprehensive Economic Trade Agreement, Regulatory Cooperation Forum' (2018) <https://open.canada.ca/data/en/dataset/c45c4cda-7134-4e65-8e99-5214eb07bcf3>.
[128] The EU's proposal for TTIP specifies that regulatory measures which relate to services outside the applicable scope of the sections on liberalisation of investment and cross-border supply of services would not form part of the applicable scope of the Chapter. See Art.x3(2) EU proposal on Regulatory Cooperation in TTIP. Services such as data processing, data storage and similar do fall under the services chapter proposed by the EU. See, for instance, Art.5-13 and Art.5-33 in European Commission, 'European Union's proposal for services, investment and e-commerce text tabled for discussion in the negotiation round of 12-17 July 2015' (EU's proposal for services in TTIP).
[129] Art.6-8 EU's proposal for services in TTIP.

while this would suggest that regulatory cooperation on data privacy issues could be possible, the regulatory cooperation activity envisaged appears to be limited to 'maintain a dialogue' and to exchange information about the Parties' legislation on those issues. As for EUJEPA, similar considerations to the ones for labour rights apply.

Given what can be found in the trade agreements under investigation, three scenarios that could materialise are highlighted here. The first is a case where labour and data privacy standards may become the object of regulatory cooperation exchanges between EU and third party regulators. In this scenario, regulatory divergences could be tackled via the activities envisaged under the regulatory cooperation chapter: be it dialogues and exchanges of information, mutual recognition, or agreement on common standards with the aim of harmonisation. The coverage of labour and data privacy rights could be problematic in cases where other necessary conditions for their protection were not met, for instance objectives of enhanced protection and scrutiny mechanisms. This is not to suggest that discussion on labour and data privacy rights should be excluded by regulatory cooperation activities. Instead, it is posited that there would be potential for regulatory cooperation to reach higher standards, but this potential would only be achieved under certain prerequisites and procedural safeguards relating to legitimacy and accountability. With respect to data privacy, this scenario appears less likely to occur in the future: the Commission's recent proposal on horizontal provisions for cross-border data flows explicitly sets out that matters of personal data fall outside regulatory cooperation activities on issues regarding digital trade.[130] Finally, some scholars have observed that the EU system of fundamental rights protection may put a limitation on the agenda-setting powers of the regulatory bodies created under the regulatory cooperation chapters.[131]

It is argued here that even where labour and data privacy rights were not made part of the subject matter of regulatory activities, they could arise as side issues, namely as a result of regulatory cooperation discussions in related sectors that *tangentially* touch upon those rights. In the Commission's recent proposal, the express exclusion of data flows from regulatory cooperation activities on digital trade certainly reveals an appreciation of the fact that indirect encroachment could occur. The fact that regulatory cooperation activities might tangentially touch upon issues of labour and data privacy rights is considered to generate the remaining two scenarios. Both are liable to raise problems for fundamental rights protection.

The first scenario regards cases where data privacy and/or labour rights are discussed. Regulators of both Parties may engage in regulatory cooperation activities on matters more or less related to fundamental rights: this situation would indirectly lead to the scenario described above whereby fundamental rights would be made the object of regulatory cooperation chapters. The second

[130] See Art.X in EU Commission proposal on data flows (n 118).
[131] Meuwese (n 117) 168.

scenario suggests that labour and data privacy rights, while relevant in regulatory activities on related matters, could indirectly be affected without regulatory cooperation activity taking place in their respect. This could be the case, for instance, of e-commerce, financial services and telecommunications, for which regulatory cooperation activity is envisaged in most of the FTAs.[132] It has been observed that, where these areas fall under the scope of regulatory cooperation and regulatory exchanges take place in their respect, regulators will also need to regulate on data.[133] In this scenario, regulatory cooperation activities could disregard the salience of fundamental rights in the subject matter at issue. As a result, rules could be made without taking into consideration potential adverse effects on fundamental rights. Against this background, the next section addresses the problem of legitimacy deficits of regulatory cooperation mechanisms.

4.3.2.3. The Legitimacy Deficits of Regulatory Cooperation

Regulatory cooperation creates an additional level of regulatory activity beyond the trade agreement itself. It implies that regulatory activity does not take place within the domestic sphere, but in a sort of "transnational space" that widens the gap between citizens and decision-makers.[134] The EU represents the best example of institutionalised regulatory convergence, and many parallels can be drawn between democratic legitimacy deficits attributed to the EU and legitimacy deficits of institutionalised regulatory cooperation mechanisms.[135] Whereas the EU already suffers from democratic legitimacy deficits, the addition of another level to it – the bilateral trade context – is very much liable to amplify the problem. A first dimension to the legitimacy deficits lies in the accountability problems that EU FTAs may generate by creating an additional law-making level. Agenda-setting and decision-making powers are usually delegated to committees that are created by the trade agreement and who have the task of implementing the chapter.[136] Some scholars have observed that it is often not clear how the power-balance is struck between the domestic and the international level.[137] Regulatory cooperation involves a space where authority and power relations both disperse and overlap. This state-of-play complicates the identification of the principals to which different subjects should be accountable.[138]

[132] Art.8.61 EUSFTA on regulatory cooperation on e-commerce only envisages dialogue and exchange of information.
[133] Bartl and Irion (n 110).
[134] Juan Santos Vara, Soledad Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations Through EU Law* (Routledge 2018).
[135] Caitríona Carter and Andrew Scott, 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union' (1998) 4 ELJ 429.
[136] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 137, 143.
[137] Mendes (n 7) 23; Gregory Shaffer, 'Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbor Agreements' (2002) 9 Columbia Journal of European Law 29, 75.
[138] Kingsbury and others (n 12); Michael Zurn, 'Global Governance and Legitimacy Problems' (2004) 39 Government and Opposition 260.

A second concern on the legitimacy deficits of regulatory cooperation consists of delegation of decision-making powers which are capable of escaping traditional domestic democratic checks and balances.[139] The 'transnational space' of regulatory activity means that regulatory cooperation mechanisms cannot rely upon the same democratic guarantees that are present at the domestic level.[140] Regulatory cooperation is clearly vulnerable to the challenges of democracy beyond the State that have long been studied by the literature on democratisation of global governance.[141] In the specific context of the latest EU FTAs, the processes and powers defined in the chapters on regulatory cooperation suggest that decisions could be taken without them being subject to parliamentary or other types of scrutiny.[142] As explored by some scholars, one way of addressing this shortcoming is to ensure some form of parliamentary oversight.[143] Considering the potential distributional consequences of such decisions,[144] concerns for fundamental rights inevitably arise.

A final concern regards the likely binding nature of the decisions, against the lack of parliamentary involvement in the implementation process.[145] In CETA, for instance, the Regulatory Cooperation Forum is the main committee with the power to make decisions.[146] Although the bindingness of the decisions is not explicitly stated (unlike the decisions of the Joint Committee), it has been observed that precisely because of this omission, it may be possible for decisions to be binding. This is especially so given the distinction that is made throughout CETA between decisions and recommendations – the former being binding, as opposed to the latter.[147] EUJEPA has a similar approach: it grants decision-making powers to specialised committees, but their decisions are not expressly said to be binding.[148] At the same time, however, the specialised committees, among which the Committee on Regulatory Cooperation,[149] can submit proposals for decisions that will eventually be adopted by the Joint Committee; these decisions are expressly said to be binding.[150] As far as TTIP is concerned, at first glance, the EU's position for a future regulatory cooperation body in TTIP appeared to *exclude* the power for it to adopt legal acts: this is specified in the latest EU proposal, but

[139] Benvenisti (n 7).
[140] Kingsbury and others (n 12).
[141] See Introduction of the thesis.
[142] Santos Vara and Sánchez-Tabernero (n 134); Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 ELJ 523; 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, 27-28 September 2019, Dalhousie University) (Weiss, 'Implementing CETA').
[143] Weiss, 'Implementing CETA' (n 142).
[144] Stewart (n 114).
[145] 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.
[146] Art.26.2.4 CETA.
[147] Weiss (n 145) 539.
[148] Art.22.3(5) EUJEPA.
[149] Art.22.3(1)(i) EUJEPA.
[150] Art.22.3(5) EUJEPA.

was likewise envisaged in the preceding proposal.[151] However, the chapter on institutional provisions sets out that the Joint Committee will have to discuss at least once a year matters pertaining to regulatory cooperation and will have the power to adopt decisions, which are expressly said to be binding.[152] While a more comprehensive account will be provided in the next chapter on the institutional dimension of EU FTAs (Chapter 5), suffice to say that the conferral of powers to treaty bodies prepares the ground for advocating for legitimacy requirements and accountability safeguards. While the delegation of decision-making powers involves important legitimacy losses, it is argued here that this would not be so unconditionally.

4.4. Regulatory Cooperation for Fundamental Rights

This section turns to the normative side of the nexus between regulatory cooperation and fundamental rights. It first provides an account of how regulatory cooperation might be inevitable and necessary in a context of new global challenges to fundamental rights (4.4.1); and then how regulatory cooperation should be rethought in its aims and design with a view to protecting fundamental rights (4.4.2).

4.4.1. A Context of Global Challenges to Fundamental Rights

Instead of being rejected as a whole, regulatory cooperation could be designed in a way that would proactively seek to protect fundamental rights, and thus contribute to the "deep agenda for fundamental rights". This is all the more compelling in a context where new developments in global trade and society increasingly challenge traditional understandings of regulatory cooperation in international economic law. To begin with, the nature of trade is changing in a way that has prompted calls for regulation of new areas. Regulatory cooperation itself was introduced, at its inception, as a way to tackle early changes in the trends of trade: from a focus on tariffs, to a gradual realisation that non-tariff barriers could hamper trade or increase its costs. Regulatory cooperation was principally conceived as a way to reduce costs and liberalise trade. Yet some argue that, today, 'liberalisation of trade' has become an obsolete and misleading characterisation of what the international trade system is for.[153] Instead, 're-regulation of trade' would better reflect what is needed in the context of globalisation.[154] While non-tariff barriers are still amongst the main obstacles to trade, there are increasing pressures for the international trade agenda to address and regulate new "trade and…" issues: issues such as the

[151] Compare page 10 EU proposal on Regulatory Cooperation in TTIP (2016) (n 35) with Art.14.2(c) EU TTIP proposal on Regulatory Cooperation (2015), see European Commission, 'Initial Provisions for CHAPTER [ ] Regulatory Cooperation' (tabled for discussion with the US in the negotiating round of 2-6 February 2015 and made public on 10 February 2015) <https://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf>.

[152] Art.X.1(6)(f) and Art.X.4 EU textual proposal institutional, general and final provisions. European Commission, 'EU Proposal for Institutional, General and Final Provisions' (tabled for discussion with the US in the negotiating round of 11-15 July 2016 and made public on 14 July 2016).

[153] Cottier (n 22).

[154] Ibid.

environment, services, e-commerce and cybersecurity, which could not be tackled by States alone. Regulatory cooperation could (and should) adapt to this changing nature of global trade, and address the needs arising from it. The integration of markets in these fields, however, is liable to lead to new social disruptions relating to *i.a.* outsourcing of services, relocation of jobs and protection of personal data.[155] Regulatory cooperation, as an enabler of further integration, should be seen in this context of pressures to regulate (new areas related to) trade, and consider potential effects on fundamental rights.

Moreover, the global socio-economic context is changing. Against a background of increasing outsourcing of jobs and global competition, new challenges arise for social security, the protection of the labour market and the flows of personal data across borders. The pervasiveness of new technologies has led Richard Baldwin to coin the term "globotics": a new type of globalisation shaped by robotics, automation and forms of artificial intelligence that are liable to affect the provision of services and reach beyond traditional harming effects on manufacturing jobs, to disruption of the work of skilled workers.[156] Trade, evolving in nature and expanding in scope, can be seen as an important vehicle of these processes. It enables and provides the environment for those exchanges to take place, in services as much as in new technologies. Yet these are often at the origin of the challenges posed to fundamental rights and social protection, both in labour and data. This backdrop might lead to new waves of backlash to trade; to new "local" claims of rights as a result of rules created at the "global level" that disregard or affect these rights.[157] These claims may well come from the (new) "losers" of globalisation identified by Baldwin. Developments in the socio-economic context have a bearing on how regulatory cooperation is relevant to global trade. Several scholars have questioned how these mechanisms can serve the international economic order and the downward pressures of globalisation on social protection.[158] Part of the answer may be that new "losers" of globalisation should be taken into account when cooperating on regulatory matters.

