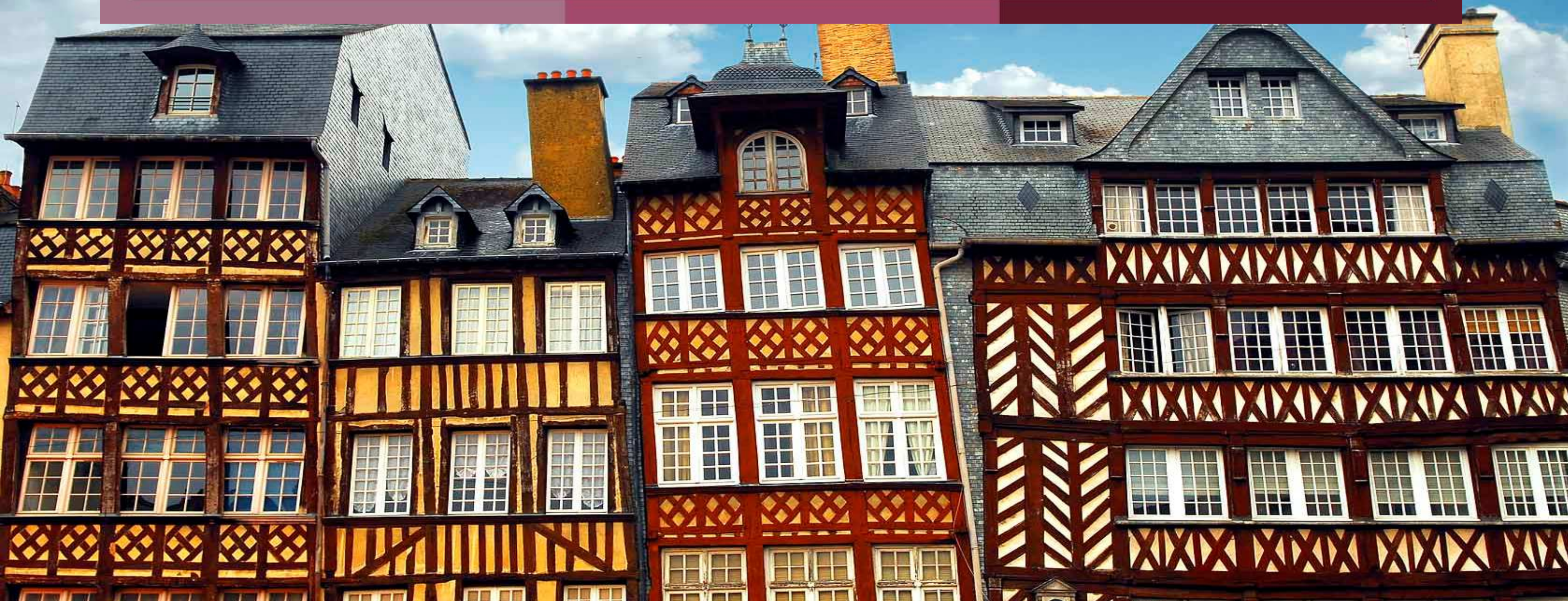
II LAwTTP Young Researchers Workshop

“The New Generation of EU FTAs: External and Internal Challenges”

Isabelle Bosse-Platière
Cécile Rapoport
Nicolas Pigeon
Editors

LAwTTIP Working Papers



ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA
DIPARTIMENTO DI SCIENZE GIURIDICHE
CENTRO INTERNAZIONALE DI RICERCHE SUL DIRITTO EUROPEO

KING'S College LONDON

UNIVERSITÉ DE RENNES 1

IODE

Co-funded by the Erasmus+ Programme of the European Union

(This page was left intentionally blank)

II LAwTTP Young Researchers Workshop

"The New Generation of EU FTAs: External and Internal Challenges"

LAwTTIP Working Papers

2019/6

This Working Paper offers an overview of II LAwTTP Young Researchers Workshop held in Rennes on 5-7 June 2019

(This page was left intentionally blank)

Editorial Board
Prof. Andrea Biondi (King's College London)
Prof. Isabelle Bosse-Platière (Université de Rennes 1)
Prof. Federico Casolari (University of Bologna)
Prof. Giacomo Di Federico (University of Bologna)
Sir Francis Jacobs (King's College London)
Prof. Marc Maresceau (Ghent University)
Prof. Nanette Neuwahl (University of Montreal)
Prof. Cécile Rapoport (Université de Rennes 1)
Prof. Lucia Serena Rossi (University of Bologna)
Prof. Takis Tridimas (King's College London)

Editorial policy
This text may be downloaded for personal research purposes only. Any additional reproduction, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper series, the year and the publisher.
The author(s), editor(s) should inform the Editorial Board if the paper is to be published elsewhere and should also assume responsibility for any subsequent obligation(s).

ISSN 2533-0942 (ONLINE)

© Editors, 2019
Printed in Italy
International Research Centre on European Law
University of Bologna
via Andreatta 4
I – 40126 Bologna
Italy
http://www.lawttip.eu

CONTENTS

CONTRIBUTORS 3

ABBREVIATIONS 4

INTRODUCTION 6

PART 1

INTERNAL ASPECTS: INSTITUTIONAL AND SUBSTANTIAL ASPECTS 8

THE PARTICIPATION OF THE EUROPEAN PARLIAMENT IN THE CONCLUSION OF THE NEW GENERATION FREE TRADE AGREEMENTS: A TEN-YEAR PERSPECTIVE 9

DEMOCRACY AND IMPLEMENTATION OF THE NEW GENERATION OF EU FREE TRADE AGREEMENTS (FTAS) 25

UPGRADING THE INTERNAL DIMENSION OF EU INTELLECTUAL PROPERTY RIGHTS? POSSIBLE EFFECTS OF EU NGFTAS ON THE (BLANK) FAIR BALANCE CONUNDRUM 43

DATA PROTECTION PROVISIONS IN NEW GENERATION FREE TRADE AGREEMENTS: ADVANTAGES AND CRITICAL ISSUES 55

PART 2

EXTERNAL ASPECTS: GLOBAL ISSUES AND ARTICULATION WITH MULTILATERAL AGREEMENTS 70

SUSTAINABLE DEVELOPMENT IN CETA — A WAY TOWARDS REFORMING INTERNATIONAL ECONOMIC LAW? 71

TRIPS-PLUS PROVISIONS IN THE EU NEW GENERATION OF FTAS WITH ASIAN COUNTRIES 84

THE EU AND ITS MEMBER STATES AT THE UNCITRAL: PUSHING FOR THE MULTILATERAL INVESTMENT COURT AGAINST THE ODDS 96

GOVERNMENT PROCUREMENTS IN NEW EU FTAS: THE ONLY WAY TO OVERCOME THE LACK OF THE WTO GOVERNMENT PROCUREMENT AGREEMENT (GPA) EFFECTIVENESS? 112

CONTRIBUTORS

Isabelle Bosse-Platière Professor of European Law, Jean Monnet Chair, University of Rennes 1, IODE

Cécile Rapoport Professor of European Law, Member of the Institut Universitaire de France, University of Rennes 1, IODE

Nicolas Pigeon Post-Doctoral Researcher, University of Rennes 1, IODE

Dr. Eva Zelazna Lecturer in Law, University of Leicester

Dr. Marie-Cécile Cadilhac Associate member, University of Rennes 1, IODE

Federico Ferri Research Fellow in European Union Law at the University of Bologna, Department of Legal Studies

Gabriele Rugani PhD Candidate, University of Pisa

Kenza Teffahi Student, University of Rennes 1

Ondrej Svoboda PhD Candidate, Charles University of Prague

Dr. Su-Ju Kang Assistant Professor, Wenzao Ursuline University, Taiwan

Dr. Thomas Destailleur Lecturer in Public Law, University Polytechnique Hauts-deFrance (University of Valenciennes)

ABBREVIATIONS

ACTA – Anti-Counterfeiting Trade Agreement
AI – Artificial Intellegency
APEC – Asia-Pacific Economic Cooperation
BCRs – Binding Corporate Rules
CCP – Common Commercial Policy
CETA – Comprehensive et Economic Trade Agreement
CIDS – Geneva Center for International Dispute Settlement
CJEU – Court of Justice of the European Union
CPTTP – Comprehensive and Progressive Agreement for Trans-Pacific Partnership's
CSR – Corporate Social Responsibility
DAG – Domestic Advisory Group(s)
DAPIX – Working Party on Information Exchange and Data Protection
DCFTA – Deep and Comprehensive Free Trade Agreements
DSM – Digital Single Market EC – European community
ECHR – European Convention of Human Rights
ECI – European Citizens'Initiative
ECJ – European Court of Justice
EESC – European and Economic Social Committee of the European Parliament
EP – European Parliament
EPA – Economic Partnership Agreement
EU – European Union
FDI – Foreign direct investments
FTAs – Free Trade Agreements
GATT – General Agreement on Tariffs and Trade
GATS – General Agreement on Trade in Services
GDPR – General Data Protection Regulation
GIs – Geographic indications
GPA – Government Procurement Agreement
ICC – International Criminal Court
ICS – Investment Court System
ICSID – International Centre for Settlement for Investment Disputes
IEL – International Economic Law
INTA – Committee of International Trade of the European Parliament
IP – Intellectual Property
IPRs – Intellectual Property Rights
ISDS – Investor-State Dispute Settlement
IT – Information Technology
JPC – Joint Parliamentary Committee
KAIDA – Korean Automobile Importers and Distributors Association
MEPs – Members of the European Parliament
MIC – Multilateral Investment Court
NAALC – North American Agreement on Labor Cooperation
NAFTA – North American Free Trade Agreement
NGFTAs – New Generation of EU Free Trade Agreements
OECD – Organization for Economic Co-operation and Development
PTIAs – Preferential Trade and Investment Agreements

