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Trade negotiations, trade policy and law-making in an era of soft law: is the EU a leader or a laggard?

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**Alexandros Bakos,
Xuechen Chen,
Joseph Dunne,
Elaine Fahey,
Maria Belen Gracia,
David Henig,
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Fabia Jones,
Christos Karetsos,
Elif Mendos Kuşkonmaz,
Paarth Naithani,
Josephine Norris,
Mariem Ben Slimane,
Oana Stefan,
Rosalind Stevens,
Thomas Verellen**

The City Law School, City, University of London, London, EC1V 0HB

2024/02

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The City Law School

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Trade negotiations, trade policy and law-making in an era of soft law: is the EU a leader or a laggard?

Alexandros Bakos, Xuechen Chen, Joseph Dunne, Elaine Fahey, Maria Belen Gracia, David Henig, Alexander Horne, Fabia Jones, Christos Karetsos, Elif Mendos Kuşkonmaz, Paarth Naithani, Josephine Norris, Mariem Ben Slimane, Oana Stefan, Rosalind Stevens, Thomas Verellen

Abstract

This report summarises the Conference 'Trade negotiations, trade policy and law-making in an era of soft law: is the EU a leader or a laggard?' that took place on 21 June 2024. Digital partnerships' and soft law frameworks in lieu of trade agreements are increasingly common led by the EU, Asia, US and UK. The EU-US Trade and Technology (TTC) and an EU- India TTC are part of the EU's pivot to multiple 'soft law' instruments in trade and technical, ie non-binding Digital Partnerships with key Asian partners, mainly leading developed economies originally part of the EU's post-Lisbon pivot to Asia. TTCs nowadays- similar to Digital Partnerships- have soft law structures, executive to executive set-up and wide-ranging emphasis on international law-making goals as to the digital economy. One entity not officially to be found within the TTC is the European Parliament (EP). The EP is formally not part in any way of the EU-US Trade and Technology Council (EU-US TTC) operating outside of its Article 218 TFEU structures. The conference explored how TTC's raises certain important question as to the increasing dominance of 'soft' law in international economic law. It reflected upon its putative exclusion of parliaments through the adoption of frameworks *outside* of the EU treaties. Are TTCs meaningfully evolving? Are trade and technology increasingly incompatible within trade agreements? Who is gaining and losing? Is EU leadership of global law-making issues arising from its data privacy first-mover regulation imperiled by a shift to soft law? How do other institutional actors get affected by a shift towards soft law in the EU? How are these issues evolving *outside* of the EU? How much are institutional relationships in trade using conventional needs put under pressure. The event considered examples beyond the EU of similar effects and divergences as to these developments in other jurisdictions. What does a future of soft law in international economic law look like for the WTO, the EU in its trade negotiations and the future of transnational partnerships beyond conventional structures? The event accounted a range of questions not limited to: constitutional challenges of negotiating trade agreements in some jurisdictions, the dominance of global supply chains, the evolution of complex privacy schism across key global orders. The event had three sessions overall : Key directions of IEL/ EU international relations law, policy and practice; Institutional issues of the soft law shift- The place of parliaments, institutions- and never courts? And Framing the key 'movers' in trade and tech: on the 'West': EU, US and key 'contra powers': China, India.

Keywords: Trade; Technology; TTC; Negotiations; Law-making; Soft law

Part I.

Key directions of IEL/ IPE/ EU international relations: law, policy & practice

‘Does soft trade law show the limits of trade agreements or is it a foundation for new ones?’