Arguably, the way regulatory cooperation has been understood so far makes it unfit and outdated for a global economic order where fundamental rights are increasingly being challenged. Although in most cases regulatory cooperation is controversial and results in unambitious outcomes, there is potential for it to harness globalisation.[159] In a context of demands for re-regulation of trade and global challenges to fundamental rights, regulatory cooperation is ever more inevitable and necessary. Regulatory cooperation could be employed as a tool to develop rules on transborder challenges

[155] UNCTAD, 'Services, development and trade: The regulatory and institutional dimension' (9 March 2016) <https://unctad.org/meetings/en/SessionalDocuments/c1mem4d11_en.pdf>.
[156] Richard Baldwin, *The Globotics Upheaval: Globalisation, Robotics and the Future of Work* (Orion 2019).
[157] Koen De Feyter, 'Human Rights: Navigating between the Global and the Local' (lecture at School of Law, Queen Mary, University of London, 14 June 2019), notes by the author.
[158] See Harlan Grant Cohen, 'What Is International Trade Law For?' (2019) 113 American Journal of International Law 326; Gregory Shaffer, 'Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards' (2000) 25 Yale Journal of International Law 1.
[159] See next section 4.4.2.

requiring concerted action by States: for instance, in the field of business and human rights, rules could be agreed upon for the conduct of corporations and protection of the labour market.[160] Such reformulation of the purpose of regulatory cooperation would allow a broader perspective on the role of regulatory cooperation in global trade and its effects. In order to rethink the foundations of international economic law today, its purpose and implications in society from a fundamental rights perspective, regulatory cooperation needs reconceptualisation, too. Regulatory cooperation should be designed in such a way to make it the solution, and not the problem, to current challenges at the intersection of trade and fundamental rights.

4.4.2. Fundamental Rights as New Objectives for Regulatory Cooperation

Regulatory cooperation needs new objectives. The examination of the potential problems arising from the chapters on regulatory cooperation warrants a change in how regulatory cooperation is understood in its justification and purpose. Provided the discussion above, regulatory cooperation can – and should – be reconceived as a tool for enhanced protection and upwards convergence. The perspective of what drives regulatory cooperation should go beyond the mere objective of reducing costs to increase economic benefits, while overlooking important social interests at stake and redistribution issues deriving therefrom.[161] In this sense, unlike the defensive approach in EUJEPA, regulatory cooperation would work as a tool to achieve enhanced protection. Some have argued that regulatory cooperation could be a viable way to overcome the apparent trade-off between freer trade and better regulation, and to advance 'both economic objectives and social preferences'.[162] Redirecting the objectives of regulatory cooperation towards enhanced protection is also the view of a number of civil society organisations.

For instance, during the consultations on the implementation of CETA, the Canadian Association for Consumers has recommended that regulatory cooperation be approached 'not with a view to eliminating some rules, but with a view to upholding trust, fostering transparency and reducing negative externalities'.[163] They have pointed at 'upward harmonization' as 'the main purpose of regulatory cooperation' when it comes to consumer protection.[164] Data privacy is also explicitly indicated as one of the areas where Canada maintains old rules, and which could therefore benefit from upwards convergence with the EU legal framework.[165] Other civil society organisations demand that

[160] See, for instance, StopISDS, 'Global rules for corporations would stop the land grabs in Sierra Leone' (11 March 2019) <https://stopisds.org/global-rules-for-corporations-would-stop-the-land-grabs-in-sierra-leone/>.
[161] Stewart (n 114).
[162] Thomas Bollyky and Petros Mavroidis, 'Trade, Social Preferences and Regulatory Cooperation The New WTO-Think' (2017) 20 Journal of International Economic Law 1.
[163] See submission by the Coalition Des Associations De Consommateurs du Québec RCF at Government of Canada (n 127).
[164] Ibid.
[165] Ibid.

the CETA Regulatory Cooperation Forum 'only be used to harmonize regulatory standards upwards to better protect the public interest in both jurisdictions.'[166] Likewise, the European Services Forum recently regretted that the EU did not take the opportunity to use regulatory cooperation mechanisms to promote its approach to the protection of personal data.[167]

Indeed, and as an additional role for regulatory cooperation, these chapters could also envisage a more proactive cooperation around fundamental rights. The protection of fundamental rights could be understood in itself as a purpose of regulatory cooperation. Regulatory cooperation should aim at upwards convergence of fundamental rights standards – which should not be lower to any of the Parties'. It could also involve cooperation on regulatory issues that more indirectly relate to fundamental rights, and which would have *the effect of* ensuring or enhancing their protection. Countering the social disruptions of the socio-economic context described above is such an example. Especially for transborder problems that could hardly be addressed domestically or by unilateral action alone – and that would potentially jeopardise fundamental rights – then countries should understand the need to cooperate to achieve enhanced protection.

Re-conceiving the aims of regulatory cooperation allows to expand the subject matter of regulatory cooperation and address regulatory issues of global relevance. For instance, as discussed in Chapter 2, regulation to tackle Corporate Social Responsibility (CSR) and due-diligence in global supply chains could be such fields.[168] These instruments would provide guidance on the future objects and direction of trade regulation: beyond reducing costs, and instead geared towards taming disruptions of market opening and globalisation.[169] While beyond the scope of the present research, the UN Sustainable Development Goals, the UN Guiding Principles on Business and Human Rights and the UN Global Compact, as well as the body of CSR literature, give useful indication of the *objects* and *addressees* of regulations; of *where* regulations is needed, in the sense of which issues compel regulation that would best address global challenges: from tax avoidance by big companies, to threats

[166] See submission by the Canadian Environmental Law Association & Environmental Defence RCF at Government of Canada (n 127).

[167] The argument was made in the context of the EU Commission proposal on data flows (n 118). See European Services Forum, 'Subject: Commission's Proposal on Cross-border data flows in Trade Agreements' (letter to Mr Kiril Yurukov, Chair of TPC Services and Investments, Trade Policy Section, 12 June 2018) <http://www.esf.be/new/wp-content/uploads/2018/06/ESF2018-10-Letter-to-TPC-on-Commissions-Proposal-on-Cross-border-data-flows-in-Trade-Agreements-12-June-2018-Final.pdf>.

[168] See Thomas Raines, 'Raise the Bar by Leveraging the EU's Regulatory Power' (12 June 2019) <https://www.chathamhouse.org/expert/comment/raise-bar-leveraging-eu-s-regulatory-power?utm_source=Chatham%20House&utm_medium=email&utm_campaign=10644417_Expert%20perspectives%202019&dm_i=1S3M,6C5A9,VHFQ8M,P1PLC,1>.

[169] Usman Ahmed, 'The Importance of Cross-Border Regulatory Cooperation in an Era of Digital Trade' (2019) 18 World Trade Review S99; Joshua Meltzer, 'Governing Digital Trade' (2019) 18 World Trade Review S23.

to labour protection in the digital era and to data privacy in global data flows.[170] However, these instruments do not feature in the trade agreements under examination.[171]

From this stance, it is possible to espouse a broader perspective on regulatory cooperation in its intersection with rights, and to appreciate its place and role in global trade today. Regulatory cooperation should be appreciated in its potential to both enable and circumscribe trade, as opposed to being a mere instrument of further market opening. Regulatory cooperation can be seen as providing the underpinning system to regulate trade and tame globalisation; to enable the framework for trade to occur without disrupting – and instead providing safeguards to – the enjoyment of fundamental rights. Further objectives relating to regulatory *coherence* would also provide a background to more normative regulatory cooperation activities.[172] For instance, CETA and EUJEPA envisage the promotion of a regulatory environment that is effective, transparent, predictable, also by means of good regulatory practices.[173] CETA goes even further than EUJEPA since it additionally seeks to build trust, mutual understanding, improvement of regulatory proposals and implementation, regulatory impacts and compliance.[174]

A first point of normative intersection between regulatory cooperation and rights would be in the objectives and the way the purpose of regulatory cooperation is conceived. Fundamental rights would not be excluded from discussions altogether, but their relevance and intersection with other objects of regulatory cooperation activities be recognised, acknowledged and eventually addressed. To this end, regulatory cooperation chapters should first of all embed *respect* for fundamental rights *in* their objectives, as a sort of negative obligation: regulatory cooperation activities should not happen when it is likely to have a negative impact on fundamental rights. In this respect, systematic impact assessments should be carried out on the effect of cooperation on regulatory matters on i.a. labour and data privacy rights, but also health and consumer protection. At the same time, these objectives would need to be sustained with adequate procedural mechanisms and safeguards to ensure both input and throughput legitimacy.

For this regulatory activity to emerge, an institutional design and set of practices would be needed that counter the throughput legitimacy deficits of regulatory cooperation. As indicated,

[170] Peter Drahos, 'Regulatory Capitalism, Globalization and the End of History' (2014) RegNet Research Paper 2014/33.
[171] See Aakriti Bhardwaj and Isabella Mancini, 'Business and Human Rights in Trade: EU's Missed Chance to be a Global Leader?' (EUTIP blogpost, 25 November 2019) <https://eutip.eu/business-and-human-rights-in-trade-eus-missed-chance-to-be-a-global-leader-2/>.
[172] A discussion of regulatory coherence goes beyond the scope of the chapter. Regulatory coherence refers to cooperation to converge practices, as opposed to standards. In TTIP, this was said to include, i.a. 'early consultations on significant regulations, use of impact assessments, evaluations, periodic review of existing regulatory measures, and application of good regulatory practices.' Council of the European Union, 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (11103/13, 17 June 2013), 12. See Meuwese (n 117).
[173] Art.21.3(b) CETA; Art.x1(1)(c) TTIP; Art.18.1(1)(1)(b) EUJEPA.
[174] Art.21.3(b) CETA.

regulatory cooperation involves a transnational dimension of regulatory activity, which potentially gives rise to a global administrative space. For this reason, these mechanisms could benefit from an application of the principles of global administrative law as a way of countering legitimacy deficits of regulatory cooperation. It has been suggested that embedding principles of transparency and non-state actors' participation in regulatory cooperation mechanisms would provide a basis for parliamentary review.[175] Indeed, some scholars have indicated how trade agreements – and the fate of regulatory cooperation as an object highly criticised – are dependent upon their ability 'to ensure political control and societal input to guarantee [their] legitimacy and accountability once in operation'.[176] There seems to be agreement among scholars that civil society input and involvement in all phases of regulatory cooperation could be a way of ensuring such accountability.[177] While most civil society groups have few resources available and may therefore find it difficult to meaningfully engage in these mechanisms, it is argued here that regulatory cooperation chapters should at a minimum involve parliamentary scrutiny and impact assessments of envisaged joint-regulatory initiatives.

4.5. Conclusion

The new commitments to cooperate on regulatory matters represent a crucial turn in EU trade policy and its deep trade agenda. They show the EU's aspiration for deeper integration and global standard-setting in a context of competing sites of regulatory activity. How global this endeavour is remains to be seen. The regulatory cooperation chapters in CETA and in the EU's proposal for TTIP reveal the EU's readiness and ambition to engage in closer and institutionalised regulatory cooperation. By contrast, the commitments in EUSFTA and EUJEPA are more modest in nature. What these agreements have in common is the possibility for the Parties to decide whether to engage or not. This somewhat depreciates the rejection of these initiatives by civil society. At the same time, the inclusion of regulatory cooperation commitments in EU FTAs creates the basis for a long-term engagement. Regulatory cooperation mechanisms create spaces where new law can develop and evolve. It is pivotal to ensure that these activities take place in a way that is consistent with fundamental rights. The EU bears responsibility if it is to be a global actor in trade *and* fundamental rights.

While it is too early to observe the actual impact of regulatory cooperation on fundamental rights, what emerges is that the relevant chapters are limited in a number of ways: they set out narrow objectives; they span a wide range of issues that could tangentially encroach fundamental rights; and they generate democratic legitimacy deficits. Regulatory cooperation comes through as a tool to address

[175] Reeve Bull and others, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' (2015) 78 Law and Contemporary Problems 1, 13.
[176] Alemanno (n 32).
[177] Bernard Hoekman and Charles Sabel, 'Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy' (2017) Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 2017/36; Wiener and Alemanno (n 4) 135; Chase and Pelkmans (n 9).

non-tariff barriers to trade, while fundamental rights appear to remain under the radar. It has been argued that regulatory cooperation mechanisms can instead work as virtual platforms for cooperation on matters pertaining to fundamental rights and trade. In a context of new global challenges to labour and data privacy rights, regulatory cooperation can be a tool for joint efforts to address them. Unlike what some scholars of civil society actors claim, fundamental rights could be addressed in regulatory cooperation activities (and should be in discussions on related issues, such as e-commerce for data privacy). This would require that: (a) the objectives of the chapters refer to the respect and promotion of fundamental rights, and strive for upwards convergence; and (b) procedural safeguards are in place. A 'deep trade agenda for fundamental rights' at the level of regulatory cooperation would rest on such reconceptualisation of regulatory cooperation.