RCEP – Regional Comprehensive Economic Partnership
SCCs – Standard Contractual Clauses
TRIPs – Agreement on Trade-Related Aspects of Intellectual Property Rights
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
TSD – Trade and Sustainable Development
TTIP – Transatlantic Trade and Investment Partnership
UNCITRAL – United Nations Commission on International Trade Law
UNCTAD – United Nations Conference on Trade and Development
US – United States WCT – WIPO Copyright Treaty
WIPO – World Intellectual Property Organization
WPPT – WIPO Performances and Phonograms Treaty
WTO – Word Trade Organization

INTRODUCTION

Isabelle Bosse-Platière, Cécile Rapoport and Nicolas Pigeon

This working paper is the result of a Young Researchers Workshop which took place at the University of Rennes 1 in June 2019. It gathers several papers that have been presented during the workshop and, after being revised, passed a selection process. In this respect, the editors of this working paper would like to deeply thank senior academics who took part in the Workshop and gave the young researchers precious comments to improve their paper before publication. In particular, we are very grateful to Federico Casolari, Emanuel Castellarin, Alan Hervé, Nathalie Hervé-Fournereau, Patrick Jacob, Christine Kaddous, Frédérique Michéa, Eleftheria Neframi, Alessandro Spano and Ramses A. Wessel for their invaluable support.

The purpose of this Young Researchers Workshop was to discuss the external and internal challenges of the so-called "New Generation" of EU Free Trade Agreements (NGFTAs), as they have been at the forefront of EU External action for the past decade[4]. These agreements aim to address and eliminate illegitimate non-tariff barriers to trade and investment. As such, they are likely to deeply interfere with several public policies. Although the European Commission in its *Trade for all* Communication[5] considers them as key instruments for the conduct of a comprehensive and balanced common commercial Policy, they are also supposed to take into consideration non-economic interests and values and to be consistent with the internal policies of the EU, when being implemented.

The scientific aim of the Workshop was therefore to deepen the legal reflection generated by these international agreements by focusing on the way – if any – they comply with the consistency requirement of the EU's external action, both with regard to its other strands and with the EU's internal policies. In this respect, two main lines of research have been put forward. The first part of the working paper deals with the internal impact these agreements may have from an institutional and substantial perspective. In particular, the role played by the European Parliament and the democratic issue are addressed before the delicate question of intellectual property rights and data protection. Then, the second part of the working paper seeks to identify the global issues these agreements are dealing with and their articulation with multilateral commitments. The paper focuses on sustainable development, ISDS, TRIPs and Government procurement.

[1] Professor of European Law, Jean Monnet Chair, University of Rennes 1, IODE (UMR CNRS 6262)
[2] Professor of European Law, Member of the Institut Universitaire de France, University of Rennes 1, IODE (UMR CNRS6262)
[3] Post-doctoral Researcher, University of Rennes 1, IODE (UMR CNRS 6262)

[4] For a fairly precise overview and an update on the status of EU free trade agreements concluded, signed or under negotiation, see, on the website of the European Commission's DG Trade, the document entitled 'Overview of FTA and other Trade Negotiations' (updated March 2019) http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[5] European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (Communication) COM (2015) 497 final.

PART 1
INTERNAL ASPECTS: INSTITUTIONAL AND SUBSTANTIAL ASPECTS

The Participation of the European Parliament in the Conclusion of the New Generation Free Trade Agreements: A Ten-year Perspective

Ewa Żelazna[1]

I. Introduction

The principle of representative democracy is one of the cornerstones of the EU legal order,[2] but its implementation at the Union level has been a subject of frequent criticism.[3] The Treaty of Lisbon, opened the next chapter in the ongoing democratisation of the EU legislative processes and policy-making practices.[4] In the EU external relations powers of the European Parliament have been significantly enhanced.[5] The provisions on the common commercial policy have established a new equilibrium in the trade-off between efficiency and democratic scrutiny. In this area the Parliament has become a co-legislator and its consent is now necessary for conclusion of treaties by the EU, including new generation free trade agreements.[6]

Since the entry into force of the Treaty of Lisbon, the Union as pursued an ambitious trade agenda. In the moment of writing, it concluded new generation free trade agreements with South Korea and Japan, signed and provisionally applied agreements with Columbia, Peru and Ecuador, Central America and Canada. Furthermore, the EU finalised negotiations with with Singapore, Vietnam, Mexico and Mercosur and commenced new ones with Australia, New Zealand, Chile and Indonesia. Furthermore, the Union pursued comprehensive trade negotiations with the US, but they were stifled by Trump's administrations.

The European Parliament has closely followed these negotiations, contributed its views in the process and had an opportunity to exercise its consent powers a number of times. Ten years since the Parliament became an actor in the common commercial policy, the time is ripe to evaluate its engagement in the procedure for concluding the new generation free trade agreements, which is the main subject of this paper.

The aforementioned agreements, which provide the basis for the analysis in this paper fall within the category of new generation free trade agreements as defined in the Commission's implementation report that was presented to the Council and the European Parliament in 2018. Accordingly, they are post-2006 international treaties of the EU that contain deep commitments

[1] Lecturer in Law, University of Leicester.

[2] Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 (TEU), Art 10(1).

[3] Giandomenico Majone, 'The Common Sense of European Integration' (2006) 13 Journal of European Public Policy 607; Kalypso Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51 Journal of Common Market Studies 51; Andrew Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union (2002) 48 JCMS 603.

[4] Panos Koutrakos, 'The Decision-Making Process' in Takis Tridimas and Robert Schütze (eds), *Oxford Principles of European Union Law* (OUP 2018), 1141- 1173.

[5] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU), Art 218.

[6] Ibid Arts 207 and 218.

in trade and areas directly linked to it that go beyond mere reduction of tariffs.[7] Unlike their predecessors,[8] the new generation free trade agreements include rules on trade in services, public procurement and since 2010, trade and sustainable development.[9] In some cases, they also contain rules on investment protection.[10]

II. The Participation of the European Parliament in the Conclusion of the New Generation Free Trade Agreements: Aims of the Analysis

Already in its early judgments, when the European Parliament's powers were limited, the Court of Justice stressed that its involvement in the legislative process is 'the reflection, at the Union level of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.'[11] The application of this broadly formulated principle, which evolved overtime, takes different forms depending on the area of the Union's competences.[12] In the common foreign and security policy, for example, it is expressed through the Parliament's right to be immediately and fully informed,[13] which enables it to scrutinise the EU's external activity.[14] Whereas, in the common commercial policy, the Parliament is a co-legislator of the framework for its implementation and has the right to consent to EU international treaties and is a co-legislator of the framework for their implementation.[15]

The Treaty of Lisbon made important steps forward in the democratisation of the EU decision-making in the area of foreign relations.[16] The expansion of the powers of the European Parliament have enabled the character of the parliamentary involvement in intranational relations to evolve. This is an important milestone not only for the EU, but also from the perspective of governance in the international economic relations. The fast progressing globalisation and increasing relevance of international law norms for lives of citizens demands more democratic control.[17] The Parliament tried to become and actor in the common commercial policy long

[7] Commission (EU), 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on Implementation of EU Free Trade Agreements: 1 January- 31 December 2017' COM(2018)728 final, 12.

[8] Ibid 27. Free trade agreements classified as 'first generation' in the Commission's implementation report consists of treaties negotiated before 2006 and Stabilisation and Association Agreements with Western Balkan countries concluded between 2009 and 2016, which typically cover only trade in goods.

[9] Ibid 12.

[10] Ibid. For example: Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (2017) OJ L11/23.

[11] Case 138/79 *Roquette Frères* v *Council* [1980] ECR 03333, para 33; Case C-300/89 *Titanium dioxide* [1991] I-02867, para 20.

[12] Case C-155/07 *Parliament v Council* OJ C 155/8; Luis N. González Alonso, Lost in principles? Institutional Balance and Democracy in the ECJ Case Law on EU External Action in Juan Santos Vara and Soledad Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019).

[13] TFEU (n 4) Art 218(10).

[14] Case C-263/14 *Parliament v Council (Tanzania)* [2016] OJ C 305/3; C-130/10 *Parliament v Council* [2012], OJ C 134; Case C-658/11 *Parliament v Commission (Mauritius)* [2014] OJ C 292/2.

[15] TFEU (n 4) Arts 207, 218.

[16] For a summary see: Christina Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' (2014) 12 I CON 904.

[17] Thomas Christiansen and Diane Fromage (eds), *Brexit and Democracy: The Role of the Parliaments in the UK and the European Union* (Palgrave Macmillan 2019).

before the entry into force of the Treaty of Lisbon and in the absence of formal powers used different means in an effort to influence it.[18] Now, it not only has the right to be involved in the decision making-process, but also to shape its role in this area.