David Henig, European Centre for International Political Economy (ECIPE)

Today’s trade barriers are not those of 1947 or 1995 when the main structures of hard law were put in place. Then, tariffs were tackled as the predominant issue, with only a broad structure for regulations and services put in place at the latter date. Moving beyond this has proved difficult as countries have been reluctant to restrict their regulatory freedoms in treaty. With pressures continuing to work against such commitments, it is important to understand whether soft law has now become the limit of aspiration in areas such as digital trade, or whether hard law can follow. Against this backdrop, Henig talked about the recent trade agreements which are based predominantly on cooperation rather than on other means and which he described as an ‘opportunity lost’. According to Henig, this emerging policy space has been long used by the US for turning away from their commitments, especially in the area of digital trade, data flows and e-commerce at WTO level. It is vivid that something has changed more broadly: binding commitments are moving away to the growth of soft law, accelerated under the influence of both domestic and global events such as the Trump presidency, Brexit, COVID and the Russian invasion in Ukraine. The reasons for this change in trajectory perhaps can be found in several places. Firstly, WTO is struggling with its reform programme. At EU level, we observe the strategic autonomy agenda, which according to Henig, brought along the idea of weaponizing the Brussels effect whereby the EU is exporting its regulations. Ultimately, even though we want multilateral commitments, bilateral commitments, etc, in fact, we are not getting any commitments, so the negotiations enter into the phase of using soft law to cooperate on trade matters. And the broader question is: are these processes a foundation of a new era of trade agreements in the years to come?

‘Cooking’ EU’s external trade and sustainability policy: soft law as one of the ‘four main ingredients’ to foster circularity

Maria Belen Gracia, University of Maastricht

The EU has been using soft law instruments in its foreign affairs policy for a long time. This approach also applies to its external trade policy. The European Commission seems to have found a successful combination of regulatory instruments to promote sustainability and circularity in its external trade policy, and soft law instruments play an important role. The presentation characterized these four different regulatory approaches, providing specific examples to illustrate their application. Soft law is part of two categories that Gracia presented: either as ‘stand-alone’ instruments or as instruments that are referred to in free trade agreements (FTAs), particularly in their trade and sustainability chapters. Issues related to the circular economy have not traditionally been covered by FTAs, but the EU has been using soft law instruments to introduce these issues in its external trade policy. The memorandums of understanding (MOUs) on sustainable raw materials value chains to support the clean energy and digital transition are examples of these instruments. Gracia also referred to the three categories of soft-law instruments proposed by Professor Andrea Ott in her paper ‘Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges,’ based on their aims and functions. Using this framework, she explained that in the case of these MOUs, some of them fall under the category of soft law instruments that precede binding customary rules and agreements, like the MOU on raw materials between the EU and China, while others, such as the MOU on raw material between the EU and Argentina could potentially

be seen as an instrument that complete and supplement binding international agreements, if the EU-Mercosur Agreement is finalized, or as a substitute of an international agreement.

Trade policy has increasingly been used by the EU to promote sustainability and circularity, as a way to address the triple planetary crisis. To do this, a balanced approach in EU's external trade policy that combines hard and soft law instruments which complement each other was needed. In this quest, soft law instruments have been instrumental in promoting sustainability and introducing elements of the circular economy in EU's trade relations with its trade partners. Their use has been particularly significant in those countries with no FTAs, since they introduce a set of soft rules to guide their trade relations or prepare the field for future agreements, while in the case of trade partners with whom the EU has signed an FTA, the interplay between these instruments requires a deeper analysis.

'Security Creep in a Minilateral European Trade Framework'