Designed with a view to working for fundamental rights, regulatory cooperation would find in their promotion an important source of societal acceptance, on which it would depend for its success. For this to happen, regulatory cooperation mechanisms need to emerge in a way that is democratically legitimate and can contribute to deliberation on fundamental rights. In addition to the conditions above, regulatory cooperation activities need to be sustained by an institutional architecture that is adequate to achieve these aims. As briefly discussed, the chapters on regulatory cooperation create bodies for their implementation whose operation has raised democratic legitimacy concerns. The next chapter turns to these bodies, by examining more broadly the institutional dimension of the new generation EU FTAs. It therefore focuses on the treaty bodies created by the trade agreements in order to reflect on the extent to which their institutional design can contribute to more consideration of fundamental rights at the implementation level.

Chapter 5 – An Inadequate Institutional Architecture for Fundamental Rights

5.1. Introduction

The institutional dimension of EU FTAs is the last level of law-making considered in this thesis. The creation of an institutional framework for the implementation of EU FTAs is what makes the FTAs 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'.[1] New entities created by EU FTAs have been delegated substantive decision-making powers, and their influence expanded into policy areas that are 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.[2] Institutions have been the focus of literature on international relations, sociology and organisational studies, while legal analyses have been limited to legalisation, compliance and enforcement issues. This chapter 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.[3] Institutions are considered to produce 'living agreements' that can endure and give rise to new laws, by way of legal outputs and exchanges arising from institutionalised practices and cooperation.[4] Following this understanding, the chapter 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

[1] 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.
[2] Some exceptions include 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; 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).
[3] Simon Bulmer, 'New institutionalism and the governance of the Single European Market' (1998) 5 Journal of European Public Policy 365, 368.
[4] Marija Bartl, 'Making transnational markets: the institutional politics behind the TTIP' (2016) Amsterdam Law School Research Paper No 2016-64, 2.

concerns of delegation of authority;[5] to prompting positive practices of transparency[6] and enabling forums for sharing information and linking issues together.[7] On the other hand, the literature on democratisation beyond the State has typically stressed 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.[8] In light of these trade-offs, the chapter asks: *to what extent is the institutional architecture for the implementation of EU FTAs adequate to protect fundamental rights?*

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 such institutional structure 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[9] 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.'[10] This chapter 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 (5.2). It then highlights major shortcomings in the mandate of treaty bodies and in internal processes of decision-making from a fundamental rights perspective (5.3). Finally, whilst not longing for the perfect model, this chapter advances a series of considerations for what could be called a 'deep' institutional architecture of EU FTAs that would adequately protect fundamental rights (5.4).

5.2. The Relevance of Institutions to Fundamental Rights

This section first provides the theoretical framework which will inform the analysis in relation to fundamental rights (5.2.1). It then moves to a brief overview of the treaty bodies that will be examined in this chapter (5.2.2).

[5] Michael Zürn, 'The politicization of world politics and its effects: Eight propositions' (2014) 6 European Political Science Review 47.
[6] Vigjilenca 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: Data, Privacy and Trade Law* (Springer 2018).
[7] 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.
[8] Marcilio Toscano and others, 'Protection of Fundamental Rights in Latin American FTAs and MERCOSUR: An Exploratory Agenda' (2014) 20 ELJ 811, 822-823.
[9] Robert Keohane, 'Twenty Years of Institutional Liberalism' (2012) 26 International Relations 125.
[10] Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 247.

5.2.1. Theoretical Framework

This chapter relies on theoretical insights from historical institutionalism, which helps explain how institutions matter and how they can matter for fundamental rights. The aim is to explore how FTAs treaty bodies might adversely impact or in fact contribute to fundamental rights. The analysis is therefore not interested in *what shapes* institutions, in this case the treaty bodies; rather, in what institutions *can shape* in their turn, once they are created.[11] Given the nature of the inquiry, historical institutionalism provides a fitting theoretical framework since it holds that *institutions matter* for they affect *outcomes*. Different institutional arrangements are deemed to have an influence on and to explain varying policy outcomes.[12] Above all, an historical institutional perspective extends the range of institutions that can be considered to matter to explaining outcomes.[13] 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 of EU FTAs *defy* classic taxonomies and definitions of 'institutions' provided by international relations scholars or social sciences:[14] they are not 'properly' international institutions,[15] nor are they informal rules and organised practices impacting behaviour, as assumed by sociology[16] and political organisation theories.[17] 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, and form 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.[18] 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*.

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[11] 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.

[12] Ibid; Bulmer (n 3) 372.

[13] Henry Farrell and Abraham Newman, 'Making global markets: Historical institutionalism in international political economy' (2010) 17 Review of International Political Economy 609, 629

[14] Hans Keman, 'Approaches to the Analysis of Institutions' in Bernard Steunenberg and Frans van Vught (eds), *Political Institutions and Public Policy* (Springer 1997).

[15] Robert Keohane, Joseph Nye and Stanley Hoffmann, *After the Cold War, International Institutions and State Strategies in Europe, 1989-1991* (Harvard University Press 1993); Robert Keohane, 'International Institutions: Can Interdependence Work?' (1998) 110 Foreign Policy 82.

[16] Sabine Saurugger and Frédéric Mérand, 'Does European Integration Theory Need Sociology?' (2010) 8 Comparative European Politics 1; Keman (n 14) 3.

[17] Johan Olsen, *Governing through Institution Building: Institutional Theory and Recent European Experiments in Democratic Organization* (OUP 2010) 36.

[18] Bulmer (n 3) 369.

In order to understand how institutions matter for fundamental rights, the analysis here centres on the *institutional design* of EU treaty bodies. For the purpose of this chapter, institutional design is defined as comprising the rules that stipulate how the treaty bodies of EU FTAs are to operate in practice.[19] Institutional and International Relations theories tell us that institutional design matters.[20] Functionalist and power-based scholars emphasise *why* an institution features a certain institutional design.[21] By contrast, 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,[22] which is what this chapter aims to find out in relation to fundamental rights. 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.[23] Instead, it is called into question and examined in its potential implications for fundamental rights.[24]

In order to examine how EU FTAs treaty bodies – 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.[25] Underlying the relevance of these elements is the tenet whereby institutional designs create *path-dependencies* which will influence the course of policy and practices.[26] Historical institutionalism predicts that, most of the time, institutions will not perform efficiently, for they are bound by rules

[19] 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 Helen Milner, 'Power, Interdependence and Nonstate Actors in World Politics: Research Frontiers' in Milner and Moravcsik (n 7) 20; Randall Stone, 'Institutions, Power, and Interdependence' in Milner and Moravcsik (n 7) 41; Bartl (n 4).

[20] Barbara Koremenos and others, *The Rational Design of International Institutions* (CUP 2009) 762; Ronald Mitchell, 'The Influence of International Institutions: Institutional Design, Compliance, Effectiveness and Endogeneity' in Milner and Moravcsik (n 7) 66; Stone (n 7) 43.

[21] 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.

[22] Bulmer (n 3) 376.

[23] Stone (n 7) 43; Olsen (n 17); Mitchell (n 20) 81.

[24] What this chapter 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 Timothy 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 ELJ 718, 726): the objectives of treaty bodies are often limited to implementation of the FTA, and it has been shown in the previous chapters that, in terms of fundamental rights, very little is there. One angle would be to consider potential for compliance with the TSD chapter, which is yet not the aim of this chapter. This chapter is also not concerned with the incentives for such compliance, nor for creating treaty bodies (see Koremenos and others (n 20)), since the latter are taken as the independent variables for the implications on fundamental rights.

[25] Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 Annual Review of Political Science 369.

[26] Bulmer (n 3) 372.

established in earlier times, and from which it is difficult to depart.[27] The resulting policy outcomes may downgrade their usefulness or sideline new demands in their respect.[28] For fundamental rights, this could mean, inter alia, that mechanisms for their monitoring and protection would be constrained by suboptimal existing practices, or even by omissions (and Chapter 2 has shown that the scope for fundamental rights in EU FTAs is very limited).

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.[29] Preferences will be part of a limited menu of options provided by the creators of the institutions.[30] 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.[31] 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.[32] The breadth and degree of clarity of the scope will determine how much discretion the members of a body will have regarding the agenda items to be discussed.[33] 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 include commitments for institutions to respect fundamental rights and to endorse procedural good governance principles could arguably lead to more socially legitimate outcomes.[34]

The second element considered here concerns *internal processes*. Historical institutionalism holds that institutional arrangements structure internal processes of decision-making and other organisational features; in turn, internal processes help explain the policy outcome.[35] In these processes, the institutional design will reflect and reproduce particular patterns of power distribution, what is termed the 'distributional effect' of institutions.[36] As Alexander Wendt has pointed out, choices about institutional designs are choices about who is empowered, or not, to make decisions.[37] According to

[27] Encyclopaedia Britannica, 'Historical institutionalism' <https://www.britannica.com/topic/neoinstitutionalism#ref323994>.
[28] Bulmer (n 3) 372.
[29] Mark Dawson, 'Fundamental Rights in European Union Policy-making: The Effects and Advantages of Institutional Diversity' (2020) 20 Human Rights Law Review 50, 54.
[30] Ibid.
[31] Bartl (n 4).
[32] Koremenos and others (n 20) 770.
[33] Weiss (n 2).
[34] Olsen (n 17).
[35] Bulman (n 3) 374
[36] Thelen (n 25) 394.
[37] Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design' in Koremenos and others (n 20) 275. See also ibid.

historical institutionalism, *interactions* – within and between institutions – matter.[38] The analysis will therefore examine the way decision-making processes are designed and what kind of interactions they envisage.[39] The relevance for fundamental rights lies in the extent to which internal processes provide for participation and institutional space to nonstate actors and parliaments: to voice concerns related to fundamental rights as much as to interact with decisional bodies, if not to take part in the decision-making process themselves. This kind of interaction could also contribute to the politicisation of institutions, which has been found to bear potential for enhancing the quality of decision-making and rendering it difficult to overlook rights-based concerns.[40] Chapter 3 has shown that engagement by actors with a direct link to citizens and politicisation of trade negotiations can have tangible positive impacts: in practices as much as in substance. When examining interactions, the chapter considers monitoring and accountability mechanisms: these are necessary so that preferences over fundamental rights do not remain abstract but are duly followed up, and reasons are given for when they are not considered.[41] Before diving into the analysis, the next section introduces the treaty bodies that will be examined in light of this theoretical framework in the remainder of the chapter.

5.2.2. 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 agreements which are provided, however, *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. The *Civil Society Forum* and the *Domestic Advisory Groups* are recently-introduced entities that institutionalise civil society in the institutional architecture of EU FTAs. They are part of the chapters on trade and sustainable development (TSD).[42] TTIP would have been the only exception to this, as it would have included them within the institutional chapters.[43] 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 cooperation, chiefly because there is no chapter on that. EUSFTA is also the only agreement not envisaging a Civil Society Forum.

[38] Dawson (n 29).
[39] Ibid.
[40] Zurn (n 5); Dawson (n 29) 51.
[41] Gráinne De Búrca, Developing Democracy Beyond the State' (2008) 46 Columbia Journal of Transnational Law 101.
[42] CETA is only a partial exception to that, since 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.
[43] European Commission, '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) (TTIP).

Treaty bodies	CETA	TTIP	EUSFTA	EUJEPA
Joint Committee[44]	✓	✓	✓	✓
Specialised committees[45]	✓	✓	✓	✓
TSD Committee[46]	✓	✓	✓	✓
Regulatory Cooperation Committee[47]	✓	✓	✗	✓
...	...	...	...	...
Working groups[48]	✗	✓	✗	✓
Contact points[49]	✓	✓	✗	✓
Domestic Advisory Groups[50]	✓	✓	✓	✓
Civil Society Forum[51]	✓	✓	✗	✓

Table 5.10 – Overview of the institutional architecture per trade agreement.[52]

Joint Committees and Specialised Committees

Joint Committees, and to a lesser extent Specialised Committees, have traditionally featured in EU international agreements.[53] 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. The Joint Committees are executive bodies formed by representatives of the EU and of the trade partner.[54] They are co-chaired by the EU Commissioner for Trade and the partner country Minister for Trade.[55] Their

[44] 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 its political counterpart, the EU-Singapore Partnership and Cooperation Agreement (PCA). Art.16.1(5) FTA refers to Art.41 PCA); Art.22.1 EUJEPA.

[45] Art.26.2 CETA; Art.X.3 TTIP; Art.16.2 EUSFTA; Art.22.3 EUJEPA.

[46] 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.

[47] Art.26.2.1(h) CETA (Regulatory Cooperation Forum); Art.X.2 TTIP (Transatlantic Regulators Forum); Art.23.3(1)(i) EUJEPA.

[48] Art.X.3 TTIP; Art.22.4 EUJEPA. For CETA, a slight exception is Art.5.14(4), whereby 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.

[49] Art.26.5 CETA; Art.X.5 TTIP; Art.22.6 EUJEPA.

[50] Art.23.8(4) and Art. 24.13(5) CETA; Art.X.7 TTIP; Art.12.15(5) EUSFTA; Art.16.15 EUJEPA.

[51] Art.22.5 CETA; Art.X.8 TTIP; Art.16.16 EUJEPA.