Although Article 207 TFEU empowers the European Parliament to participate in the decision-making in the common commercial policy, it does not expressly assign it any responsibilities. In contrast, the same provision imposes duties upon the Commission and the Council to ensure compatibility of international treaties with the Union's internal policies and rules.[19] Even though the Parliament is well placed to contribute to the attainment of this objective, the provision remains silent on the matter concerning its role. A lack of a clear mandate for the European Parliament in the common commercial policy could have weakened its position vis-à-vis the Commission and the Council, which have more experience as actors in this area. However, the Parliament has used the flexibility in the Treaty to develop a consistent practice in negotiations on the new generation free trade agreements through which it established its role.

The analysis in subsequent sections maps the tools that allow the Parliament to shape the content of the new generation free trade agreements of the EU. It discusses how they were used by the Parliament since the entry into force of the Treaty of Lisbon and the influence that this practice has had influenced on the general conception of the role of the Parliament in external trade relations.

III. Participation of the Parliament in the Early Stages of Negotiations

The Parliament has marked its presence and tried to impact the negotiations on the new generation free trade agreements from the early stages in the process. It adopted a proactive attitude, despite the fact that the Treaty excludes it from the decision-making on the opening of negotiations, which is controlled by the Council[20] that acts upon a recommendation from the Commission.[21] The Parliament has, however, made the most of the right to be fully and immediately informed, conferred upon it in Article 218 TFEU,[22] which has enabled its active participation ensuring the democratic scrutiny of the entire process of concluding an agreement.[23] The Treaty obligation has been reinforced by the provisions of the Framework Agreement that require the Commission to inform the Parliament about its intentions to propose the start of negotiations and transmit draft negotiating directives at the same time as this information is

[18] An example of the Parliament's effort to influence the common commercial policy before Treaty of Lisbon: Case C-360/93 *Parliament v Council* [1996] ECR I-01195. A summary of its long-term strategy to democratise EU policies can be found in: Daniel Thym, 'Parliamentary Involvement in European International Relations' in Cremona and de Witte (eds), EU *Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008), 6.

[19] TFEU (n 4) Art 207(2)

[20] Ibid Art 218(2).

[21] Ibid Art 218(3).

[22] This has also been the case in other areas of EU external action see: Juan Santos Vara, 'The European Parliament in the Conclusion of International Agreements post-Lisbon: Entrenched between Values and Prerogatives' in Juan Santos Vara and Soledad Rodríguez Sánchez-Tabernero (eds), The Democratisation of EU International Relations through EU Law (Routledge 2019).

[23] TFEU (n 4) 218(10), 207(3).

provided to the Council.[24] Furthermore, the Court of Justice reminded the Council of its duty to keep the Parliament informed in judgements concerning the EU agreements with *Tanzania*[25] and *Mauritius*.[26]

The Parliament's Rules of Procedure provide that it may ask the Council not to authorise opening of negotiations until it had an opportunity to express its position[27] and in its early judgments the Court pointed out that the right to be informed implies also that the Parliament should be given an opportunity to express an opinion.[28] Even though the Rules of Procedure do not impose binding obligations upon the Council, they were effectively invoked in response to the commencement of trade negotiations between the EU and Japan.[29] After the Parliament made its request,[30] the directives for these negotiations were adopted after the Parliament passed a resolution that stated its views.[31] The significant amendments introduced in the Treaty of Lisbon to the provisions governing the common commercial policy have forced the Council and the Parliament to redefine their relationship, which in the beginning encountered some difficulties.

The main obstacle in the way of a relationship between the institutions was the attitude of secrecy in the Council.[32] In the past, the negotiating directives issued to the Commission were kept confidential out of concern that their release would undermine the EU's negotiating position.[33] This approach stood in the way of an effective involvement of the Parliament at all stages of the negotiating process. The issue was addressed in a Framework Agreement concluded in 2014 between the Council and the Parliament.[34]

The interinstitutional arrangement, however, only regulates handling of confidential information by the Parliament and does not provide for declassification of negotiating directives.[35] Enhancement of transparency in trade negotiations has been one of the Parliament's priorities and in a number of resolutions it called onto the Council to make directives available to the public in good time.[36] Negotiations with Chile made a positive step towards transparency

[24] Interinstitutional Agreements, Framework Agreement on relations between the European Parliament and the European Commission (2010) OJ L 304/47 (Commission-Parliament Framework Agreement), Annex III, paras 2 and 3.

[25] Case C-263/14 *Parliament v Council (Tanzania)* [2016] OJ C 305/3, para 73.

[26] Case C-658/11 *Parliament v Commission (Mauritius)* [2014] OJ C 292/2, paras 75-78.

[27] European Parliament, Rules of Procedure: 8th Parliamentary Term (2019) Rule 108(3).

[28] Case 138/79 *Roquette Frères* v *Council* [1980] ECR 03333, para 34.

[29] European Parliament, Resolution of 11 May 2011 on EU-Japan Trade Relations (2012/C 377 E/04) OJ C 377 E/19.

[30] European Parliament, Resolution of 13 June 2012 on EU Trade Negotiations with Japan (2012/2651 (RSP)) (2013/C 332 E/06) (2013) OJ C 332 E/44.

[31] European Parliament, Resolution of 25 October 2012 on EU Trade Negotiations with Japan (2012/2711(RSP)) (2014/C 72 E/02), OJ C 72 E/16; Council (EU), Directives for the negotiations of a Free Trade Agreement with Japan dated 29 November 2012, (2017) 15864/12 ADD 1 Rev 2 DCL 1.

[32] Andrea Ott, 'The European Parliament's Role in EU Treaty- Making' (2016) 23 MJ 6 1009, 1021

[33] Ibid.

[34] Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of common foreign and security policy, [2014] OJ C 95/1.

[35] Ibid.

[36] European Parliament, Modernisation of the Trade Pillar of the EU-Chile Association Agreement: European Parliament Recommendation of 14 September 2017 to the Council, the Commission and the European External Action Service on the Negotiations of the Modernisation of the Trade Pillar of the EU-Chile Association Agreement (2017/2057(INI)) (2018/C 337/17) (2018) OJ C337/113, para 1(ad); European Parliament, Negotiating Mandate for

being guaranteed in trade negotiations from the very beginning, with the Council publishing the full mandate soon after its adoption.[37] Since then, mandates were also published for negotiations with New Zealand[38] and Australia.[39]

It has become a standard constitutional practice that the Parliament expresses its position in the early stages of negotiations. It was followed in negotiations with the US,[40] Australia,[41] New Zealand[42] and Chile[43]. In all of them, the Parliament adopted non-legislative resolutions that stated its objectives, before the Council decided on the mandates. Some common themes can be identified in these early communications. Firstly, the Parliament consistently defined its function in trade negotiations, as facilitating inclusive and open discussion.[44] The commitment towards actively representing the EU citizens in international treaty-making is also visible from a frequent recourse to the written questions, which are frequently posed to the Commission and the Council by the Members from the very start of trade talks.[45] Furthermore, from an institutional perspective, the Parliament protected its prerogatives by frequently reminding the Council and the Commission about their obligations of reporting.[46]

Secondly, the Parliament positioned itself as the guardian of human rights and other values of the EU, such as transparency, protection of environment, animal welfare, equality etc.[47] This is consistent with the role of the European Parliament in EU foreign relations more generally, as

Trade Negotiations with New Zealand: European Parliament Resolution of 26 October 2017 containing Parliament's Recommendation to the Council on the Proposed Negotiating Mandate for Trade Negotiations with New Zealand (2017/2193(INI)) (2018/C 346/28) (2018) C 346/219, para 13.

[37] Council (EU), EU-Chile Modernised Association Agreement: Directives for the Negotiation of a Modernised Association Agreement with Chile dated 8 November 2017 (2018) 13553/17 ADD1 DVL 1.

[38] Council (EU), Negotiating Directives for a Free Trade Agreement with New Zealand dated 8 May 2018 (2018) 7661/18 ADD1.

[39] Council (EU), Negotiating Directives for a Free Trade Agreement with Australia dated 8 May 2018 (2018) 7663/18 ADD 1 DCL 1.

[40] European Parliament, EU Trade and Investment Agreement Negotiations with the US: European Parliament Resolution of 23 May 2013 on EU trade and Investment Negotiations with the United States of America (2013/2558(RSP)) (2016/C 055/16) (2016) OJ C 55/108.

[41] European Parliament Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35.

[42] European Parliament Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35.

[43] European Parliament Resolution on the Mandate for the Modernisation of the EU-Chile Association Agreement *supra* note 35.

[44] European Parliament, Resolution on the Opening of Negotiations with the US *supra* note 39, para 23, Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35, para 21; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35, para 23.

[45] See for example: European Parliament, Written Questions by Members of the European Parliament and Their Answers given by a European Union Institution [2014] OJ C 273/1; European Parliament, Written Questions with Answer: Written Questions by Members of the European Parliament and Their Answers given by a European Union Institution [2014] OJ C 288/1.

[46] Resolution on the Opening of Negotiations with the US *supra* note 39, Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35.