Alex Bakos and Christos Karetsos, City Law School, City, University of London

Security considerations seem to become ever more present in the European Union's trade and investment policy. Such linkages, however, open different avenues for reaching security goals, beyond the Common Foreign and Security Policy constraints (traditionally connected to hardcore military and defense considerations). Examples range from economic security (as reflected in foreign direct investment screening or redressive measures against market-distorting foreign subsidies) to cybersecurity aspects. Of particular interest here are soft law instruments spurring cooperation in trade matters that also present a security nexus (such as the EU-US Trade and Technology Council or the India-Middle East-Europe Economic Corridor). At first glance only serving a cooperative purpose, such frameworks might "creep" into areas traditionally reserved not only for more formal security decision-making, but also based on consensus. Potential executive dominance in this area, coupled with the reduced role of the EU's Parliament, risk exacerbating such concerns. There was an evolving view of security interests (from military and defense to economic security which considers energy security as an intermediate point). Minilateral (focused and issue-specific) and soft law instruments were increasingly used to attain security goals and spur security decision-making. For instance: strategic partnerships to ensure access to raw materials (energy security); memoranda of understanding to facilitate reciprocal access to defence procurement; digital partnerships (cybersecurity, secure 5G technology, the resilience of semiconductor GVCs etc.); climate clubs (with wider view of security interests, which includes environmental security). However, minilateralism is heavily linked to informality and unveils a (often) non-binding character. As Lucian Cernat pointed out, trade mini-deals may make the bulk of instruments ordering trade in which the EU is involved and through which trade policy is implemented.[1] Yet, soft international agreements lack transparency – sometimes even hard to identify and access.[2] Check and balances are only in place for binding, hard instruments (e.g. traditional PIL governed treaties – CJEU, Opinion 1/75) under Arts. 216 and 218 TFEU.

The executive's role in negotiating, adopting, and implementing mini-deals, especially when security concerns are involved entailed that increased executive power was being used to shape security decision-making (e.g., economic security attained through the use of trade defense instruments – Foreign Subsidies Regulation, Anti-Coercion Instrument etc.), with the Commission as the central actor. However, security decision-making was also seen with non-binding instruments, such as strategic partnerships, "minilateral" initiatives such as the India-Middle East-Europe Economic Corridor etc. Security increasingly acted as a space for

[1] Lucian Cernat, 'The Art of the Mini-Deals: The Invisible Part of EU Trade Policy' (2023) ECIPE 11/2023.

[2] See Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39(1) Yearbook of European Law 569.

contestation and as a race for epistemic authority – the power to identify security threats and to take measures that proactively safeguard security lies mainly with the Commission and, in the CFSP area, with the Council. The identification of strategic partners and the content of the strategic partnerships entailed a limited role for the EU Parliament. *But*, security considerations encompassed secrecy by default and effectiveness and quick decision-making are essential – it raised the question as to where to strike the balance between accountability and effectiveness? A distinction between *reactive* security measures (e.g. sudden change in a market due to the disbursement of foreign subsidies) and *proactive* security measures (e.g. identifying strategic partners) could safeguard the need for executive effectiveness and accountability. Minilateralism mostly entails *proactive* security decision-making, yet it is heavily removed from the reach of the Parliament's supervision. Yet, structural, institutional, and even governance culture may justify the use of soft law instruments to pursue security decision-making. A s*cattered* executive also raised issues eg – Commission/Council/European Council. The Council (still) exercises *formal* decision-making in the CFSP sphere. The contributors raised the issue as to about potential incoherence in security strategy. Security decision-making associated with soft law had also been shown in the past to be problematic.[3] Parliament had been removed from the formal process of concluding an agreement relating *exclusively* to the CFSP. Should the same principle not apply to concluding soft law arrangements? In this case, however, the Commission takes on a more prominent role, which could differentiate the latter situation from the CFSP process. Nonetheless, the Parliament is sometimes involved in the process of concluding soft law instruments (e.g. Strategic Partnership between the EU, its Member States, and Japan), although there is no single coherent approach to negotiating and concluding strategic partnerships. Engaging the Parliament even informally should, in theory, be sufficient to exercise a (limited) degree of accountability in regards to security decision-making and strategy (e.g., Parliament's approval in 2019 of a resolution according to which Russia could no longer be considered a strategic partner) – but should this apply equally to reactive and proactive security measures? The flexibility of soft law instruments, in fact, allowed the engagement of various stakeholders that otherwise may not have been engaged through the formal processes of hard law agreements (e.g., private firms in economic security decision-making and governance).

Flexible frameworks and non-binding instruments: what's driving the 'soft-law' trend in EU trade policy?