[52] Source: compilation of the author based on treaty provisions.

[53] For instance, the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [1999] OJL114/6. For a discussion, see Steve Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis' (2000) 2 European Journal of Migration and Law 127. Another example is the EU-Turkey Association Council created by the Ankara Agreement and the Customs Union Joint Committee of the EC-Turkey Customs Union, see Steve Peers, 'Living in Sin: Legal Integration under the EC-Turkey Customs Union' (1996) 7 EJIL 411; Nanette Neuwhal, 'The European Parliament and Association Council Decisions: The Example of Decision 1/95 of the EC/Turkey Association Council' (1996) 33 CMLR 51.

[54] Art.26.1(1) CETA, Art.X.1(1) TTIP, Art.16.1(1) EUSFTA, Art.22.1(1) EUJEPA.

[55] Art.26.1(1) CETA, Art.X.1(a) TTIP, Art.16.1(2) EUSFTA, Art.22.1(3) EUJEPA.

main function is to supervise and facilitate the implementation and operation of the entire agreement.[56] 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, the Specialised Committees are intergovernmental executive bodies composed of representatives of the Parties.[57] 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.[58]

Joint Committees	**CETA**	**TTIP**	**EUSFTA**	**EUJEPA**
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 5.11 – Selected decision-making powers of the Joint Committee per trade agreement.[59]

[56] 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.
[57] 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.
[58] Art.26.2(4) CETA and Art.22.3(5) EUJEPA. Regarding 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. See, for instance, Art.2.13(1), second sentence; Art.6.17 in connection with Art.16.2(1) and Art.34 of Protocol 1 to EUSFTA; Art.4.12(1) (unclear scope of 'implementing measures'); Art.5.10(1).
[59] Source: compilation of the author based on treaty provisions. In TTIP, the power of the Joint Committee to dissolve Specialised Committees only refers to those it establishes, not the ones established by the agreement.

Specialised Committees	CETA	TTIP	EUSFTA	EUJEPA
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 5.12 – Selected decision-making powers of Specialised Committees and their relationship with the Joint Committee.[60]

Notwithstanding their historical inclusion in EU international agreements, the Joint and Specialised committees of the latest trade initiatives have seen their tasks widen, and their powers expand. Overall, the EU FTAs under investigation are relatively similar in what they provide regarding these bodies. Where they differ, reasons can be traced back to *chronology* or to the *regional trade partners*. Regarding the former, the negotiations of EUSFTA largely preceded the politicisation of TTIP, and were therefore not affected by it, unlike CETA. In turn, many institutional provisions of CETA can be found replicated in EUJEPA. As a result, EUSFTA is the least ambitious in terms of institutional architecture, whereas TTIP can be placed at the opposite side of the spectrum. CETA and EUJEPA are quite similar in the structure and powers of their institutional bodies. Where they differ the most is in the role and place of civil society in the implementation stage, which clearly reveals a regional divide of North American and Asian trade partners. Whether civil society is given a place within the institutional structure and how it interacts with the Joint and Specialised Committees is held here to matter for fundamental rights. The next section presents the main bodies for the involvement of civil society at the implementation level and highlights differences across the agreements under analysis.

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 the latter beyond the negotiation stage. Such bodies are considered here to have the potential to ensure that the implementation of EU FTAs does not sideline fundamental rights concerns. Two main bodies stand out which increasingly institutionalise the participation of civil society at this stage: the Domestic Advisory Groups (DAGs), which have 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

[60] Source: compilation of the author based on treaty provisions.

establish their own new domestic advisory group, or to consult an already existing one.[61] At the moment of writing, the EU and the respective trade partners have established the DAGs for CETA and EUJEPA, but not for EUSFTA.[62] The DAGs consist of a small number of civil society representatives and permanent observers.[63] With the exception of EUJEPA, all the other FTAs stipulate that there shall be a 'balanced representation' including business, social and environmental stakeholders.[64]

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.[65] 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.'[66] 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, the rather encompassing interpretation of institutions by historical institutionalism allows to examine them as institutions that matter.

The next section turns to explore the elements of the theoretical framework with respect to the treaty bodies of the new generation EU FTAs. It highlights omissions with respect to fundamental rights: in the *preferences* that the institutional design provides for the treaty bodies; and in *internal processes*, which are found as falling short of accounting for an institutional environment that can

[61] 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 (the respective DAGs are thus established under the relevant chapter). TTIP would have differed more significantly, since it would have established the DAGs under the overarching institutional chapter. It would have therefore recognised them a constitutive part of the institutional architecture of the agreement. This would have also been reflected in the scope of their mandate. See Art.23.8(4) and Art.24.13(5) CETA; Art.X.7 TTIP; Art.12.15 EUSFTA; Art.16.15 EUJEPA.

[62] The statement of the non-establishment of the DAGs for EUSFTA is based on the answers received by Europe Direct via email correspondence.

[63] Eighteen for CETA and twelve for EUJEPA. See respective rules of procedure (RoP), RoP 2.1 EU DAG for CETA and RoP 2.1 EU DAG for EUJEPA. European Economic and Social Committee (EESC), 'Rules of procedure of the EU Domestic Advisory Group created pursuant to Trade and Labour Chapter (Chapter 23 - Article 23.8, paragraphs 4 and 5) and to Trade and Environment Chapter (Chapter 24 - Article 24.13, paragraph 5) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)
<https://www.eesc.europa.eu/sites/default/files/files/en_rules_of_procedure_for_eu_dag_for_ceta_0.pdf>; EESC, 'Rules of procedure of the EU Domestic Advisory Group created pursuant to the Trade and Sustainable Development chapter (Chapter 16 - Article 16.15) of the EU-Japan Economic Partnership Agreement (EPA)' (2020)
<https://www.eesc.europa.eu/sites/default/files/files/final_rules_of_procedure_-_eu_dag_for_japan.pdf>.

[64] Art.23.8(4) and 24.13(5) CETA; Art.X.7 TTIP; Art.12.15 EUSFTA. The RoP of the EU DAG for EUJEPA prescribes this balanced representation.

[65] 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).

[66] Art.22.5(2) CETA; Art.X.8(2) TTIP; Art.16.16(2) EUJEPA. This is also repeated in the RoP of the EU DAGs for CETA and EUJEPA.

adequately safeguard fundamental rights. The layering and 'copy-pasting' of treaty bodies across different FTAs, with slight differences as to civil society participation, appear to concur with path-dependency predictions and outcomes that may easily ignore fundamental rights considerations and impacts.

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

This section examines the institutional architecture of EU FTAs from a fundamental rights perspective. It first looks at the *mandate* of treaty bodies as an institutional design element indicative of what these treaty bodies are expected to do, and therefore influencing their preferences (5.3.1). The second part turns to the *processes of decision-making*, focusing in particular upon the interactions between decisional bodies and civil society bodies, and relevant monitoring mechanisms (5.3.2).

5.3.1. Fundamental Rights Gaps in the Mandate of Treaty Bodies

The mandate of treaty bodies is pivotal for how the actors of a treaty body understand their role and behave with other actors of the institutional architecture set up by the FTA. From an historical institutionalist perspective, the mandate reflects what the Parties to the FTA decide as to what the preferences of the treaty bodies should be. Fundamental rights would be the 'preference', and therefore a potential policy outcome, inasmuch as the mandates included aims and actions geared towards their protection, above all in the context of trade. Yet a comparison of the mandates across treaty bodies reveals that only labour rights would benefit from an institutional structure, mostly to monitor compliance with them.

Starting with the Joint Committees, their main function is to supervise and facilitate the implementation and operation of the agreement.[67] In all the FTAs under analysis, the scope of the activities of a Joint Committee can be said to encompass all the chapters of an FTA.[68] 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 that chapter. 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

[67] 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'.

[68] See Art.26.3 CETA. In TTIP, the Joint Committee would have also had specific duties in relation to regulatory cooperation.

regulatory environment and good regulatory practices as some of the objectives that regulatory cooperation mechanisms should pursue and incorporate – and it has been argued that these "procedural" objectives and mechanisms could contribute to an outcome that does not jeopardise fundamental rights.[69] In the institutional provisions of the FTAs, however, the objectives of the Joint Committees appear to remain substantive, in the sense of achieving 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 therein. Only CETA and EUJEPA have a fully-fledged Committee on TSD.[70] The EU proposal for the institutional chapter of TTIP refers to the establishment of a TSD Committee, and it can be expected that such a Committee would have been established had TTIP been successful. Its specific features, however, are not elaborated in the EU textual proposal for the TSD chapter, so it is not possible to draw conclusions on the scope of its mandate.[71] As far EUSFTA is concerned, the Parties are required to establish a *Board* on TSD, rather than a formal Committee comparable to the one in CETA and EUJEPA. Besides the task of overseeing the implementation of the chapter, the EUSFTA Board on TSD is not given further powers.[72] Above all, there are no records of its establishment. By contrast, both CETA and EUJEPA do not limit the tasks of the TSD Committee to monitoring the implementation of the TSD chapter, but 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. In CETA, the Specialised committees – which include the TSD Committee – can propose draft decisions to the Joint Committee, but the specific articles on the TSD Committee do not reiterate this possibility.[73] EUJEPA, by contrast, assigns a wider range of powers

[69] Art.18.1(1) EUJEPA and Art.x.1(1)(c) TTIP- EU proposal for Chapter: Regulatory Cooperation (21 March 2016).

[70] 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, Art.23.8(2) CETA for Trade and Labour and Art.24.13(3) CETA for Trade and Environment.

[71] See 'EU Textual Proposal for the Chapter on Trade and Sustainable Development' (tabled for discussion with the US in the negotiating round of 19 - 23 October 2015 and made public on 6 November 2015) <https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf>. At the same time, the European Commission's *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'. European Commission, 'EU Position Paper on Trade and sustainable Development Chapter/Labour and Environment: EU Paper outlining key issues and elements for provisions in the TTIP' (2015) <https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf>

[72] 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.

[73] Nonetheless, and unlike EUJEPA, CETA provides that the TSD Committee reviews the impact of the agreement on sustainable development (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.

to the TSD Committee, which include the following: to make recommendations to the Joint Committee;[74] to pursue cooperation between its work and the activities of the ILO;[75] and to seek solutions to resolve differences between the Parties regarding the interpretation or application of the chapter.[76] Notwithstanding the slight variations between CETA and EUJEPA, what the TSD Committees have in common is that they remain limited in what they are 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 that 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. As shown in Chapter 2, for instance, 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 also do not enjoy a treaty body, chiefly because there would be no provision to monitor.

Nonetheless, CETA suggests that the TSD Committee may review the *impact* of the Agreement on sustainable development.[77] Importantly, whereas the task of *monitoring* the TSD chapter would mean to ensure *compliance* with labour rights commitments, here the reference is made to the *impact* that the whole agreement may have on sustainable development. 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.[78] In both cases, such an assessment could imply an assessment and review of potential impacts on labour rights. As discussed in Chapter 2, different chapters in the FTAs might indeed have an impact on labour and other fundamental rights. 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,[79] 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'.[80] It is argued here that 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. The TSD Committees could additionally benefit from suggestions by civil society actors, who may be familiar with local fundamental problems, and who are for the first time assigned a body and a role in the institutional architecture of EU FTAs.

[74] Art.16.13(2)(a) EUJEPA.
[75] Art.16.13(4) EUJEPA.
[76] Art.16.13(2)(e) EUJEPA.
[77] Art.22.4(1) CETA.
[78] Art.16.11 EUJEPA.
[79] Marise Cremona and Joanne Scott (eds), *EU Law Beyond Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 19.
[80] European Ombudsman, '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' (2016).

The role of the DAGs and the CSF 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 TSD Chapter.[81] The role of the CSFs is to 'conduct a dialogue', and can therefore work as a platform for horizontal exchanges between a wider number of civil society actors. 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.[82] While the preferences of the DAGs and of the CSF may depart from those of the Parties, the texts of the FTAs suggest that these 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*.[83] Similarly, EU civil society actors have recently demanded to enlarge the scope of the mandate to the whole agreement.[84] However, it is argued here that the *widening* of the scope does not necessarily correspond to a "deepening" of the mandate. The latter would coincide, inter alia, with an instance 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 neither 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 anything could be on the agenda of the DAGs.[85] A wider agenda might

[81] The proposal of TTIP differs from the other FTAs since it would have extended scope of their oversight to the entire agreement. See Art.X.7(1) EU TTIP proposal for Institutional, General and Final Provisions.
[82] Art.23.8(4) CETA; Art.X.7(1) TTIP; Art.12.15(5) EUSFTA; Art.16.15(1) EUJEPA.
[83] Art.X.7(1) EU TTIP proposal for Institutional, General and Final Provisions.
[84] See EESC, 'The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements' (Opinion adopted 15 January 2019) <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements>; European Commission, 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (26 February 2018) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> (European Commission, 'Non-paper').
[85] Informal interview with civil society representative.