[47] European Parliament Resolution on the Mandate for the Modernisation of the EU-Chile Association Agreement *supra* note 35; Resolution on the Opening of Negotiations with the US *supra* note 36; European Parliament Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35; European Parliament Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35.

depicted in the literature.[48] Moreover, the Parliament frequently highlights the EU's commitment towards multilateralism. Although these actions are consistent with Article 21 TEU, which requires the Union to observe and promote values and principles that inspired its creation in all its external action,[49] in its current practice the Parliament makes only a brief reference to this provision in its resolutions.[50] This can be contrasted with the contribution that the Parliament made to one of the early new generation free trade agreements. In the resolution on the agreement with Central America, the Parliament highlighted that its conclusion 'helps to achieve goals of the EU external action, as enshrined in Article 21 of the Treaty on the European Union.'[51] This wording was not chosen for the current resolutions and has been replaced with a mere acknowledgement that the Treaty provision applies.[52]

The approach weakens the normative value of Article 21 TEU, but it increases flexibility. The Parliament has made a visible effort to recognise the multifaceted nature of trade negotiations and tried not to unduly politicise them with non-trade related objectives from the start. In some cases, nonetheless, the Parliament was not afraid to touch on sensitive political issues. For example, in the resolutions on the opening of negotiations with New Zealand and Australia, it called onto the Council to recognise in the mandate obligations of the EU partners towards indigenous people.[53] Although the Council did not to follow these recommendations in the mandates,[54] there is a value in the Parliament bringing attention onto these politically sensitive topics. In its current practice, however, the Parliament retains a considerable freedom in this aspect and a more comprehensive approach to the application of Article 21 TEU could provide better guarantees that these issues will be brought into the debates.

Although a position expressed by the Parliament in the early stages of the negotiating process does not bind either Council in its decision on the mandate, or the Commission in negotiations, it has an impact upon the agenda setting. The early resolutions 'cast a shadow'[55] over the entire negotiations containing frequent remainders[56] that each new generation free trade agreement negotiated by the Union requires the Parliament's consent.[57] However, the Parliament does not reject international agreements negotiated on behalf of the Union and its Member States lightly and has never threatened to do so with regards to a new generation free trade agreement. A refusal to grant consent always has serious implications and since becoming an actor in the

[48] Santos Vara (n 21).

[49] The obligation has been expressly incorporated into the common commercial policy. Art 207(1) TFEU provides that 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

[50] Resolution on the Opening of Negotiations with the US *supra* note 39, Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35.

[51] European Parliament, Resolution of 11 December 2012 on the draft Council decision on the conclusion of the Agreement establishing an Association between the European Union and its Member States, on the one hand and Central America on the other (16395/1/2011 – C7-0182/2012 – 2011/0303(NLE)) [2015] OJ C 434/181, para 1(ab).

[52] See Resolutions listed in *supra* note 49.

[53] Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35, para 15; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35, para 16.

[54] Council (n 37); Council (n 38).

[55] Ariadna Ripoll Servent, The Role of the European Parliament in International Negotiations after Lisbon, (2014) 21 Journal of European Public Policy 568.

[56] See Resolutions listed in *supra* note 49.

[57] Ott (n 31), 1020.

common commercial policy the Parliament has tried to work together with other institutions to advance interests of the Union. The Parliament should, however, be cautious that its cooperative attitude does not weaken its scrutiny function and reduces its consent to a mere rubberstamp.

It has been suggested in the literature that the powers of the Parliament in the early stages of negotiations should be extended by imposing a requirement of the parliamentary consent for the opening of negotiations alongside that of the Council and its formal approval of a negotiating mandate.[58] Furthermore, in its recent resolutions the Parliament has stressed that its role should be strengthened at each phase of the process leading up to the conclusion of the EU's trade agreements.[59] Since the Parliament its known for influencing Treaty changes by establishing constitutional practices and through interinstitutional agreements,[60] its active involvement in the early stages could suggest a strategy of moving that direction.

However, such a Treaty amendment requires a careful evaluation.[61] Although the development would further democratise the processes of concluding international treaties that fall within the scope of the common commercial policy, it could also reduce the Parliament's willingness to mention difficult political issues at the outset of negotiations, because of the serious consequence that this would have on the process. Furthermore, any decision to expand the Parliament's powers in the common commercial policy should take into account the principle of institutional balance, which requires clear conceptualisation of roles and responsibilities of each institution in this area. Although these issues inspire the discussion in this paper, their thorough evaluation, which requires a robust methodology, is a subject for future research. The discussion here proceeds with evaluating the next stage in the process in the making of the new generation free trade agreements and the role played in it by the European Parliament.

IV. The Negotiating Stage

It is the Commission's prerogative to undertake negotiations on the new generation free trade agreements.[62] In performing this duty the Commission is required to keep both the Parliament and the Council fully informed,[63] which provides avenues for the Parliament's involvement. The cooperation between the Commission and the Parliament at this stage has been agreed in and is regulated by the Framework Agreement.[64] The provisions of the Framework Agreement are intended to enable a meaningful participation of the Parliament in the negotiating process by giving it access to the same documents as the Council and allowing it time to formulate a position at each stage of negotiations.[65] Furthermore, they oblige the Commission to take the Parliament's

[58] Youri Devuyst, European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements (2013) 12 J Int'l Bus & L 259, 290-290. cf Ott, 1020

[59] Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35.

[60] On the efforts of the European Parliament to democratise law and policy making in the EU see: Francis Jacobs, Richard Corbett and Michael Shackleton, *European Parliament* (John Harper Publishing, 8th edn, 2011).

[61] Ott (n 31) 1020

[62] TFEU (n 4) Art 207(3).

[63] TFEU (n 4) Arts 207(3), 218(4), 218(10).

[64] Commission-Parliament Framework Agreement *supra* note 23.

[65] Ibid point 24.

views into account[66] and explain if its suggestions were incorporated in the text of the negotiated agreement.[67]

The negotiating process is closely followed by the responsible committee of the Parliament, which for the new generation free trade agreements is the Committee on International Trade (hereafter INTA Committee). In practice, the Commission shares variety of information with the Parliament, including draft texts and reports on negotiating rounds, notes and internal working papers.[68] Moreover, the Commission and Council provides answers to questions submitted by the Members of the European Parliament,[69] who also have an option of participating as observers in negotiations.[70] The Trade Commissioner and senior Commission officials attend plenary debates at the Parliament, as well as meetings of the committee.[71] During the course of negotiations, the Parliament can adopt recommendations to the Council and the Commission, which normally takes the form of a non-legislative resolution.[72] The Parliament made detailed recommendation to the Commission for the negotiations on the TTIP [73] and adopted a similar practice in relation to a number of other agreements in which it informs the Commission of its position and reminds it of its commitments towards the Parliament.[74]

The current framework, which offers a multitude of options for a dialogue enabled the development of a constructive relationship between the intuitions, with the Commission embracing its new obligations and treating the Parliament as an equal partner in the process.[75] It has been reported that the Parliament's suggestions have made a difference in negotiations with South Korea and resulted in inclusion of labour and environmental standards, which developed in the EU's standard text offered to negotiating partners.[76] The labour standards, in particular, have become an area of Parliament's specific focus with regards to the new generation free trade agreement and are frequently mentioned in its resolutions.[77]

[66] Ibid point 24, Annex III para 3.

[67] Ibid Annex III paras 4 and 5

[68] Devuyst (n 57) 297-298.

[69] Examples include: EU-Vietnam trade agreement: European Parliament, Written Questions by Members of the European Parliament and their answers given by the European Union institutions, [2013] OJ C 248E/1; CETA: European Parliament, Written Questions by Members of the European Parliament and their answers given by a European Union institutions [2013] OJ C 321 E/1; EU-Japan: European Parliament, Written Questions by Member States and their answers given by European Union institutions [2013] OJ C 321 E/1.

[70] Commission-Parliament Framework Agreement *supra* note 23, Annex III.

[71] Devuyst (n 57) 297-298.

[72] European Parliament Rules of Procedure (n 26) Rule 108(4); Rule 99(5).

[73] European Parliament, Negotiations for the Transatlantic Trade and Investment Partnership (TTIP): 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)) (2017/C 265/05) (2017) OJ C 265/35.

[74] See for example: European Parliament, State of play of EU-Mercosur trade relations. European Parliament resolution of 17 January 2013 on trade negotiations between the EU and Mercosur (2012/2924(RSP)) [2015] OJ C 440/101; European Parliament, EU-Vietnam Free Trade Agreement Negotiations. European Parliament Resolution on 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement (2013/2989(RSP)) [2014] OJ C 443/64.

[75] Ott (n 31) 1020.

[76] Devuyst (n 57) 297-298.

[77] Increasingly mentioned in the recent practice of the Parliament, see for example: European Parliament, Containing a Motion for a Non-legislative Resolution on the Proposal for a Council Decision on the Conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (COM(2018)0691 –

Consistently with the position adopted in the early stages of negotiations, the Parliament reminds the Commission about the need to include in the EU trade agreements binding commitments on fundamental rights, achieve high environmental standards, promote rule of law, democracy and other values of the Union.[78] The Parliament also recognises the strategic importance of trade agreements for the Union. Thus, a position that has been consistently adopted in the Parliament's practice it that of attaining non-trade objectives through trade, with its greater liberalisation being the primary goal, which aligns with the approach adopted by the Commission.[79]

V. Availability of the Opinion Procedure in Article 218(11) TFEU

A powerful tool that the Parliament can use to influence a course of negotiations, for example in case of a disagreement with the Commission, is to request and Opinion from the Court of Justice pursuant to Article 218(11) TFEU. Questions that can be submitted to the Court of Justice must pertain either to the compatibility of an envisaged agreement with EU law or the EU's competence to enter into international obligations.[80] This option can be exercised virtually at any point in the negotiating process, given the Court's broad interpretation of the term 'envisaged agreement'[81] and until the Council' decision on conclusion.[82] The Parliament has had this right since the entry into force of the Treaty of Nice and exercised it twice to date.[83] Its first request for an Opinion, which was withdrawn soon after its submission, concerned the agreement between the EU and the US on the processing and transfer of Passenger Name Record data by air carriers.[84] The second regarded a similar agreement negotiated with Canada.[85] The Court's *Opinion* affirmed the Parliament's view that the provisions of the agreement did not comply with standards on data protection set out in the TFEU and the Charter and as a result it had to be renegotiated.[86]

In the triggering of the Opinion procedure the Parliament stood in opposition to the trend favouring national security objectives in personal data handling that had been developing in the

C8-0000/2018 – 2018/0356M(NLE)), 2018/0356M(NLE), nyr; European Parliament non-legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (07964/2018 – C8-0382/2018 – 2018/0091M(NLE)) P8_TA-PROV(2018)0505, nyr.