Josephine Norris, European Commission Legal Service

In the wake of the EU policy shift to 'open strategic autonomy', the EU's engagement with its strategic partners has shifted track. The talk outlined how the establishment of new fora to discuss and develop mutual solutions on trade and technology – the TTCs - had been accompanied by a proliferation of 'strategic partnerships' and other non-binding instruments. Norris argued that trade policy is inherently dynamic as priorities change constantly both in terms of geopolitical alliances and in terms of values. Ultimately, it is important to enquire whether utilising soft law is a shift, a positive choice or, in fact, a response out of necessity. Arguably, negotiating an agreement is a long process and its modification can be complicated. Therefore, soft law assists in the cases where there is a need to move fast, adapt and adjust. Soft law can be a way to move forward when the rest of the international community is not ready. Moreover, soft law can also be a positive choice because it can serve as a platform where you can discuss alignment on topics where there are not yet international preferences. However, soft law is also a necessity in the cases where ambitions have changed. Against this backdrop, Norris' presentation examined the drivers and institutional implications of the reliance on these soft law instruments from the European Commission's perspective.

[3] E.g. Ramses Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreement' (2021) 44(1) West European Politics 72.

Part II.

Institutional issues of the soft law shift- The place of parliaments, institutions- and less so courts in contemporary trade?

‘The role of the European Parliament in the EU-UK Trade and cooperation agreement and the role of EPLO UK’

Fabia Jones, European Parliament Liaison Office (EPLO) in the United Kingdom

Jones outlined the European Parliament’s role in international trade agreements. First, the Commission must inform Parliament at all stages of negotiations and Parliament can pass resolutions and address questions to the Commission, the High Representative of the Union for Foreign Affairs and Security Policy/Commission Vice-President (HR/VP) and the Council. Most importantly, the European Parliament has a veto over trade agreements at the ratification stage when it must give its consent to the conclusion of an agreement with a yes/no vote. Parliament can accompany formal consent to international trade agreements with resolutions setting out the reasons for its decision and making recommendations on implementation. As to resolutions on the EU-UK Trade and Cooperation Agreement (TCA) and the Withdrawal Agreement, inter alia, the contributor outlined Parliament’s concerns about the limited scope of the TCA as well as about its procedural deviations and about the implementation of the protocol on Ireland/Northern Ireland, and its emphasis on the need for greater investment in customs control facilities. Jones also described the questions Parliament asked about the EU-UK TCA and its implementation, including questions on fisheries, governance, trade and social dumping, respect for EU standards, justice and home affairs, data protection, education, space and humanitarian aid. But how is the EP performing its oversight and monitoring here? This occurs mostly through workshops, hearings and discussions by interested parliamentary committees and the UK Contact Group together with the EU-UK Parliamentary Partnership Assembly established by the TCA. Jones further delineated the role of EPLO in the UK. It supports parliamentary liaison between the European Parliament and the UK by keeping the EP informed about developments in the UK affecting EU-UK relations and by supporting EP delegations and members visiting the UK. It also engages in outreach to EU citizens living in the UK and UK citizens interested in the European Parliament including youth and cultural outreach.

‘Institutional Issues of the Soft Law Shift: The de facto exclusion of the European Parliament in the TTC with the US’

Joseph Dunne, outgoing director EPLO Washington DC

Dunne considered that the answer to the question posed by the Conference on the effectiveness of the ‘soft law’ approach of the European Commission in the adoption of frameworks outside of the EU treaties in deepening the EU’s trade and technological cooperation internationally, could only be in the affirmative. The success of the soft law approach comes however with a degree of loss of democratic legitimacy, given the *de facto* exclusion of the European Parliament in the Trade and Technology Council (TTC) with the United States. The European Parliament Liaison Office (EPLO) in the US, which he had led, was established in April 2010 as a means of strengthening links with the US Congress, especially the House of Representatives. Its bridge-building/ connecting role and parliamentary diplomacy had added a new ‘hard’ dimension to a parliamentary relationship that dates back to 1972. EPLO US channels the visits of 100 Members per year on average, covering both the specialized Transatlantic Legislators’ Dialogue (TLD) first formalized in Strasbourg in 1999, and committee-to-committee dialogue on sector-specific issues. In recent years, there had been a concerted effort to enhance legislative dialogue by hosting rapporteurs on specific legislation (AI Act, DMA, DSA, CBAM, Data Act). In this way the office

had sought to build on congressional awareness of the ‘Brussels effect’, which could not always be taken for granted.