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 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.[86] Above all, such understanding is not critical of the TSD chapters and only seeks civil society engagement to achieve their *effectiveness*. It is not surprising that the Commission – who designs and negotiates these chapters – seeks such effectiveness. However, also many scholars and human rights advocates call for increasing the effectiveness of TSD chapters, especially by means of tougher enforcement, without critically engaging with what these chapters provide in the first place.[87] Albeit crucial, a mandate that is limited to effectiveness omits and prevents examinations of intrinsic linkages between other sections of the FTAs that might have an impact on fundamental rights, as discussed in Chapter 2. The focus on effectiveness also excludes ex-post evaluations of negative impacts predicted in the ex-ante sustainability impact assessments. The methodology of the ex-post impact assessments of EU FTAs corroborates this observation.[88] 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.[89] 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 the EU-Canada

[86] European Commission, 'Non-paper' (n 84). 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).

[87] See Introduction of the thesis.

[88] See Elisabeth Bürgi Bonanomi, 'Measuring Human Rights Impacts of Trade Agreements-Ideas for Improving the Methodology: Comparing the European Union's Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology' (2017) 9 Journal of Human Rights Practice 481.

[89] 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.

joint workshops with civil society on collective bargaining.[90] The agenda of the second EU-Canada CSF was also open to 'any other issues', albeit limited to the field of TSD.[91] 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, is whether the DAGs and the CSF manage to put these issues on the agenda. With this in mind – and in the context of the broader discussion on the gaps of fundamental rights in the mandate of treaty bodies – the next section examines the extent to which the design of internal processes of decision-making provide an institutional environment where potential implications on fundamental rights are taken into consideration; and where the views of civil society representatives find their way into the policy process.

5.3.2. 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 mechanisms being applied to them. Significantly, Joint Committees can take decisions that will be binding under international law on the Parties, as well as under EU law on the EU and its Member States.[92] The powers of the Joint Committees appear to go beyond the mere executive implementation of obligations within the scope of the FTAs.[93] Their decision-making powers encompass an indefinite range of issues with potential implications on fundamental rights.[94] The examination of the chapters on Regulatory Cooperation in Chapter 4, for instance, has shown how the subject matter of regulatory cooperation activities can be far-reaching. As more *political* functions are being attached to *executive* treaty bodies, the internal process of decision-making requires political oversight by parliaments and civil society. [95] It has been

[90] European Commission, 'Joint Report' (2019) (Comprehensive Economic and Trade Agreement: Meeting of the Civil Society Forum, 12 November 2019) <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158679.pdf>.

[91] See Session IV 'Any other CETA Trade and Sustainable development Issues' in European Commission and Government of Canada, '2019 Canada-EU CETA Civil Society Forum Programme' (12 November 2019) <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158384.DOCX>.

[92] 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 Art.218(7) TFEU and Art.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 Weiss (n 2). 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 (C-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 A 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).

[93] Weiss (n 2) 536.

[94] Ibid.

[95] 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, 27-28 September 2019, Dalhousie University) (Weiss, 'Implementing CETA') 7.

argued that insofar as the authorities that operate beyond the State are vested with more political functions, a pressing need of legitimation necessarily arises.[96] The examination of the rules for processes of decision-making, including how actors have to interact with each other, reveal that issues of fundamental rights can be easily sidelined.

5.3.2.1. The Discretionary Interaction with Civil Society

The interaction of decisional bodies with the 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 is largely representative and consultative. When looking at the texts of the FTAs, no clauses expressly provide that the Joint Committees are required to let civil society actors join their meetings (see Figure 5.1 below). 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.[97] However, when it comes to the functioning of the Joint Committee more specifically, the institutionalisation of interactions with the public is nearly absent.

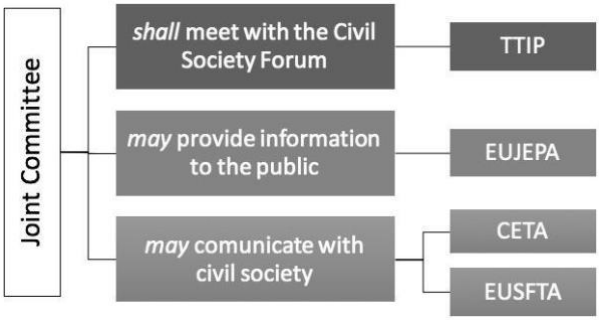

Figure 5.1 – Interactions of the Joint Committee with non-state actors per FTA.[98]

Only TTIP clearly mandates that the Joint Committee meet with the Civil Society Forum.[99] In EUJEPA, the Joint Committee *may* provide information to the public, which yet suggests a debriefing opportunity, rather than an actual communication or exchange.[100] CETA and EUSFTA stipulate that the Joint Committee *may* communicate with all interested parties, including the private sector and civil society organisations.[101] The current implementation of CETA reveals that 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

[96] Pieter De Wilde and Michael Zürn, 'Can the politicization of European integration be reversed?' (2012) 50 JCMS 137; Michael Zürn and others, 'International authority and its politicization' (2012) 4 International Theory 69.
[97] 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.
[98] Source: compilation of the author based on treaty provisions.
[99] Art.X.1(9) TTIP.
[100] Art.22.1(5)(c) EUJEPA.
[101] Art.26.1(5)(b) CETA and Art.16.1(4)(b) EUSFTA.

and Territories.[102] The agenda of the CETA Joint Committee meeting omitted any interaction or ex-post debrief session with civil society, unlike, for instance, the case of TSD Committees meetings.[103] The same occurred at the first meeting of the EUJEPA Joint Committee.[104] As for EUSFTA, no meetings appear to have taken place so far.[105]

A slightly different picture emerges for the Specialised Committees. Regarding the TSD Committees specifically, 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;[106] to hold a session with the public to discuss the implementation of the chapter;[107] and to present updates on implementation to the Civil Society Forum, including annual reports as to its follow-ups on these communications.[108] EUJEPA provides that one of the functions of the TSD Committee is to interact with civil society but does not elaborate further on this.[109] In EUJEPA, it is up to the Parties – and not a duty of the TSD Committee – to give information on the implementation of the TSD chapter at the Joint Dialogue with civil society.[110] Beyond 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.[111] By contrast, no such debrief session was foreseen or took place at the first meeting of the EUJEPA Regulatory Cooperation Committee.[112]

The existence of requirements to interact with civil society is yet not the same as making those actors observers or true participants of the meetings. CETA lacks provisions to this 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.[113] The review includes a debrief session, where the TSD

[102] See European Commission, 'Report' (Comprehensive Economic and Trade Agreement (CETA): Meeting of the Joint Committee, 26 September 2018) <https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157470.pdf>.
[103] This is discussed further in the next paragraph.
[104] See European Commission, 'Agenda' (Meeting of Japan-EU EPA Joint Committee, 10 April 2019) <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157971.pdf>.
[105] No documents are available, see <https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/index_en.htm>.
[106] Art.22.4(4)(a) CETA.
[107] Art.22.4(3) CETA.
[108] Art.22.4(4)(b) CETA.
[109] Art.16.13(2)(c) EUJEPA.
[110] Art.16.16(4) EUJEPA.
[111] European Commission, 'Agenda' (1st Meeting of the CETA Regulatory Cooperation Forum, 14 December 2018) 4 <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) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>.
[112] European Commission, 'Agenda' (EU-Japan Economic Partnership Agreement (EPA): First Meeting of the Committee on Regulatory Cooperation, 20 January 2020) <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158579.pdf>.
[113] 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>; and European Commission, 'Agenda' (Meeting of Committee on Trade and Sustainable Development, 13 November 2019) <https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc_158424.11.19%20(for%20publication).pdf>.

Committee informs the DAGs of its discussions;[114] 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.[115] Conversely, once again, the first meeting of the EUJEPA TSD Committee held no dedicated sessions with civil society.[116] What emerges from this picture is that the disparity across FTAs 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.[117] Civil society actors seem to have welcomed the transparency practices by the CETA specialised committees.[118] Considering that such best practices have not been 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 participation would not be meaningful in the absence of follow-up mechanisms. However, the FTAs under analysis omit follow-up mechanisms.

5.3.2.2. 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.[119] What is interesting for the present chapter 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

[114] Ibid.

[115] European Commission, 'Joint Report' (Comprehensive Economic and Trade Agreement (CETA): Meeting of the Committee on Trade and Sustainable Development, 13 November 2019) <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158604.pdf>.

[116] European Commission, 'Agenda' (EU-Japan Economic Partnership Agreement (EPA): First Meeting of the Committee on Trade and Sustainable Development, 29-30 January 2020) <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158594.pdf>.

[117] This is reflected in the great interest shown by civil society representatives in being part of the EU DAG for CETA, far less when compared to other trade agreements. Interviews with civil society representatives.

[118] The European 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) <https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157679.pdf>.

[119] Ibid. In EUJEPA, this is not expressly mentioned, but it can be expected that the DAGs would have similar opportunities to do so. In order to submit such recommendations, a DAG adopts declarations which have to be consented to and voted by its members.

executive bodies would feel obliged to take them into account.[120] Formal feedback mechanisms whereby the Joint and Specialised Committees had to explain which inputs were used and which were not would be an example.[121] Arguably, the shorter the reporting chain from one treaty body to another, the better for accountability and organisational efficiency.[122] 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, from an historical institutionalist perspective, 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;[123] 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.[124] 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*.[125] EUSFTA does not, however, establish a CSF. As for the *CSF*, different FTAs provide different modalities of interaction. The visualisation below (Figure 5.2) 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 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.

[120] Lore Van Den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6 Global Labour Journal 221, 225-226.
[121] Ibid.
[122] In the context of the consultation of civil society for the mainstreaming of fundamental rights in EU border management policy, it has been found that 'the learning potential is stronger where interaction is more frequent, focused on specific issues, and not dispersed in the consultation of a multitude of organisations'. See Leila Giannetto, *More than consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies. The case of Frontex and its Consultative Forum* (PhD thesis, University of Trento, 2018) 248.
[123] RoP 6.1 and 10.1 EU DAG for CETA; RoP 10.4 EU DAG for EUJEPA.
[124] 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.
[125] Art.12.15(5) EUSFTA.

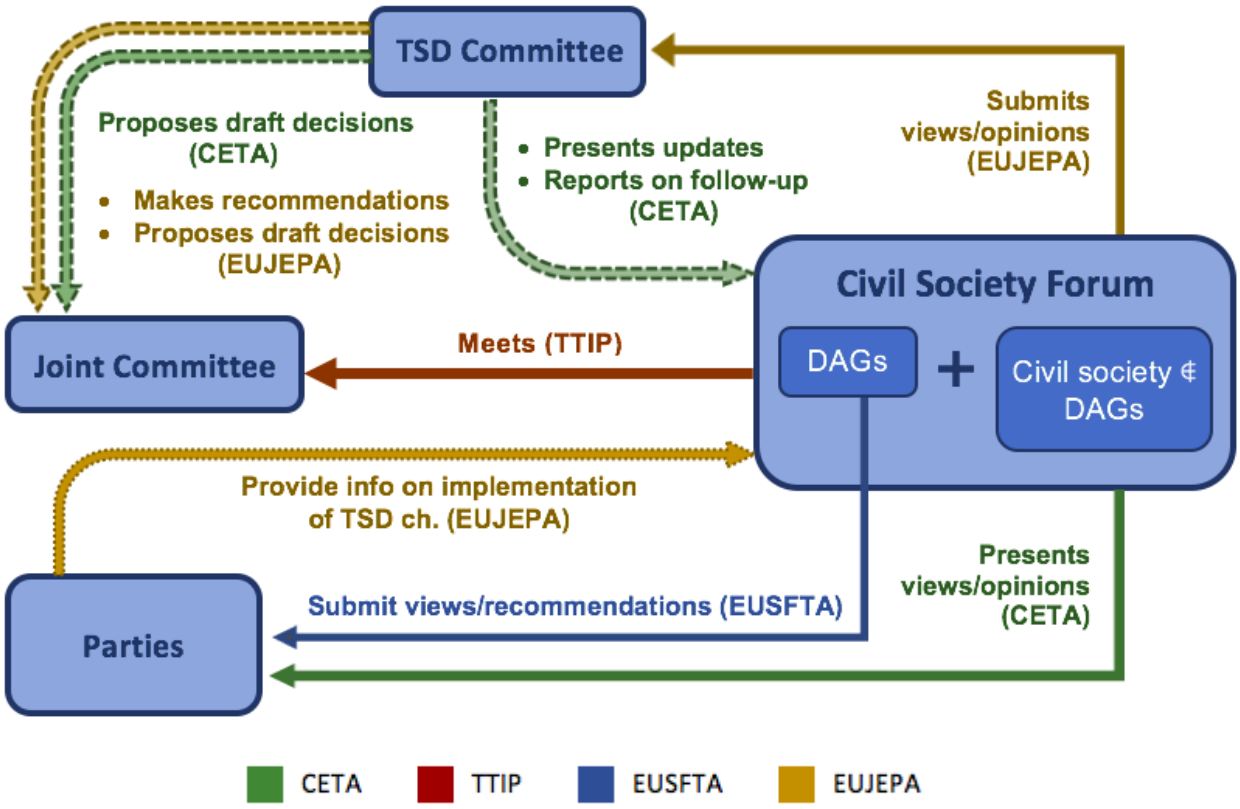

Figure 5.2 – Interactions between different treaty bodies as per the text of the trade agreements.