[78] See Resolutions in *supra* note 72 and 73.

[79] Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy*, (Publication Office of the European Union, 2014.

[80] TFEU (n 4) Art 218(11).

[81] Opinion 1/75 *Local Cost Standards* [1975] ECR 1360; Opinion 2/94 *Accession to the ECHR* [1996] ECR I-1759, paras 1-22.

[82] Opinion 1/94 *WTO Agreement* [1994] ECR I–5267, paras 10–12; Opinion 3/94 *Framework Agreement on Bananas* [1995] ECR I–4577.

[83] Cf: Consolidated Version of the Treaty Establishing the European Community [2002] PJ C 325/33, Art 300(6); Consolidated Version of the Treaty Establishing the European Community (Amsterdam Consolidated Version) [1997] OJ C 340/173, Art 300(6).

[84] Removal from the Register of Opinion C-1/04 [2005] OJ C 69/12.

[85] On the subject see: Claude Moraes, 'The European Parliament and Transatlantic Relations: Personal Reflections' in Elaine Fahey (ed), *Institutionalisation beyond the Nation State: Studies in European Law and Regulation* (Springer 2018), 31.

[86] Opinion 1/15 *EU-Canada PNR Agreement* [2017] OJ C 309/3.

international treaty-making practice since the terrorist attacks in the US in 2011.[87] The decision to request an Opinion from the Court[88] together with the refusals of consent to some high profile agreements by the Parliament,[89] have defined its role as the guardian human rights in EU foreign relations.[90] It also demonstrated that the recourse to the procedure in Article 218(11) TFEU is another important tool that the Parliament can use to shape the content of EU international agreements. It not only poses a threat of potential re-negotiations, but also delays the vote in the Parliament until the date of the delivery of the Court's Opinion.[91]

The Parliament has not exercised this option in relations to the new generation free trade agreements.[92] The Court delivered two *Opinions* on the matter and the Parliament made submission in one of them. In *Opinion 2/15,* the Parliament has supported the Commission's interpretation of the scope of the EU's exclusive competence, as encompassing all aspects of the new generations free trade agreements, including international investment protection,[93] which was subsequently removed from their scope.[94] Although the Court did not accept the arguments with regards to international investment, it referred to the Parliament's submission on the commitments concerning trade and sustainable development.[95] The Court agreed that the policy idea behind the new generation free trade agreements requires to acknowledge that a wide range of aspects is relevant for today's trade, not only classical elements that concern tariffs and non- tariff barriers. The Court found, contrary to the Opinion of the Advocate General,[96] that the chapter on trade and sustainable development in the EU-Singapore Free Trade Agreement fell entirely within the scope of the common commercial policy.[97] The Court's decision strengthens the sustainability dimension in the new generation free trade agreements and was visibly influenced by the Parliament's contribution.[98]

In the light the meaningful participation of the Parliament in *Opinion 2/15,* its decision not to make a submission in *Opinion 1/17* on the compatibility of the investor-state dispute resolution system with EU law is surprising. As the Parliament has been involved in the debates on this

[87] Arianna Vedaschi, 'The European Court of Justice on the EU-Canada Passenger Name Records Agreement' (2018) 14 ECL Review 410.

[88] European Parliament resolution of 25 November 2014 on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data (2014/2966(RSP)) OJ C 289/2.

[89] See on the subject: Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements: IS the EU Executive Unbound?' (2013) 50 CML Rev 423; Marieke de Goede, 'The SWIFT Affair and the Global Politics of European Security' (2012) 50 JMKS 214; Juan Santos Vara, 'The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data after Lisbon' (2013) 2 CLEER Working Papers.

[90] Devuyst (n 57).

[91] Rules of Procedure (n 26) 108(6).

[92] Two requests for Opinion concerning to new generation free trade agreements were submitted by the Commission and Belgium. See: Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C 239 /3; Opinion 1/17 *Comprehensive Economic and Trade Agreement* (2019) nyr.

[93] Op 2/15 *supra* note 91 paras 17-18, 173.

[94] Devuyst (n 57).

[95] Opinion 2/15 (n 91) 140.

[96] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] OJ C 239/3 Opinion of AG Sharpston, 491.

[97] Opinion 2/15 (n 91) 140.

[98] Marise Cremona, 'Case Comment: Shaping EU trade policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 ECL Review 231.

subject since the EU has launched its comprehensive policy on international investment protection,[99] *Opinion 1/17* appears as a missed opportunity to reaffirm its position on the issue and further pursue its objectives in this sphere. This has undermined the Parliament's influence over the development of the EU's common commercial policy in the sphere of international investment.

VI. Provisional Application in the Context of New Generation Free Trade Agreements

The Opinion procedure can also impact the decision on provisional application, as in the case of CETA and its investment chapter, which was excluded from such application due to the pending challenge before the Court.[100] Nonetheless, a request made by the Parliament does not have to preclude a provisional application, as only the consent of the Council at this stage is necessary.[101] From the Parliament's perspective, the current rules on provisional application are its Achilles' heel insofar as the EU international treaty-making procedure is concerned. Although an agreement that becomes effective without the Parliament' consent can be questioned on grounds of democratic legitimacy, its successful application would make it more difficult to reject it in the process of ratification. Thus, the existing framework provides a possibility to circumvent the Parliament at this stage in the treaty-making process. The interinstitutional agreement imposes upon the Commission only the duty to inform the Parliament of provisional application, but allows for a derogation in urgent cases.[102]

In the early practice of the EU, the provisional application of the new generation free trade agreements occurred frequently and was proposed to South Korea,[103] Columbia, Peru,[104] Ecuador,[105] Central America,[106] and Canada.[107] As the Union has decided to sign these agreements together with the Member States, their ratification required consent of not only the European Parliament, but also all national and regional parliaments, which has taken a

[99] European Parliament, Resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)) OJ C 296 E/34.

[100] Council (EU), Decision 2017/38 of 28 October 2016 on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) between Canada on the one Part and the European Union and Its Member States, of the Other Part [2017] OJ L 11/1080.

[101] TFEU, Art 218(5).

[102] Commission-Parliament Framework Agreement (n 23), Annex III(7).

[103] Council (EU), Decision of 16 September 2010 on the Signing, on Behalf of the European Union and Provisional Application of 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 (2011/265/EU) [2011] L 127/1.

[104] Council (EU), Decision of 31 May 2012 on the Signing, on Behalf of the European Union and Provisional Application of the Trade Agreement between the European Union and its Member States of the one part and Columbia and Peru, of the other Part (2012/35/EU) [2012] L 354/1.

[105] Council (EU), Decision 2016/2369 of 11 November 2016 on the signing, on behalf of the Union, and provisional application of the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador [2016] OJ L 356.

[106] Council (EU), Decision 2012/734 of 25 June 2012 on the signing on behalf of the European Union of the Agreement Establishing an Association between the European Union and Its Member States, on the one hand, and the Central America on the other, and the provisional application [2012] OJ L346/1.

[107] Council (EU), Decision 2017/38 of 28 October 2016 on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) between Canada on the one Part and the European Union and Its Member States, of the Other Part [2017] OJ L 11/1080.

considerable time.[108] So far, only the agreement with South Korea entered into force after five years of ratifications.[109] Therefore, these agreements are a good example of the utility of provisional application in plurilateral negotiations. There has been, however, a change in the EU treaty-making practice, with the latest agreements being signed only by the EU.[110] It resulted in a considerable improvement in the ratification period, with the EU-Japan Economic Partnership Agreement taking only five months to conclude. [111]

The development was possible due to the confirmation by the Court that almost the entire field of external economic relations falls within the scope of the common commercial policy, which is an area of the EU exclusive competence.[112] The only part that remains with the Member States consists of the non-direct foreign investment.[113] As a direct consequence of the *Opinion*, the Commission decided to remove chapters containing rules on investment protection from the scope of the new generation free trade agreements,[114] which enabled the EU to conclude them without involving national and regional parliament of its Member States. The improvement in efficiency in the EU treaty-making practice could result in less frequent use provisional application with more new generation free trade agreements following the path of Japan and Singapore.

Reducing a recourse to provisional application provides better guarantees of the Parliament's involvement and safeguards the effectiveness of the consent procedure. It should be, however, noted that in the past practice provisional application has not caused problems with regards to new generation free trade agreements. A possibility of a later rejection by the Parliament was considered to affect the practice at this stage.[115] Since the conclusion of the EU-South Korea Free Trade Agreement,[116] the provisional application has been made effective after the Parliament expressed its consent.[117] Nonetheless, in the absence of legal guarantees, the Parliament has

[108] On the subject of mixed agreements see: Christophe Hillion and Panos Koutrakos (eds) *Mixed Agreements Revisited* (Bloomsbury Publishing 2010).