The establishment of EPLO had closely followed the entry into force of the Lisbon Treaty and the shock rejections of the ‘PNR’ and ‘Swift’ agreements, which had put the European Parliament on the US ‘mental map’ for the first time. These agreements were also incidentally good examples of the shortcomings of purely executive-to-executive negotiations. That the European Commission and the US Administration have now again chosen an executive-to-executive mode of operation with the TTC, may be explained in part by the experience of negotiating the (ultimately unsuccessful) Transatlantic Trade and Investment Partnership (TTIP) - where the US side was unsure how to manage institutional rivalry in the EU, while the European Commission felt itself put in a disadvantageous negotiating position with respect to the US negotiators because of the EP’s refusal to accept the need for secrecy.

The EP has nevertheless consistently supported the TTC (cf. the Picula report of October 2021) and kept itself informed through monitoring arrangements agreed between the International Trade Committee (INTA) and Industry and Research (ITRE) committees. ‘In camera’ information was passed to these Committees on a regular basis by the Commissioners involved in the TTC. There were unsuccessful attempts, notably by ITRE Committee Vice-Chair Kumpula, to create a monitoring group specifically tasked with following the TTC. The EP has accordingly - up to now – accepted its lack of formal involvement in the TTC exchange for privileged information access for Members active in the trade area. It remains to be seen whether this position will be endorsed or modified in the new parliamentary term (2024-2029). Congress, for its part, has shown limited interest in the progress of the TTC.

‘Treaty Scrutiny: The Role of Parliament in UK Trade Agreements’

Alexander Horne, Cornerstone Chambers/ Durham University

There is broad agreement that the current process of treaty scrutiny in the UK Parliament, based on the Constitutional Reform and Governance Act 2010 but substantively going back to a scheme established in 1924, is no longer fit for purpose. There are two reasons for this: first, in the last century the number, content, scope and mechanisms of treaties have changed substantially. Second, during the UK’s membership of the EU some of the most complex modern treaties, namely free trade agreements (FTAs), had been concluded by the EU and effective mechanisms of parliamentary control had developed in this regard. With Brexit, these have fallen away. Since then, the Parliament has established a formal treaty scrutiny mechanism in the House of Lords and has gained significant experience in handling treaties. We believe that the time has now come to learn from this experience and reform the UK treaty scrutiny system. The presentation outlined a proposal with a number of reforms to improve the practice of treaty scrutiny. These proposals consisted of five main elements: (1) systematic scrutiny of treaties in both Houses of Parliament; (2) the introduction of a parliamentary consent vote in the House of Commons for significant treaties, particularly new FTAs; (3) ensuring the early involvement of Parliament starting with the negotiating mandate for FTAs; (4) broadening the list of documents subject to scrutiny; (5) to cope with the increased workload, introducing a sifting mechanism (that would be conducted in a new Sifting Committee in the House of Commons and in the International Agreements Committee (IAC) in the House of Lords) to identify treaties requiring thorough parliamentary engagement.

‘Trade and engagement with civil society in the UK and the EU’

Rosalind Stevens, Civil Society Alliance

For most trade agreements since the 2011 EU-Korea Free Trade Agreement, a Domestic Advisory Group (DAG) has been set up in the EU and in the partner country or countries to advise on the implementation of the trade agreement or parts of it. The DAGs seek to advise