Figure 5.2 reveals that the shortest route for the CSF to the Parties is provided for in CETA: here, the views of the DAGs and other civil society actors can be presented directly to the Parties.[126] Similarly, under TTIP, the CSF would have directly met with the Joint Committee.[127] EUJEPA creates the longest route: the CSF can submit opinions and views to the TSD Committee first,[128] which in turn may make recommendations or propose draft decisions to the Joint Committee.[129] These institutional designs can be compared with the EU Association Agreements (AA) 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.[130] 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 Committee

[126] Art.22.4(4)(b) CETA.
[127] 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.
[128] Art.16.16(4) EUJEPA.
[129] Art.16.13(2)(a) and Art.22.3(5) EUJEPA.
[130] Art.443 EU-Moldova Association Agreement. 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 [2014] OJ L260/4.

meetings. The DAGs representatives have informed the TSD committee of the CSF discussions, presented their joint statement, and given feedback.[131] 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.[132] 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.'[133] While it can be expected that civil society comprised the DAGs of each side,[134] 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.[135] However, both sides reassured that the views expressed by the DAGs on the implementation of the TSD chapter 'would be duly received.'[136] 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.[137] As the minutes have not been published,[138] 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

[131] European Commission, 'Agenda' (n 113); European Commission, 'Joint Report' (n 115).
[132] RoP 14 CETA Joint Committee. See 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 [2018] OJ L 190/13.
[133] European Commission, 'Agenda' (Trade And Sustainable Development Joint Dialogue with Civil Society, 31 January 2019) <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158578.pdf>.
[134] Eve Päärendson (EESC EU-Japan Follow-Up Committee), 'EU-Japan EPA and the role foreseen for civil society' (2019) <http://www.office.kobe-u.ac.jp/ipiep/materials/EuropeanCenterSymposium2019/1-1-4_Ms.EvePaarendson.pdf>.
[135] European Commission, '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' (29-30 January 2020) <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158664.pdf>.
[136] Ibid.
[137] Ibid.
[138] 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>.

meetings.[139] No follow-up requirements are demanded of the Joint Committee, nor of the TSD Committee.

CETA is the only FTA which expressly requires the TSD Committee to report back to the CSF on the follow-up on the views of civil society presented to the Parties.[140] 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, 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.[141] 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.[142] Eventually, the CETA TSD Committee remains free to set its own agenda and decide which recommendations it may make to the Joint Committee.[143]

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.

5.3.2.3. 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, the EP were granted a place in the implementation stage as well. This expectation becomes stronger when

[139] 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] OJ L167/81; compare with RoP 14(3) of the EU-Canada Joint Committee (n 132).
[140] Art.22.4(4)(b) CETA.
[141] European Commission, 'Joint Report' (Comprehensive Economic and Trade Agreement: Meeting of the Committee on Trade and Sustainable Development, 13 September 2018)
<https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157409.pdf>
[142] Interview with civil society representative.
[143] RoP 8 of the CETA Joint Committee, to be read in conjunction with RoP 14(4).

considering the EU Association Agreements, which provide an insightful, existing alternative institutional design.[144] For example, the EU-Ukraine AA foresees a Parliamentary Association Committee, composed of members of the EP and of the Ukrainian Parliament.[145] Significantly, this body has 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.[146]

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, but it longed to 'foster the parliamentary dimension' of the Agreement.[147] 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 have occupied in the operation of the Agreement remains unclear. By contrast, the TTIP proposal for regulatory cooperation of 2015 included a placeholder on the interaction of the Regulatory Cooperation Body with legislative bodies.[148] These proposals have not been replicated in following FTAs, as could have been EUJEPA, which alongside CETA and EUSFTA lack provisions for parliamentary involvement at the implementation stage.

Not only the EP enjoys no 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.[149] 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.[150] However, this should not lead to the conclusion that parliaments

[144] See 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 [2015] OJ L164/2); Art.440 EU-Moldova AA (n 130); 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 [2014] OJ L161/3).
[145] Art.467 EU-Ukraine AA.
[146] Art.468 EU-Ukraine AA.
[147] Art.X.6 TTIP.
[148] Art.14(6) TTIP Proposal for Regulatory Cooperation (2015). European Commission, 'Initial Provisions for CHAPTER [ ] Regulatory Cooperation' (tabled for discussion with the US in the negotiating round of 2-6 February 2015 and made public on 10 February 2015).
[149] Art.26.1(5)(b) CETA and Art.16.1(4)(b) EUSFTA.
[150] Weiss, 'Implementing CETA' (n 95) 5.

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.[151] 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). Image 5.3 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.

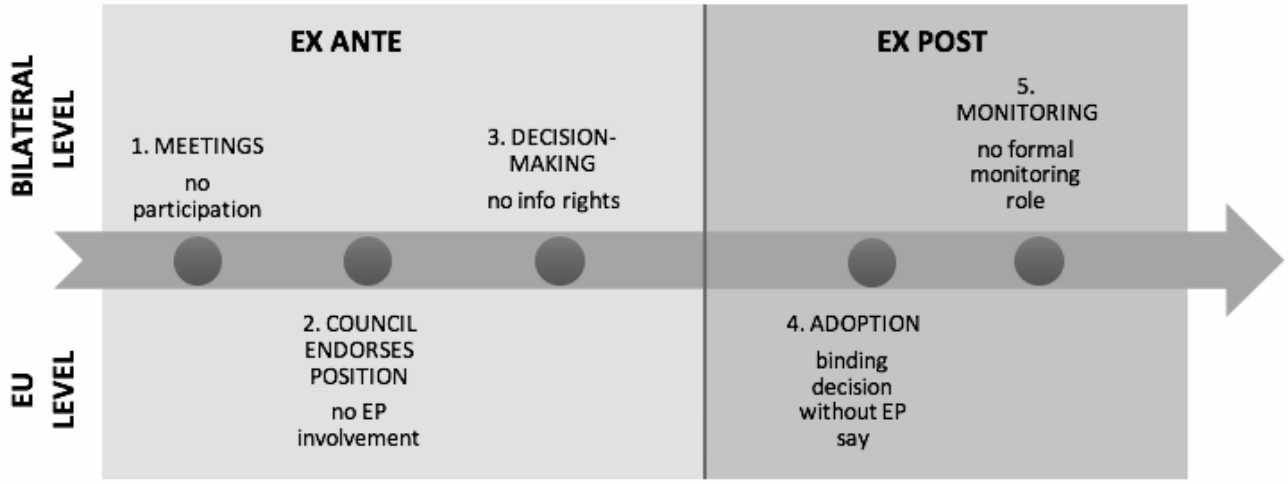

Figure 5.3 – EP's relegation from decision-making at the bilateral and domestic level, before and after decisions are adopted.[152]

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.[153] 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

[151] Bart Kerremans and others, 'Parliamentary scrutiny of trade policies across the western world' (2019) (Study requested by INTA Committee).
[152] Source: compilation of the author based on treaty provisions.
[153] Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47, 26.

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',[154] 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.[155] Through 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.[156]

Neither of these 'special regimes' grant a say to the EP. Mark 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'.[157] 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.'[158] Given the EP's lack of say in these special regimes, in its rules of procedure the EP carved out the possibility of issuing recommendations on the proposed positions.[159] 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 not be under 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

[154] With the exception of 'acts supplementing or amending the institutional framework of the agreement', requiring ordinary legislative procedure. For a thorough discussion of Art.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 CMLR 79.

[155] 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) 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 [2019] OJ L138/84). 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.

[156] Weiss (n 2) 541.

[157] Dawson (n 29) 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.

[158] Ibid.

[159] See Rule 109 (now Rule 115): 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 in European Parliament, 'Rules of Procedure of the European Parliament' (8th parliamentary term - July 2018).

domestic stage.[160] As suggested by Wolfgang 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.[161]

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.[162] 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.[163] 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.[164]

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.[165] While the status of these decisions in EU law is disputed and controversial,[166] 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'.[167] The EP would remain outside this process. It has been suggested that the EP be given the possibility to suspend the decision.[168] At the same time, *bilaterally*, the EP's control powers are limited to its own-developed monitoring mechanisms, which would supervise the implementation of the decision and the FTA more broadly.[169]

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

[160] Art.218(10) TFEU.
[161] If the treaty body decision amounts to rule-making which interferes with tasks of the European Parliament, see Weiss, 'Implementing CETA' (n 95) 16.
[162] 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) EUJEPA.
[163] Thomas Verellen, 'On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case' (2016) 1 European Papers 1225.
[164] Weiss (n 2); 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.
[165] Art.26.4(2) CETA; Art.X.4 TTIP; Art.16.4(1) EUSFTA; Art.22.2(1) EUJEPA.
[166] Wessel and Blockmans (n 13).
[167] Joni Heliskoski, 'Casenote on Case 370/07, Commission v Council' (2011) CMLR 555, 557-558.
[168] Weiss (n 2) 552.
[169] 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).

stop at its entry into force. Implementation is a crucial phase in its life-cycle.[170] The lack of parliamentary say during the implementation of an FTA goes to the detriment of the dual source of EU democratic legitimacy.[171] Furthermore, an enhanced role during trade negotiations means the EP will be held responsible to meet its constituencies' expectations.[172] 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.[173] Yet this would only be ancillary to an institutional architecture that should incorporate safeguards for fundamental rights to create a sort of 'harm-proof' institutional environment in the first place.[174]

5.4. Designing a "Deep" Institutional Architecture for Fundamental Rights

The analysis of the institutional design of EU FTAs sheds light on 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, this chapter has focused on the mandate of the treaty bodies and on the interactions of the decision-making processes. A series of limitations have been found, which suggest that, with the exception of labour rights, the implementation of EU FTAs may easily overlook fundamental rights. The preferences set up for the treaty bodies are narrow-sighted from a fundamental rights perspective. As discussed, 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 that they may neglect the relevance of fundamental rights of the decisions they take, because their role is to facilitate the implementation of the FTA. For the DAGs and the CSF, this means that they may not raise 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

[170] Patrick Leblond, 'Making the Most of CETA: A Complete and Effective Implementation Is Key to Realizing the Agreement's Full Potential' (CIGI Papers No 114, 30 October 2016).
[171] Weiss (n 2) 552.
[172] Puccio and Harte (n 169).
[173] See Articles 218(11), 263, 267 TFEU.
[174] The chapter 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).

rights will be the resulting policy outcome. This section draws from these findings and evaluates them normatively. The aim is to depict what could be considered 'deep' for fundamental rights in the institutional dimension of EU FTAs, namely what kind of institutional architecture could work for the protection of fundamental rights.

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. As to 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. Chapter 2 has shown that commitments on fundamental rights in the new generation EU FTAs largely focus on international labour standards but carve out data privacy rights, against a context where other issues of 'deep' FTAs become increasingly relevant to fundamental rights. At the implementation level, it remains at the discretion of the actors of treaty bodies whether to add initiatives that go beyond the scope of the FTAs. Chapter 3 on the negotiations of EU FTAs tells us that it is necessary for civil society and the EP to engage if change is to occur, and that this engagement needs to be consistent. The current implementation of CETA shows that under best practices of transparency and regular exchanges with civil society, it is possible for issues beyond the scope of the FTA to be raised at civil society meetings.

It still has to be seen whether discussions will touch upon issues relating to fundamental rights. In the ideal scenario, not only new initiatives for fundamental rights could come forward, but policy space for deliberation could also emerge.[175] The uniqueness of the new treaty bodies that institutionalise the involvement of civil society lies in their effect of enabling horizontal dialogue on a series of issues related to trade. Research has shown that horizontal dialogues between civil society actors from the EU and partner countries have great value in themselves for the development of new initiatives and as a learning process.[176] This is particularly relevant in light of the findings of Chapter 4, where regulatory cooperation was said to potentially work as a forum for cooperation on a series of global challenges and rules that could benefit fundamental rights once the agreement is concluded. The mandate of the DAGs and CSF should accordingly put more emphasis on exploring the normative relationships between trade and fundamental rights, in order to trigger discussions thereon and lead to new policy outcomes. As

[175] 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).
[176] Van Den Putte (n 120).

discussed, however, there is no guarantee that proposals on fundamental rights will reach the agenda of the decisional treaty bodies.