[109] Council (EU), Decision 2015/2169 of 1 October 2015 on the conclusion of 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 [2015] OJ L 307/2.

[110] Council (EU), Decision 2018/966 of 6 July 2018 on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L 174/1; Council (EU), Decision 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore [2018] L 267/1.

[111] Council (EU), Decision 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership OJ L 330/1.

[112] TFEU (n 4) Arts 3(1)(e), 207.

[113] Opinion 2/15 (n 91).

[114] Examples include agreements with Japan, Vietnam and Singapore.

[115] David Kleimann and Gesa Kübeck, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15, (2016) EUI Working Papers RSCA 2016/58.

[116] European Parliament, Legislative Resolution of 17 February 2011 on the draft Council decision on the conclusion of 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 (08505/2010 – C7-0320/2010 – 2010/0075(NLE)) [2012] OJ C 188E/113; Notice concerning the provisional application of 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 [2011] OJ L 168/1.

[117] Other example includes: European Parliament, Legislative Resolution of 11 December 2012 on the draft Council decision on the conclusion of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (14762/1/2011 — C7-0287/2012 — 2011/0249(NLE)) [2015] OJ C 434/190; Notice concerning the provisional application between the European Union and Peru, of the Trade

reminded the Commission and the Council to involve it in the decision-making at this stage and insisted that the practice is codified in an interinstitutional agreement.[118] Thus, in relation to provisional application the Parliament has fought for the right of the EU citizens to be involved at each stage in the decision making process in the EU.

VII. Conclusion of the New Generation Free Trade Agreements

The signature of an agreement by the Council, starts the procedure for the conclusion of an international agreement. At this stage, the Council transmits to the Parliament a proposal of the Commission, with a request for consent.[119] In case of mixed agreements, national ratifications also commence at this stage.[120] The Council concludes an agreement after all parliaments involved in the process express their views.[121] In the European Parliament the INTA Committee presents a recommendation on an adoption of a new generation free trade agreement.[122] As the responsible committee closely follows the negotiations and frequently interacts with the Commission and the Council it is well-placed to formulate a position at this stage. In doing so, it also seeks opinions from other Committees that may have a stake in the agreement, in the context of the new generation free trade agreements, these may be committees on Environment, Public Health and Food Safety, Transport and Tourism, Foreign Affairs, Employment and Social Affairs, Agriculture and Rural Development. The report and draft resolution prepared by a committee are debated in the Parliament ahead of the vote on the agreement.[123] The Parliament's consent to a particular agreement is expressed in a legislative resolution.[124] The practice has also

Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2013] OJ L 56/1; Notice concerning the provisional application between the European Union and Colombia, of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2013] OJ L 201/7.

[118] Resolution on the Negotiating Mandate for Trade Negotiations with Australia *supra* note 35; Resolution on Negotiating Mandate for Trade Negotiations with New Zealand *supra* note 35.

[119] TFEU (n 4) Art 218(6); see for example: Commission (EU), Proposal for a Council Decision on the Signing, on behalf of the European Union of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam of 17 October 2018, COM(2018) 692 final 2018/0357(NLE).

[120] TFEU (n 4) Art 218(6); On the procedure see: Guillaume Van der Loo, 'Less is more? The Roles of National Parliaments in the Conclusion of Mixed (Trade) Agreements' CLEER Paper Series 2018/1.

[121] Examples include: Council Decision (EU) 2018/1907 of 20 December 2018 on the Conclusion of the Agreement between the European Union and Japan for an Economic Partnership, (2018) OJ L 330/1; Council Decision (EU) 2015/2169 of 1 October 2015 on the conclusion of 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 [2015] OJ L 307/2.

[122] Rules of procedure (n 26) 99(1), Rule 108(7).

[123] See for example a record of a debate on the EU-Singapore FTA: http://www.europarl.europa.eu/doceo/document/CRE-8-2019-02-12-ITM-021_EN.html

[124] European Parliament, Legislative Resolution of 17 February 2011 on the draft Council decision on the conclusion of 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 (08505/2010 – C7-0320/2010 – 2010/0075(NLE)) [2012] OJ C 188E/113; European Parliament, Legislative Resolution of 11 December 2012 on the draft Council decision on the conclusion of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (14762/1/2011 — C7-0287/2012 — 2011/0249(NLE)) [2015] OJ C 434/190. European Parliament, Legislative Resolution of 11 December 2012 on the draft Council decision on the conclusion of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America, on the other (16395/1/2011 — C7-0182/2012 — 2011/0303(NLE)) (Consent) OJ C 434/187; 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

developed to enact alongside it a non-legislative resolutions that states reasons for the decision and outlines objectives for the implementation phase.[125]

In the non-legislative resolutions of the Parliament, reveal the vision for the EU trade policy as a mean for achieving not only greater trade liberalisation, but also non-trade related objectives enshrined in Article 21 TEU, which have been incorporated in the common commercial policy in the Treaty of Lisbon.[126] The Parliament has emphasised that the new generation free trade agreements can facilitate the development of the rule of law, respect for democracy and human rights and promote sustainable development in a number of ways.[127] Firstly, by opening a political dialogue and setting up of an institutional structure by the EU and its trading partner for co-operation in these areas.[128] Secondly, by incorporating binding commitments and an effective enforcement mechanism, which in case of non-compliance would lead to the suspension of the agreement, hence the trade benefits that come with it.[129] Thirdly, the Parliament adhered to the traditional view of trade that improvements in economic prosperity of a country achieved through greater market liberalisation facilitate social and political development.[130]

In its resolutions the Parliament frequently addresses specific issues it considers problematic in the context of a particular trading partners of the EU, such as: social cohesion, drug trafficking and organised crime in counties of Central America,[131] deforestation in Ecuador,[132] illegal logging and unreported fishing in Japan.[133] Common themes have also emerged. The Parliament has been insisted that all EU trading partners adhere to core Conventions of the International Labour Organisation and contribute towards achieving objectives of the Paris agreement.[134] Despite sometimes serious concerns expressed about the political and human rights situations in the EU partner countries, the Parliament has to date approved all of the new generation free trade

Union and Its Member States, of the Other Part (10975/2016/2016-C8-4038/2016-2016/0205(NLE)) (Consent) [2018] OJ C 252/348; 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 (07964/2018 – C8-0382/2018 – 2018/0091(NLE)), P8_TA-PROV(2018)0504, nyr; 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 (07971/2018 – C8-0446/2018 – 2018/0093(NLE)) P8_TA-PROV(2019)0088 nyr.

[125] Rules of Procedure (n 26) Rule 99(2).

[126] TFEU (n 4) Art 207.

[127] European Parliament, Resolution of 11 December 2012 on the draft Council decision on the conclusion of the Agreement establishing an Association between the European Union and its Member States, on the one hand and Central America on the other (16395/1/2011 – C7-0182/2012 – 2011/0303(NLE)) [2015] OJ C 434/181.

[128] Ibid.

[129] Ibid.

[130] See Resolutions mentioned in *supra* notes 120 and 126.

[131] European Parliament, Resolution on the Conclusion of the Association Agreement with Central America *supra* note 126.

[132] European Parliament, Resolution of 26 November 2015 on the accession of Ecuador to the Trade Agreement concluded between the EU and its Member States and Colombia and Peru (2015/2656(RSP)) [2017] OJ C366/144.

[133] European Parliament non-legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership (07964/2018 – C8-0382/2018 – 2018/0091M(NLE)) P8_TA-PROV(2018)0505, nyr.

[134] Ibid, European Parliament non-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 (07971/2018 – C8-0446/2018 – 2018/0093M(NLE)), P8_TA-PROV(2019)0089, nyr.

agreements with an overwhelming majority,[135] which reaffirms its philosophy of achieving change through trade and aligns with the ideology of the Commission.

In the light of this, the real opportunity for the Parliament to act as the guardian of human rights and other values in the EU trade policy will be during the implementation phase of the new generation free trade agreements. The Parliament has consistently highlighted to the Commissions that it wishes to actively participate in the application of the EU agreement after its entry into force and Art 207 TFEU grants it power to define, together with the Council, a framework for implementing the common commercial policy.[136] In its concluding resolution for the EU-Central America Association Agreement, the Parliament, for example, requested an annual report from the Commission on the implementation of the human rights commitments.[137] Whilst a detailed analysis of this aspect is essential for a holistic understanding of the role of the Parliament in the common commercia policy it is a subject for future research.

VIII. Conclusions

The European Parliament has embraced its new powers in the common commercial policy by developing a standard practice of actively contributing at each stage in the process of negotiating new generation free trade agreements. It has demonstrated high levels of engagement already during the opening of negotiations, which has facilitated changes in the interinstitutional relations with visible improvements in the Council's approach to transparency in interinstitutional relations. This has also brought positive developments for the citizens, with an increasing number of negotiating mandates being published soon after their adoption.