the parties to trade agreements, based on information they obtain from their members or partner organisations in the countries concerned, to help improve implementation of the agreements. The DAGs seek to achieve balanced representation of business organisations, trade unions, environmental and other organisations. Starting with the EU-United Kingdom Trade and Cooperation Agreement, the DAG mandate was widened to cover agreements in their entirety. In response to demand from DAG members, the UK DAG now has several subgroups, including one on the nations and regions, which add a citizens' perspective to discussions - albeit the issues raised do not always fall strictly within TCA implementation issues. In light of the upcoming review (as opposed to renegotiation) of the UK-EU TCA the focus of civil society is to find issues that could be resolved by mutual 'side agreements' with the EU. We also consider issues that might be included in future trade negotiations in areas that would be mutually beneficial – for example, the Horizon programme and other initiatives to address barriers to incoming and outgoing mobility, particularly barriers for youth mobility and for the creative, art and cultural industries. To have their voices heard, civil society would like to see a strengthened UK Civil Society Forum with formal membership that is not identical to the DAG membership as is currently the case. Unresolved issues include limited administrative capacity, lack of institutional visibility, and difficulties interacting with some non-EU counterpart DAGs. Civil society is also keen for the youth sector to be represented within the DAG. Against this backdrop the speaker explained that unlike the DAG, the Civil Society Forum is not membership based, although this was not clear initially. Theoretically, it is open to all civil society organisations to apply for participation in the annual meetings in person or online, or as an observer . The remit of the CSF is limited to implementation of TCA part 2 - trade, transport, fisheries and other arrangements, including the 'level playing field' and sustainability provisions.

Part III.

Framing the key 'movers' in trade and tech: on the 'West' and key 'contra powers'

'Towards an EU Data Protection Adequacy Decision for India'

Paarth Naithani, Jindal Global Law School, India

The EU GDPR regulates personal data processing. For the transfer of data from the EU to another jurisdiction, the EU Commission can pass an adequacy decision. It allows the transfer of personal data from the EU to the jurisdiction without needing further authorisation. In the absence of adequacy decisions, the requirement for transfer is standard contractual clauses or the data subjects' consent (among other grounds). India is an important trade partner of the EU. An adequacy decision would facilitate free data transfer of data from the EU to India, benefitting trade. India has recently passed its first comprehensive data protection legislation, the Digital Personal Data Protection Act of 2023 (hereinafter: DPDP). How can the DPDP enactment provide an adequate level of data protection to the EU? In the past, the Article 29 Working Party Adequacy Referential[4] recommended the inclusion of certain provisions in a jurisdiction's data protection law to ensure adequate level of protection. India is yet to pass additional Rules under the DPDP, which could fill some of the gaps that the DPDP does not address. The fundamental right to privacy requirements can be an answer to some missing safeguards in exemptions. Since the right to privacy has been recognised as a fundamental right under Article 21 of the Constitution of India (KS Puttaswamy Judgement of the Supreme Court of India), the Rules can clarify that the requirement of necessity and proportionality can be read into the DPDP exemptions. It can be recognised that the exemptions for national security and law enforcement are not absolute. The KS Puttaswamy judgement, however, acknowledged that the right to privacy is not absolute and national security is an obvious restriction. Although the judgement does not clarify this, the Rules can make clear that measures restricting privacy in case of national security need to be necessary and proportionate (in correspondence with EU law and the CJEU case law). Therefore, the DPDP Rules can fill some of the apparent gaps to help ensure adequacy. According to the speaker, of utmost importance is acknowledging necessity and proportionality as key requirements for measures infringing privacy, especially in case of data processing for law enforcement and national security. These requirements can be recognised with the enactment of the law. There is also the need to clarify the scope of the exemption of Art 17(1)(d) DPDP which shall not apply to the data of EU data subjects that is transferred to India. The presentation outlined how these considerations will help move towards an EU Data Protection Adequacy Decision for India.