Regarding the gaps in *internal processes of decision-making*, the findings of the analysis resonate with historical institutionalist insights on the distributive effects of institutions. The EU is increasingly forcing and forging new entities that appear to streamline civil society participation and open 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 institutional chapters clearly hints at this. At the same time, the institutional architecture of the new generation EU FTAs reveals a typical path-dependent phenomenon that is "institutional layering": the *addition*, as opposed to the *improvement*, of the interactions with already existing institutions.[177] The introduction of too many entities and mechanisms has overcrowded the institutional architecture of EU FTAs and eventually "fatigued" participation by interested parties.[178] DAGs have been created for each FTA, but the coordination, organisational and financial consequences only realised at a later stage.[179] The Joint Committee for EUJEPA has recognised that 'there exist many frameworks for policy dialogues' and recommended different bodies seek 'synergies'.[180] Members of the DAGs harshly criticise not being informed about proposals and their lack of involvement throughout the process.[181] All this has arguably an impact on participation of those representing citizens once the agreement is concluded.

Most importantly, a stark contrast emerges 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.[182] Chances for fundamental rights to be discussed would be enhanced by allowing the EP and civil society representatives to be present at the

[177] Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 International Organization 367.
[178] 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' (2018) Institute for European Studies, Issue 2018/01.
[179] European Commission, 'Non-paper' (n 86).
[180] European Commission, 'Joint Minutes' (First Meeting of the Joint Committee of the EU-Japan Agreement for an Economic Partnership, 23 May 2019) <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158381.pdf>.
[181] See intervention by Lina Carr (ETUC) and Tanja Buzek (EESC) at the 2nd Civil Society Forum (12 November 2019) notes by the author. Video recording of the Forum was provided by email and made available to the researcher for one week by Andreas Tibbles, Trade Policy Officer, Trade Agreements Secretariat (TCT) Global Affairs Canada. The recording is not available online.
[182] Potjomkina (n 179).

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.

A final point 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.[183] Even though civil society can interact with the Joint and Specialised Committees and submit views, no mechanisms are in place requiring the Joint or Specialised committees to follow up on their comments or recommendations.[184] What is most problematic, however, is the lack of clarity on how several insights from civil society will be filtered and selected. 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.[185] The annex also 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.[186] It would also mean designing and institutionalising processes that are informed by aims of democratic governance, as opposed to policy effectiveness.[187] Given the absence of institutionalised democratic procedures for decision-making,[188] 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.[189]

The contribution of the institutional architecture of an FTA to fundamental rights would rest on creating institutions with a mandate to monitor and assess the impact on fundamental rights; on opening up policy space for horizontal exchanges on local fundamental rights issues; and on creating an institutional environment where procedures for decision-makers are subject to accountability and

[183] See on this Jan Orbie and others (n 179). On the methodological challenges, see Jennifer Zerk, 'Human Rights Impact Assessment of Trade Agreements' (Chatham House Research Paper, 2019).
[184] Recently, the Commission has included 'Follow-up mechanisms in place with regular feedback from the domestic advisory groups'. See Annex 13: 'Support to civil society participation in the implementation of EU trade agreements', in European Commission, 'Commission Implementing Decision of 22.5.2017 on the 2017 Partnership Instrument Annual Action Programme for cooperation with third countries to be financed from the general budget of the European Union' C(2017)3311 final.
[185] Annex to the TTIP EU's proposal for the Chapter on Regulatory Cooperation. European Commission, 'TTIP- EU proposal for Chapter: Regulatory Cooperation' (tabled for discussion with the US and made public on 21 March 2016).
[186] Jonathan Kuyper, 'Global democratization and international regime complexity' (2013) 20 European Journal of International Relations 620.
[187] De Búrca (n 41) 131.
[188] Steven Wheatley, 'A Democratic Rule of International Law' (2011) 22 EJIL 525, 535.
[189] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 17.

monitoring mechanisms. An examination of the institutional architecture of the new generation EU FTAs reveals a series of omissions that do not fulfil these needs. The institutional design for the operation of the treaty bodies 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. The analysis has shown that the proliferation of treaty bodies for the implementation of EU FTAs has not equated with a 'deep' institutional architecture that can adequately safeguard fundamental rights, but that alternatives exist and are possible.

5.5. Conclusion

The exploration of fundamental rights in the institutional dimension of EU FTAs implementation reveals a series of shortcomings in relation to the mandate and internal processes of decision-making. Despite significant novelties, the limitations that remain lead to foresee little consideration of fundamental rights once the agreement is to become 'alive'. Historical institutionalism tells us that institutional design matters, for it affects 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 the EU FTAs bodies at first sight suggests a departure from past practices when only Joint and Specialised Committees were created. In fact, looking at the purpose of these new bodies and how they have 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 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, in order to ensure that the implementation of FTAs is responsive to citizens' preferences and safeguards their fundamental rights. Once a trade agreement is concluded, it is pivotal

that the impact on fundamental rights of its implementation is monitored and that its institutional architecture creates an environment where its bodies are accountable, can deliberate and exchange views on fundamental rights in the context of trade.

Given the findings of Chapter 3, the institutional architecture of EU FTAs could have institutionalised the involvement of the EP, alongside the creation of bodies for civil society, thereby reflecting their demands to have a say and ensure that the efforts at democratising EU external trade do not stop at the negotiation stage. The mismatch between the empowerment of the EP during the negotiations and its relegation at the implementation level prevents the EP not only from scrutinising the work of the executive, but also from ensuring that its constituencies' demands are eventually met. The institutional architecture of EU FTAs could have also filled some of the gaps found in Chapters 2 and 4. Regarding the former, the limited scope of fundamental rights has been reflected in a governance arrangement limited to the monitoring of labour rights. A more extensive – or perhaps 'deeper' – mandate would have included: (1) monitoring the impact of the FTA on fundamental rights, bearing the potential for (2) horizontal exchanges of views, between civil society actors of the EU and trade partner, on broader issues pertaining to the nexus between trade and fundamental rights. As to regulatory cooperation, an institutional architecture with accountability mechanisms at its centre would have countered some of its legitimacy deficits, and potentially led to cooperation on global challenges to fundamental rights in the context of trade. While trade agreements have deepened, and their scope, actors and integrationist aspirations become more ambitious, only to a limited extent do they reflect concerns for fundamental rights.

Conclusion

This research emerged from the desire to identify mechanisms ensuring that fundamental rights are not jeopardised by far-reaching deep trade agreements and rather proactively protected. The aim has been to build a bridge between trade and fundamental rights. This thesis sought to depict what has been called "a deep agenda for fundamental rights" for the new generation EU FTAs with other developed countries. The study wanted to unpack this black box and fill it with meaning as to what this agenda should look like. The exploration of fundamental rights in "deep" features of FTAs at different levels of trade law-making has been the narrative thread of this research. The core message is that fundamental rights require consideration and safeguards at all these levels. Self-standing provisions on fundamental rights within the text of the FTAs is not enough. What is necessary for the protection of fundamental rights in trade starts with the trade negotiations, goes through new levels of law-making, up to the implementation. The omissions that have been shown in this regard yet leave an unsatisfactory picture, albeit a highly expected one.

I. Exploring and understanding "a deep agenda for fundamental rights"

By seeking to explore fundamental rights in the new generation EU FTAs, the author soon realised that the research would have implied an exercise of proving a negative, since the object of the search was something that typically lies outside the trade realm. The language of "fundamental rights" is not used as such in trade negotiations. In some cases, fundamental rights end up in the bulk of "non-trade" issues. This label yet suggests that fundamental rights may not be relevant to trade. Fundamental rights are often considered an additional issue that "loads the boat" too much, hence complicating trade negotiations. This label thus may indirectly justify views according to which fundamental rights should not be dealt with by trade agreements or be the object of trade negotiations; as the argument goes, trade lawyers and trade negotiators are not equipped to deal with fundamental rights issues. As Chapter 3 has shown, the argument according to which fundamental rights should remain outside the realm of trade is also the standpoint of many human rights advocates and other civil society actors.

The main argument of this thesis has been the opposite: fundamental rights and trade are not irreconcilable, and there are ways to make them converge so that they can mutually sustain each other. Carving out fundamental rights from the FTAs risks sustaining – if not perpetuating – potential adverse effects on them. Instead of rejecting trade agreements altogether, the focus should be on ensuring their compatibility with fundamental rights from the outset and throughout the life-cycle of FTAs. And instead of pulling out fundamental rights from trade agreements altogether, the focus should be on

incorporating safeguards and mechanisms geared towards the protection of fundamental rights. While this ambition does not coincide with the current state of things, the thesis has argued that it would be possible to enhance cooperation on fundamental rights and the convergence of these two agendas, for instance by using regulatory cooperation to discuss fundamental rights challenges and enabling dialogues between civil society actors at the implementation level. While trade agreements have typically been used as tools to tame potential human rights violations in the partner country, it is time for fundamental rights to be considered as an intrinsic matter of trade.

The contextual background and factual features of the new generation of EU FTAs warrant a renewed understanding of fundamental rights in trade. This understanding needs to be informed by possible new challenges to fundamental rights as a result of "deep" FTAs. It needs to take into consideration that the trade partner is not a developing country which may lack the capacity to deal with human rights violations; or a trade partner that might in fact provide higher safeguards than in the EU. With developed trade countries as trade partners, the EU could tackle fundamental rights problems affecting the *developed* world, which are not necessarily the same in the *developing* world, or which might in fact affect the developing world "by afar". A renewed understanding of fundamental rights in trade implies updating to new concerns and challenges emerging for both labour and data privacy rights in the context of digital trade and an increasingly digitised economy. Trends of backlash to globalisation need to be countered by providing concrete safeguards and evidence that ambitious trade agreements will not affect the enjoyment of people's rights, hence providing a highly-needed source of legitimacy. The approach to fundamental rights in the new generation EU FTAs yet appears to be significantly de-contextualised and detached from this understanding.

The exploration of fundamental rights at different levels of trade law-making reveals that major steps forward are still backward in a number of ways. When looking at the texts of the FTAs, provisions on labour rights suggest that the concerns are mostly linked to social dumping and are easily tamed with provisions on core labour standards; whereas data privacy rights are hardly dealt with at all despite the prominence of digital trade (Chapter 2). Only the negotiations of TTIP (and to a lesser extent CETA) have benefited from innovative proposals on labour and data privacy rights in trade, respectively from trade unions and the LIBE Committee; yet in most cases the very first demand remains the enforcement of the TSD chapters, if not the halt of the negotiations (Chapter 3). Civil society actors largely rejected endeavours of regulatory cooperation, which is still viewed in its trade guise, namely as a tool to tackle non-tariff barriers to trade (Chapter 4). The role of treaty bodies is also limited to "execute" the FTAs, and in practice a number of limitations exist on the possibility for them to contribute to new initiatives on fundamental rights and trade (Chapter 5). This limited understanding of fundamental rights in trade is corroborated by the series of omissions that have been found in their regard.

II. Summary of empirical findings: fundamental rights omissions of EU FTAs

From the normative stance whereby fundamental rights protection needs to be the leading thread throughout different stages of the life-cycle of EU deep FTAs, the research has yet found significant omissions. The study addressed four major levels of trade law-making: the FTA itself, the negotiation stage, new regulatory cooperation mechanisms and the institutions for the implementation and monitoring of the FTAs. The starting point was that the EU has the potential to be a global actor in trade *and* fundamental rights, in the sense of making these two agendas converge (Chapter 1). On the one hand, while the EU's internal legal framework for fundamental rights has consolidated, the EU still lacks a fully-fledged fundamental rights policy internally. On the other hand, the Treaty of Lisbon has marked the beginning of a normative impetus for the EU's external action: it has added a new layer which enables the EU to pursue fundamental rights externally, while also constraining its action by requiring it to be compliant with fundamental rights. The recent conclusion of deep FTAs provides new material to examine such pursuance of, and compliance with, fundamental rights in trade.

The most manifest way in which fundamental rights are dealt with in trade agreements is by means of express provisions (Chapter 2). When it comes to the scope of fundamental rights, the new generation EU FTAs present a number of more or less extensive provisions on labour and data privacy rights. In this case, one cannot speak of omissions as such. Still, one can critically engage with the current approach and point at some limitations. Labour rights only appear in the TSD chapters: they are compartmentalised as a self-standing issue having no link with other sections of the FTA. They are not totally extrinsic from the FTAs insofar as they reflect social dumping concerns in the context of trade liberalisation. Yet they still appear to be detached from broader labour rights concerns that may be relevant in the context of FTAs between developed countries, given the lowering labour protection in high income economies, and in light of the adverse effects that deep FTAs themselves may perpetuate.[1] When it comes to data privacy rights, a lot of reluctance still exists to provide a coherent framework that would proactively address their protection in the context of cross-border services. Moreover, due to the lack of an international framework of reference, much is left at the discretion of the Parties or to parallel bilateral arrangements.[2]

[1] See Christian Häberli, Marion Jansen, José-Antonio Monteiro, 'Regional trade agreements and domestic labour market regulation' (2012) International Labour Organization, Employment Working Paper 120; 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).