The practice that developed through the Parliament's engagement in negotiations on the new generation free trade agreements improves the way in which democratic legitimacy is EU external action is realised by facilitating inclusive and open discussion. However, any proposals for extending the Parliament's powers in the early stages should be carefully assessed, with particular regard being paid to the impact of such a change on the willingness of the Parliament to bring sensitive political issues into the deliberations on conclusion of trade treaties. In the future, the Parliament should consider increasing the relevance of Article 21 TEU in its scrutiny of the new generation free trade agreements in order to improve coherence of its practice and that of the EU external action as a whole. The current legal framework that governs the conclusion of the new generation free trade agreements provides many opportunities to develop interinstitutional dialogue, which have been embraced in the practice to date. Whilst, a notable gap exists in rules governing provisional application posing a risk of undermining democratic legitimacy, it has been mitigated through effective interinstitutional cooperation to date. Nonetheless, in order to guarantee future participation of the parliament, the current practice should be codified in an interinstitutional agreement.

---

[135] Votes in favour: EU-South Korea Free Trade Agreement- 465 (17 February 2011); EU- Columbia and Peru Comprehensive Trade Agreement- 486 (11 December 2012); EU-Central America Association Agreement- 557 (11 December 2012); CETA- 408 (15 February 2017); EU-Japan Economic Partnership Agreement- 474 (12 December 2018); EU-Singapore Free Trade Agreement- 425 (12 February 2019).

[136] TFEU, Art 207(2).

[137] European Parliament, Resolution on the Conclusion of the Association Agreement with Central America *supra* note 126.

The Parliament has used existing tools effectively to establish a strong presence in the EU external trade action to date. This should not, however, be equated with a strong position of the Parliament in the common commercial policy. Whilst more research is necessary in order to quantify Parliament's influence over the Union's common commercial policy, the Parliament could consider increasing the relevance of Article 21 TEU in its scrutiny of the new generation free trade agreements in order to improve coherence of its practice and that of the EU external action as a whole.

DEMOCRACY AND IMPLEMENTATION OF THE NEW GENERATION OF EU FREE TRADE AGREEMENTS (FTAS)

Marie-Cécile Cadilhac[1]

I. Introduction

In the 2015 *Trade for all* Communication, the European Commission committed to "focus on the implementation of the sustainable development dimensions of FTAs [which] should be a core component of the enhanced partnership with (…) the European Parliament and stakeholders on FTA implementation, as well as dialogue with civil society".[2] Through this commitment, the European Commission shed light on the link that may exist between Trade and Democracy at the implementation stage of free trade agreements (FTAs). It more precisely highlighted the possible role for representative democracy – embodied by the European Parliament – and participatory democracy – embodied by citizens and civil society – in implementing European Union (EU) FTAs.

Such a perspective is of significant interest in two main respects. Firstly, it brings together two concepts – Trade and Democracy – which traditionally have difficulty in "complementing or adjusting to each other".[3] Indeed, as a component of Foreign Policy, Trade used to be considered as "a matter for princes, not for peoples".[4] This can notably explain why, within the EU legal order, the European Parliament (EP) has long been excluded from the procedure for concluding international trade agreements.[5] Trade and Democracy have nevertheless recently been reconciled. The Lisbon Treaty has come as a turning point in this regard. First of all, it has inserted a new Title (Title II TEU) dedicated to "democratic principles" which shall apply in *all areas of EU action,* including trade. These principles encompass, on the one hand, representative democracy which "founds" the functioning of the Union and which is, first and foremost, embodied by the European Parliament.[6] The democratic principles

[1] University of Rennes 1, Associate member – Institut de l'Ouest: Droit et Europe (IODE, UMR CNRS 6262).

[2] European Commission, Communication, *Trade for All – Towards a more responsible trade and investment policy,* COM(2015)497 final, 14.10.2015, p. 17.

[3] We translated from « commerce et démocratie peinent à se compléter voire à s'ajuster », C. FLAESCH-MOUGIN, « Commerce et démocratie – Quelques réflexions sur l'ère post-Lisbonne », *in Mélanges en l'honneur du Professeur Henri Oberdorff,* N. KADA (dir.), LGDJ-Lextenso, Paris, 2015, 303 p., pp. 107-124.

[4] We translated from « 'l'affaire des princes' et non (…) des peuples », M. AMELLER, « Parlements – Une étude comparative sur la structure et le fonctionnement des institutions représentatives dans cinquante-cinq pays », Presses universitaires de France, 2e éd., 1966, 378 p., p. 356.

[5] See ex-article 300(3) TEC (Nice version): "The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3) (…)."

[6] Article 10(1) and (2) TEU. The second pillar of representative democracy being embodied by Member States which are "represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens" (Article 10(2) TEU). Since our contribution will focus on the mechanisms of representative and participatory democracy provided by EU Law, it will not address the involvement of national parliaments of EU Member States in the implementation of EU FTAs. Indeed, the control conducted by national parliaments over

comprise, on the other hand, participatory democracy, which implies that every citizen has "the right to participate in the democratic life of the Union (…)."[7] In particular, participatory democracy can be carried out through "an open, transparent and regular dialogue [maintained by the institutions with] representative associations and civil society",[8] broad public consultations,[9] or the European Citizens' Initiative (ECI).[10] Second of all, since the entry into force of the Lisbon Treaty, the Common Trade Policy has been subject to the ordinary legislative procedure (Article 207(2) TFEU), which means that the European Parliament now gives its consent to the conclusion of international trade agreements (Article 218(6)(a) TFEU). This democratic change in the EU Treaties has triggered a new dynamic in the recent practice which has been dominated by an unprecedented involvement of parliaments, citizens, and civil society during the negotiating process of the new generation of EU free trade Agreements. The latter will here be understood as covering both self-standing FTAs negotiated/under negotiation with countries from the American (Canada,[11] Columbia-Peru- Ecuador,[12] the USA[13]), Asian (South-Korea,[14] Vietnam,[15] Japan,[16] Singapore[17]) and Oceania (Australia, New-Zealand) continents, and (Deep and Comprehensive) Free Trade Agreements (DCFTA) included in recent association agreements (AA) with Eastern Neighbours (Ukraine,[18] Moldova,[19] Georgia[20]) and Central America.[21] In this regard, one could remember the MEPs' activism to protect the interests of the European automotive industry during the

their government is specific to each Member State. For the same reason, our contribution will not analyse the role of parliaments in the partner countries.

[7] Article 10(3) TEU.

[8] Article 11(2) TEU.

[9] Article 11(3) TEU.

[10] Article 11(4) TEU.

[11] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.01.2017, p. 23.

[12] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 21.12.2012, p. 3; Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador, OJ L 356, 24.12.2016, p. 3.

[13] See the former negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

[14] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14.05.2011, p. 6.

[15] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, COM(2018)691 final, 17.10.2018, Annex 1.

[16] Agreement between the European Union and Japan for an Economic Partnership (EPA), OJ L 330, 27.12.2018, p. 3.

[17] Free Trade Agreement between the European Union and the Republic of Singapour, COM(2018)196 final, 18.04.2018, Annex 1.

[18] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.05.2014, p. 3.

[19] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Moldova, of the other part, OJ L 260, 30.08.2014, p. 4.

[20] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.08.2014, p. 4.

[21] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346, 15.12.2012, p. 3. The expression "DCFTA" is not expressly included in the EU-Central America Association Agreement.

negotiations of the EU-Korea FTA.[22] One could also remember the great hostility expressed towards the CETA and the TTIP within the European Parliament as well as through the European Citizens' Initiative 'Stop TTIP', the 2015 public consultation on the ISDS mechanism, and the great amount of petitions received by the European Parliament. This trend has led the academic community to focus on the rise of representative and participatory democracy *during* the procedure for concluding the new generation of EU FTAs.[23] In contrast, little research has been conducted on the role of democracy *after* the conclusion of these trade agreements, i.e. at the later stage of their implementation.[24] This is the **second interest** of our perspective: exploring the links between Democracy and Trade at the specific and under-studied implementation stage of the new generation of EU FTAs. This approach is all the more valuable as the new FTAs are particularly ambitious[25] and are therefore more likely to interfere with public policies and to affect citizens' life.

In view of these elements, the following questions arise: How do the principles of representative and participatory democracy – laid down in Articles 10 and 11 TEU – apply at the implementation stage of EU FTAs? More particularly, how do the European Parliament, citizens and civil society get involved when the EU FTAs are being implementing?

In order to answer these questions, a comprehensive approach is needed. It firstly requires analysing the democratic instruments provided by Law, including those specifically set out in the EU FTAs as well as those more broadly offered by EU Law. It also requires comparing these legal means with practice in order to measure to what extent the democratic dimension enshrined in Law is really effective. Such an analysis reveals, before all, that the European Parliament, European citizens and civil society organisations are involved in the implementation of EU FTAs: the democratic principles laid down in Articles 10 and 11 TEU *do apply* at this specific stage. This analysis also reveals the specific features of this democratic dimension. It is multi-layered and multi-speed: the principles of representative and participatory democracy *do not uniformly apply* when it comes to implementing EU FTAs. Indeed, EU FTAs themselves create a sharp imbalance in favour of participatory democracy over representative democracy **(2).** However, EU Law understood more broadly provides for

[22] See e.g. L. RICHARDSON, "The post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations", *College of Europe EU Diplomacy Paper,* 05/2012.