'Understanding China's approach to multilateral and regional digital trade governance'

Xuechen Chen, Northeastern University London

In recent years, China has been proactive in collaborating with other international actors to forge regulations for global digital trade. At the multilateral level, China has actively engaged in WTO negotiations concerning e-commerce and information and communications technology (ICT) products. During these discussions, it has introduced various proposals aimed at improving cross-border e-commerce, trade facilitation, logistics, payment systems, and other related areas. At the regional level, in 2021, China's applications to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and The Digital Economy Partnership Agreement (DEPA) were steps towards harmonizing its

[4] Article 29 Working Party Adequacy Referential Adopted on 28 November 2017, last revised and adopted on 6 February 2018 18/EN WP 254 rev.01.

economic and trade policies with those of the international community, thereby further opening its economy. Despite these recent developments, there has been a lack of scholarly discussion regarding China's approach to and engagement with multilateral and regional digital trade governance. This presentation mapped China's involvement in digital trade governance at multilateral, regional, and bilateral levels. It sought to compare and contrast China's approach to digital trade with that of other major players, such as the US and the EU. There are multiple layers of digital trade regimes in the Asia-Pacific region, which include both legally binding trade agreements and other less formal and more flexible forms of activities governing digital trade eg Trade agreement with digital trade chapters, such as CPTPP, Regional Comprehensive Economic Partnership (RCEP) and stand-alone DTAs, as evidenced in the US-Japan DTA adopted in 2020. There are also informal, non-binding, and less institutionalized mechanisms to advance dialogue and cooperation concerning digital trade proliferate. ASEAN has established a few digital trade initiatives such as the e-ASEAN Framework in 2000 (ASEAN 2000), the ASEAN Economic Community Blueprint (2015) and the ASEAN Agreement on Electronic-Commerce (AAEC) (2019). Evidently, the digital trade governance landscape in the Asia-Pacific region is highly fragmented. While this regime complex may result in a lack of coherence, it creates possibilities for cooperation among actors with different preferences. For instance, the CPTPP and RCEP stand as two important trade agreements centering on the Asia-Pacific region, different in terms of the level of liberalization in digital trade. The CPTPP is featured by its ambitious liberalized approach to digital trade while the RCEP offers more adaptable and flexible provisions on digital trade, particularly regarding data regulation. Several important features underlying China's approaches to digital trade governance in the Asia Pacific region can be delineated. First, China has adopted a relatively conservative stance on digital trade governance. E-commerce provisions and chapters have been absent from China's FTAs until recently. The first FTAs containing E-commerce provisions were signed in 2015 by China with Australia and Korea. However, these provisions remained modest with a primary focus on E-commerce trade, such as paperless trading, and customs duties on electronic transmissions. The second characteristic featuring China's approach to digital trade governance in the Asia-Pacific region is that it encompasses not only top-down state and sub-state actors led institution-building but also bottom-up efforts involving non-state actors in China's digital diplomacy towards the ASEAN countries. Moreover, the role played by China's local governments also cannot be ignored. A notable example is the China-Singapore (Chongqing) Demonstration Initiative on Strategic Connectivity Initiative (CCI). Notably, Chinese private actors have been crucial actors in shaping China's digital governance approach. For instance, state-owned enterprises, such as China Telecom and China Mobile, as well as private companies, such as Huawei, Baidu, and Alibaba, have significantly expanded their market share in the region, particularly under the umbrella of Digital Silk Road. The third characteristic of China's approach to digital trade is its active promotion of digital technical standards. Technical standards are important to digital trade governance eg harmonized standards in areas such as privacy and consumer protection are the key in managing global digital trade. China's standard-setting efforts include supporting Chinese officials in senior positions and providing the necessary financial and technical support required to standards proposals in international standards institutions like the 3rd Generation Partnership Project (3GPP) and the International Telecommunication Union (ITU). Moreover, China underscores the private sector's primacy and importance in setting digital technical standards. In the field of digital trade like e-commerce, digital payment, and digital lending system, there are fewer regulations and standards. Chinese enterprises under the support of the government therefore seek to take the first-mover advantage to establish de facto standards in these digital trade areas. Ultimately, China's approach to digital trade is characterized by its consideration of security implications: digital trade brings about security concerns. In the case of China, security implications of digital trade are particularly profound, aligning with its longstanding prioritization of cyber sovereignty in shaping its domestic cyber governance approach. Security concerns, notably data sovereignty considerations, have predominantly influenced China's stance on digital trade. To govern the digital economy, China has adopted multiple laws and regulatory measures, including the Cybersecurity Law, the Data

Security Law (DSL), the Personal Information Protection Law (PIPL), and the Measures of Security Assessment of Cross-border Transfer of Personal Information and Important Data. These laws and measures shape China's domestic approach to the digital economy and serve as the basis of its stance on digital trade internationally.