[2] See discussion on adequacy decisions in Chapter 2. Elaine Fahey and Isabella Mancini, 'The EU as an Intentional or Accidental Convergence Actor? Learning From the EU-Japan Data Adequacy Negotiations' 26 International Trade Law and Regulation 99.

Taking a step back from the text of the agreement, omissions have been found at the negotiation stage, with respect to the engagement and substantive proposals by actors with a direct link to citizens (Chapter 3). It has been found that cases where the European Parliament and civil society *did* engage have equated with procedural shifts in treaty-making practices that have enhanced the democratic dimension of trade negotiations. Conversely, when they did not, negotiations could proceed as in the pre-Lisbon era. Discrepancy in engagement is also reflected in inconsistencies about substantive contributions in relation to fundamental rights and trade. The "widening" of the actors has not always coincided with their "deepening", intended as cases where the European Parliament and civil society have not only been vocal, but also advocated for fundamental rights. Only TTIP can be said to have benefited from elaborate proposals on how to deal with labour and data privacy rights, albeit only from a selected number of actors. While it is not possible to draw a direct correlation, one can see that more contestation and politicisation has overall led to more extensive and detailed provisions.

One of the objects of harsh criticism during the trade negotiations was the ambition to engage in regulatory cooperation activities: these have been examined here as additional levels of law-making requiring scrutiny from a fundamental rights perspective (Chapter 4). While it is too early to observe the actual impact of regulatory cooperation on fundamental rights, it has been found that the relevant chapters are limited in a number of ways. In terms of the objectives, regulatory cooperation is pursued mainly to address non-tariff barriers to trade and precludes or subordinates other normative aims. The subject matter of regulatory cooperation activities touches upon a wide range of issues that could more or less directly implicate fundamental rights. Finally, in the way it has been designed in the FTAs under examination, regulatory cooperation may imply procedures that generate democratic legitimacy deficits. Fundamental rights risk remaining – and appear to remain – under the radar. These limitations are not offset by provisions on the rights to regulate: the kind of safeguard they provide applies to the national level, not at the transnational level, once the trade partners decide to engage in regulatory cooperation activities.

At the transnational level, the institutional architectures bringing the FTAs alive have been found to be inadequate to achieve aims of fundamental rights (Chapter 5). This investigation has shown that, despite significant novelties, the treaty bodies envisaged by the new generation EU FTAs suffer from gaps in the mandate and deficiencies in the decision-making processes. Regarding the mandate, decisional treaty bodies have been assigned the task of implementing and monitoring what can be found in the FTA. The limited scope of fundamental rights in the FTAs and the narrow objectives of the regulatory cooperation chapters lead to foresee little consideration of fundamental rights at the implementation stage. Proposals by civil society via the respective bodies risks remaining abstract words since they do not undergo follow-up mechanisms – with the only exception of CETA. Regarding the decision-making processes, the exclusion of the EP means lack of political scrutiny from the main

institution representing citizens. As to civil society, their bodies are consultative and their interaction with the Joint Committee remains at the discretion of the latter.

Despite slight differences across trade agreements, the current approach to fundamental rights in the new generation EU FTAs does not reveal an up-to-date understanding of fundamental rights in trade, embedded in the present context of complex and far-reaching FTAs concluded between developed countries. These omissions cast a shadow over the EU's contribution to fundamental rights in global economic governance. In light of the main omissions and deficiencies with respect to fundamental rights at different levels of trade law-making, the next section turns to outline the main feature of what is called here "a deep agenda for fundamental rights" that the EU could pursue as a global actor in trade *and* fundamental rights.

III. Policy implications: towards a deep agenda for fundamental rights

This study conveys an alternative reading and understanding of fundamental rights in trade which should inform future EU trade negotiations with developed countries. Given the aforementioned omissions, the study has advanced some normative considerations on how to fill the gap and foster convergence between different levels of trade-law-making and fundamental rights. This section builds upon the findings about the *exploration* of fundamental rights and turns to answer the question of how to *understand* a deep agenda for fundamental rights in the context of the new generation EU FTAs with other developed countries. The thesis has attached the label "deep" to all those features, mechanisms and practices that at different stages of the FTAs have allowed, or would allow, to ensure that fundamental rights are not undermined and instead proactively protected. The core chapters of the thesis have developed a normative understanding of what was presented, at the beginning, as a black box to be filled with meaning – the deep agenda for fundamental rights. This section provides an overview of what this agenda means and implies in practice, while drawing some policy implications.

Regarding the scope of fundamental rights in the text of the FTAs, it has been argued that the focus should not be on increasing the quantity of the range of fundamental rights to be included; rather, their protection in EU FTAs requires designing provisions that can *qualitatively* appreciate how different aspects of international trade might affect them (Chapter 2). The trend in what has been defined as the gold standard FTA for labour rights – CETA – goes towards the inclusion of a broader range of rights. While to be welcomed, this may not always be a viable way. In addition, it may not necessarily reflect an appreciation of challenges to fundamental rights facilitated by the FTAs. On labour rights, it is important that commitments on investment, liberalisation of services and rules of origin are accompanied by commitments that prevent and monitor potential adverse impacts on labour rights. On data privacy rights, the Parties should commit to proactively protect them and include mechanisms to

cooperate on side-issues in the context of digital trade. Above all, fundamental rights should be recognised in the objectives and across other dimensions of the FTAs. At the same time, challenges to fundamental rights in the context of international trade should be identified and addressed in the FTAs, also by means of cooperation.

Alternative provisions on fundamental rights and novel understandings as to their relationship in the present context of globalisation and digitalisation should become the object of advocacy by actors with a direct link to citizens during the trade negotiations (Chapter 3). Trade negotiations are the first crucial step in the life-cycle of an FTA where actors have the possibility to influence the future content of the text. Empirical findings have shown that scrutiny and contestation can lead to positive shifts in democratic practices, which suggests that such scrutiny should be consistent across trade negotiations. This applies to both civil society and the EP, which has tended to become vocal only in the aftermath of the politicisation of trade negotiations. Not only should the actors that represent citizens engage and mobilise, they should also advance proposals on fundamental rights. They are supposedly the ones that can work as transmission belts for citizens and are closer to their needs and local circumstances. Their procedural and substantive engagement should be the case not only at the negotiation stage, but also across different levels of trade law-making.

One of these levels is regulatory cooperation: while civil society actors have tended to reject it on arguments of diminished regulatory space at the domestic level, this thesis has suggested that regulatory cooperation activities should be harnessed to tackle global challenges in relation to fundamental rights and trade (Chapter 4). Fundamental rights could be addressed in regulatory cooperation activities (and should be in discussions on related issues, such as e-commerce for data privacy). This would require that the objectives of the chapters refer to the respect and promotion of fundamental rights and strive for upwards convergence. As a mechanism that could "alter" the content of trade agreements, regulatory cooperation could also target specific issues related to fundamental rights which were controversial during the negotiations and which accounted for a limited scope within the FTA. Furthermore, regulatory cooperation chapters should include procedural safeguards. This would require i.a. an institutional architecture able to ensure that fundamental rights are not side-lined.

A "deep agenda for fundamental rights" necessitates an adequate institutional architecture for the implementation of the agreements (Chapter 5). Treaty bodies of EU FTAs should be given the mandate and tools to monitor the impact of the FTAs on fundamental rights, as opposed to merely check whether the provisions of the FTAs are implemented and abided by. The institutional architecture should also create an environment able to facilitate deliberation and exchanges of views on broader issues pertaining to the nexus between trade and fundamental rights. No further bodies for civil society should be created, but the interactions among the existing ones should be improved. Importantly, proposals by civil society actors should be the object of follow-up mechanisms providing reason on why some proposals are considered and which are not. The same applies to the EP, which should be

given a body or venue to play a role at the implementation level, and most importantly be involved in decision-making processes, both at the bilateral and the "domestic" level. These normative considerations are not exhaustive and instead aim to open up the path to further research.

IV. Wider Contribution and Future Research

The wider contribution of the thesis lies in its call to reconsider and reconceptualise the nexus between trade and fundamental rights, while submitting proposals on how these two agendas can converge and mutually sustain each other. This thesis has done so by first empirically showing omissions with respect to fundamental rights and then by normatively providing suggestions on the ways forward. The methodological approach to the study of fundamental rights in EU FTAs can be considered part of the wider contribution: fundamental rights have been explored across different levels of trade law-making and in their intersection with "deep" features of the new generation EU FTAs. While addressed singularly, these levels have been considered as both cumulative and part of a broader whole. The normative findings of each chapter concur to build the conceptualisation of "a deep agenda for fundamental rights". Since no other studies have adopted such an approach, this thesis provides a methodological framework that could be employed in similar research projects that study FTAs and their nexus with other subjects, especially other sets of fundamental rights.

Furthermore, the thesis has provided a detailed comparative depiction of fundamental rights in EU trade across regions. This study has departed from an analysis of stand-alone or pairs of cases that has characterised the literature so far,[3] and has considered four case studies, alongside a regional approach. The juxtaposition of North American and Asian trade partners reveals some dividing lines as to the deepness of fundamental rights at different levels of law-making. These dividing lines are particularly evident with respect to Singapore and to a lesser extent with Japan when compared with Canada and the US. In some other cases, however, this regional divide is much more blurred. In the words of Sophie Meunier and Jean-Frederic Morin, no agreement is an island.[4] This study has highlighted influences and "copy-paste" from trade negotiations and agreements to the others. It would be incorrect to conclude that fundamental rights enjoy a more prominent place in the FTAs with North American than with Asian trade partners. The findings do not lead to a clear-cut picture as to differences of how the EU deals with the two regions.

This research then has also contributed to the broader aim of the thesis regarding the role of the EU as a global actor in trade *and* fundamental rights. It has provided empirical findings of the extent to

[3] Or comparisons of CETA and TTIP, or comparisons of Singapore and South Korea for instance, see e.g. Dirk De Bièvre, 'The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiations' (2018) 53 The International Spectator 70; Lachlan McKenzie and Katharina Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' (2017) 55 JCMS 832.

[4] Sophie Meunier and Jean-Frederic Morin, 'No Agreement is an Island: Negotiating TTIP in a Dense Regime Complex' in Mario Telò and others (eds), *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Ashgate 2015).

which EU trade law-making with countries spanning North America and Asia ensures the protection of fundamental rights. The Treaty of Lisbon has provided new normative impetus for the EU to pursue fundamental rights in its external relations. The combination of this mandate with the EU's ambitions in North America and Asia could have meant a new place for fundamental rights in global economic governance emerging from deep trade initiatives with strategic trade partners. The study has argued that a series of omissions still exist when it comes to ensuring that fundamental rights are not undermined. In a context of backlash to free trade and new challenges to fundamental rights, not least competition regarding global standard-setting in trade, fundamental rights could represent a much-needed metrics for the legitimacy of EU external trade.

There are different ways in which these findings can be complemented or added to. For instance, the timing of the research has not allowed us to engage in an examination of the implementation of *all* FTAs.[5] Future studies could undertake empirical research as a continuation to the present analysis, also on the impact of the implementation of FTAs on fundamental rights and issues of enforcement. Other studies could focus on different sets of rights that might be implicated in the context of deep FTAs.[6] Furthermore, this thesis has focused on four case studies, but future research could compare different regions and highlight different understandings as to rights, not least specific needs in those countries and regions. A comparative perspective of developing and developed countries could also emphasise divergences in approaches to the nexus between trade and fundamental rights. The current negotiations with the UK are a major case study, especially given the developed nature of the country and its historical ties to the EU. The current discussions on the level playing field and dynamic alignment are crucial to novel approaches to fundamental rights in trade, which could become the object of future research.

Furthermore, the findings of this research open up new exploratory agendas. The normative considerations that were suggested on the way forward could become the object of research projects of their own. A broader aim of these studies could be the democratisation of global economic governance. Democratising trade agreements is a timely pressing normative challenge. One strand of research could examine how the "deep agenda for fundamental rights" outlined in this thesis could contribute to the democratisation of trade law-making beyond the State from a theoretical perspective. Another strand of research could address the question of how to democratise trade law and governance beyond the metrics of fundamental rights. This thesis has taken fundamental rights as one way of legitimising trade agreements, but ambitious trade agreements compel new conceptualisation of democracy beyond the State, and fundamental rights may be only one of its components. Future research could still draw from the approach adopted in this thesis whereby FTAs are examined throughout their life-cycle. Overall, more research needs to be done on how different levels of trade law-making can be democratic and

[5] This was only possible with respect to the institutional dimension of CETA and EUJEPA.

[6] For instance, the recent EU proposal on a chapter on gender could become the object of similar enquiries.

provide mechanisms to ensure the protection of fundamental rights. By designing its own "deep agenda for fundamental rights" in trade, this thesis has provided a first step into this timely research agenda.

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