'Balancing Power and Protecting Rights: A Study on Soft Law Instruments in EU-Canada Trade and Technology Relations'

Thomas Verellen, Utrecht Law School

The presentation investigated the accountability mechanisms inherent in the soft law instruments governing EU-Canada relations in the fields of trade and technology, with a specific focus on the roles of the European Parliament and judicial review. It sought to critically assess whether these mechanisms ensure executive transparency and uphold individual rights, thereby questioning the dominance of the executive in the formulation and implementation of soft law. Through qualitative analysis of soft law examples, including the 2021 Strategic Partnership on Raw Materials and the 2023 Digital Partnership, the contribution explored the extent of legislative oversight and judicial capacity to scrutinize these instruments, highlighting areas for enhancing accountability and safeguarding individual rights within this transatlantic partnership and beyond. It used CETA as an example because CETA is well known for the successive controversies it has generated as it has made—its way through the various national parliaments. Despite CETA and its provisions for further implementation through binding mini-agreements, the EU has been making several so-called 'non-binding agreements' with Canada on diverse issues such as raw materials, digital policy and environmental and climate change policy. These non-binding agreements often 'build on' the collaboration established by CETA through several 'specialized committees' on themes such as raw materials and e-commerce. However, they exist independently from CETA. Non-binding agreements are agreements that the parties intend not to be legally binding. The intention of the parties is key in determining the legal bindingness of an agreement. This intention is often explicitly stated, as in the EU-Canada Green Alliance, which holds that the agreement "does not, nor is it intended to create any rights or obligations under domestic or international law and has no financial implications for either Partner." When an agreement lacks such a clause, the text and context must be examined. Terms such as "intend to" rather than "shall" indicate an intention not to conclude a legally binding agreement. A lack of binding character does not mean non-binding agreements are irrelevant. On the contrary, for numerous reasons, a growing number of important agreements are concluded as non-binding agreements. The memorandums of understanding on migration matters the EU— or rather, 'Team Europe'—has been concluding with its southern neighborhood are a case in point. Given their growing political significance, it matters how the EU concludes non-binding agreements. In recent years, an interinstitutional modus operandi has developed whereby the Commission negotiates so-called 'non-binding instruments' (NBI) after receiving authorization from the Council. If and when the negotiations conclude successfully, the Commission seeks permission from the Council to finalize the agreement. This practice can be traced back to the Court of Justice's judgment in the *Swiss MoU* case,[5] where it held that the conclusion of non-binding agreements requires Council approval when it constitutes an act of policy-making. Policy-making is a Council prerogative as per Article 16 TEU. Following this judgment, the Council and Commission created their own non-binding agreement, a set of 'arrangements', to implement the Court's judgment. The two institutions responsible for law-making in the EU, i.e., the Council and Parliament, are treated unequally. This runs counter to one of the rationales of the Lisbon Treaty, which was to introduce a parallelism between internal and external decision-making procedures—hence the involvement of both Parliament and Council in the Article 218 TFEU procedure to negotiate and conclude legally binding international

[5] Case C-660/13 *Council of the European Union v European Commission (Swiss MoU)* ECLI:EU:C:2016:616.

agreements in instances where the ordinary legislative procedure applies internally. It is one of two things: either an agreement is not sufficiently important to require approval by the law-making institutions (the 'legislature'), in which case the Commission (the 'executive') should be able to conclude it independently; or the agreement is important enough to require such approval, in which case both law-making institutions, i.e., Parliament and Council, should have their say. As it stands, the arrangements to conclude non-binding instruments are a convenient way to avoid scrutiny by the European Parliament while preserving Member State control.