[23] See e.g. C. FLAESCH-MOUGIN, « Commerce et démocratie – Quelques réflexions sur l'ère post- Lisbonne », above-cited; J. ORGAN, "EU Citizen Participation, Openness and the European Citizens Initiative: The TTIP Legacy", *CMLR,* 2017, Vol. 54, pp. 1713-1747; C. RAPOPORT, « L'élaboration des accords de libre- échange de l'UE à l'ère post-Lisbonne », Intervention lors du colloque *Du marché intérieur au grand marché transatlantique – L'Union européenne, le droit et le libre-échange,* A. HERVE (dir.), Brest, 6-7.10.2016; C. RAPOPORT, « La participation du public à l'élaboration des partenariats transatlantiques », *in* C. DEBLOCK, J. LEBULLENGER (dir.), *Génération TAFTA – Les nouveaux partenariats de la mondialisation,* PUR, 2018, 352 p., pp. 181-198.

[24] See e.g. L-M. CHAUVEL, "The Role of the European Citizens' Initiative in FTA Negotiation and Implementation", *to be published;* J. ORBIE, D. MARTENS, L. VAN DEN PUTTE, "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation", *CLEER Papers,* 2016/3.

[25] The new FTAs indeed go beyond tariff cuts and trade in goods. They cover areas such as services, public procurement, investment liberalization and protection, regulatory cooperation, and trade and sustainable development.

additional democratic instruments that compensate for this gap and create, to some extent, a rebalance towards representative democracy (3).

II. Democracy within EU FTAs: An imbalance in favour of participatory democracy

Whereas the Treaty on the European Union mentions representative democracy *before* participatory democracy, whereas the European Parliament is an *EU institution with a co-legislative power in Common Trade Policy* while citizens and civil society have, at best, a consultative or an initiative status, the new generation of EU FTAs paradoxically provides for a significant involvement of civil society (II.2), contrary to an inconsistent and overall weak involvement of the European Parliament (II.1).

II.1. An overall weak involvement of the European Parliament

At first sight, a comparison between the parliamentary dimension of the (DC)FTAs included in association agreements and the one enshrined in the self-standing FTAs reveals a sharp discrepancy. On the one hand, the association agreements with Eastern Neighbours and Central America require setting up a Joint Parliamentary Committee ("Parliamentary Association Committee") (JPC) which is competent regarding the implementation of all aspects of the association agreement, including the (DC)FTA. JPCs consist of Members of the European Parliament on the one hand, and of Members of the Parliament(s) of the partner country(ies), on the other. They receive information regarding the implementation of the association agreement[26] and may make recommendations to the Association Council.[27] Hence, even if non-legally binding, there *is* here an indisputable involvement of the European Parliament in the implementation of these (DC)FTAs.

On the other hand, there seems to be no room for representative democracy in the implementation of EU self-standing FTAs. Indeed, the already signed/concluded EU FTAs (Canada, Japan, South-Korea, Singapore, Vietnam, Colombia/Peru/Ecuador) are completely silent about parliaments. The same conclusion applies to the FTAs which are currently being negotiated with Australia and New-Zealand.[28] This first outcome must nevertheless be nuanced since the new EU strategy requires reading together the free trade agreement and the Framework agreement which is legally linked to it.[29] In that perspective, with the exceptions of Singapore and Vietnam, the Framework agreements (Canada, Japan, South-Korea,

[26] The JPCs may request relevant information regarding the implementation of the Association Agreement from the Association Council and shall be informed of the decisions and recommendations of the Association Council.

[27] Articles 467 and 468 EU-Ukraine AA; Articles 440 and 441 EU-Moldova AA; Articles 410 and 411 EU-Georgia AA; Article 9 EU-Central America AA.

[28] The negotiating directives and/or the textual proposals are also silent about parliaments.

[29] This means that the FTA shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. In that respect, see e.g. J. LEBULLENGER, « L'articulation entre les accords de partenariat et de cooperation (APC) et les accords de libre-échange », Le partenariat UE-ASEAN, A BERRAMDANE, M. TROCHU (dir.), Bruylant, Bruxelles, 2013, 261 p., pp. 40-59. This pattern does not apply to the EU-Colombia/Peru/Ecuador partnership. Moreover, there is no explicit link in the agreements with Canada and Japan.

Australia, New-Zealand) actually refer to a parliamentary dimension. However, it is very weak. These agreements only provide for or – even more weakly – promote "exchanges" of delegations and/or other contacts between the European Parliament and the parliamentary assembly of the partner country.[30] The chosen wording is extremely broad. It does not institutionalize the above-mentioned interparliamentary exchanges and gives no detail about the frequency, the scope or the purpose of interparliamentary meetings. Neither does it consider a possible dialogue or exchange of information with the joint bodies established by the framework agreement/foreseen FTA. Hence, the most basic level of a parliamentary dimension has been favoured.

This poor parliamentary dimension of self-standing FTAs raises several issues. **First**, the effectiveness of the interparliamentary "exchanges" – as envisaged in the Framework Agreements – on trade matters depends on the entry into force (or the provisional application) of the said Framework Agreements which is not necessarily synchronized with the entry into force of the free trade agreements. Thus, the FTAs will not necessarily immediately benefit from the interparliamentary dialogue included in the Framework Agreements. Second, the silence kept by self-standing FTAs on the European Parliament is in sharp contrast with its decisive involvement before the conclusion of trade agreements. As above-recalled, the European Parliament holds a veto right (Article 218(6)(a) TFEU) which has been accompanied in practice by a strong activism aiming at influencing the content of the new generation of EU FTAs. There is therefore a clear asymmetry – one could even say an inconsistency – between the European Parliament's powers applying *before* and *after* the conclusion of trade agreements. Third, the EU self-standing FTAs provide for no parliamentary control of the joint bodies they establish and entrust with decision-making powers. This could result in jeopardizing the European Parliament's co-legislative status and in infringing upon the institutional balance provided for in the EU Treaties. Indeed, the joint bodies set up by FTAs may be authorised to make binding decisions that can interfere with the European Parliament's functions, "especially if these decisions have an impact on political choices or if their implementation requires changes to EU legislative acts."[31] More precisely, "if a committee decision requires the adoption of implementing rules by the EU legislature, the European Parliament might, without prior involvement, be bound by substance of the committee decision. Hence, the conferral of powers to treaty bodies could circumvent essential procedural rules established in EU primary law."[32] The CETA is, in this regard, persuasive.[33] Fourth, the poor parliamentary dimension of EU self-standing

[30] Article 3.3.e of the EU-Korea Framework Agreement (OJ L 20, 23.01.2013, p. 2); Article 1.3 of the EU-Japan Strategic Partnership Agreement (OJ L 216, 24.08.2018, p. 4); Article 27.1.e of the EU-Canada Strategic Partnership Agreement (OJ L 329, 03.12.2016, p. 45); Article 3.3.e of the EU-Australia Framework Agreement (JOIN(2016)8 final, 14.04.2016); Article 3.2.f of the EU-New Zealand Partnership Agreement on Relations and Cooperation (JOIN(2016)6 final, 14.04.2016).

[31] W. WEISS, "Delegation to treaty bodies in EU agreements: constitutional constraints and proposals for strengthening the European Parliament", *European Constitutional Law Review,* 2018, Volume 14, pp. 532-566, p. 547.

[32] *Ibid,* p. 549.

[33] W. WEISS notably mentions that the "implementation of a committee decision under Article 21.7.5 CETA might require changes to EU Directive 2001/95 on the Community rapid information system; the European

FTAs/Framework Agreements results in no particular democratic involvement when it comes to considering trade sanctions against a partner country which would violate the Human Rights clause ("essential element clause") enshrined in the concerned Framework Agreement.[34] If such a state of play is in line with what already exists in most of the other EU International Agreements, one could have considered that the European Parliament should be involved in scrutinizing the implementation of the Human Rights clause given the democratic nature of this institution and, by extension, its particular legitimacy in that matter.

In conclusion, despite the establishment of a Joint Parliamentary Committee by the recent Association Agreements, the involvement of the European Parliament in implementing the new generation of EU FTAs is, overall, very weak. It is true that this weakness echoes to some extent the silence kept by Article 218(9) TFEU on a possible involvement of the European Parliament at the implementation stage of EU External Agreements. Nevertheless, this current situation raises several concerns. Consequently, it invites to consider possible solutions in order to ensure the efficiency and the consistency of the European Parliament's powers while taking into account other cross-cutting requirements, such as the EU capacity to assert itself on the international scene. Solutions may be found in institutionalizing Joint Parliamentary Committees – when they do not exist – or in granting the European Parliament an observer status in joint bodies that would allow it to have a say when these bodies adopt decisions. Solutions may also be found in a better involvement of the European Parliament – beyond its information – in the procedure for adopting the Council decisions "establishing the positions to be adopted on the Union's behalf in a body set up an agreement." Such a perspective would require a revision of Article 218(9) TFEU. *A minima,* one can imagine that the European Parliament challenges before the Court of justice a decision adopted on the basis of Article 218(9) TFEU and, on this occasion, sheds light on the inconsistency of its powers. In view of the principle of institutional balance, the ECJ would, in such circumstances, be able to assess if the European Parliament should be more involved and, if needed, may find a way to reinforce its status, as it has already done in the past.[35] It seems to us this reflection is all the more needed as the new generation of EU FTAs provides, by contrast, for a significant involvement of civil society.

II.2. A significant involvement of civil society

By contrast with the weak parliamentary dimension, participatory democracy has been put at the fore in the new generation of EU FTAs. Beyond transparency which should facilitate its

---

Parliament would be bound in spite of not having participated in the committee decision enactment" (*Ibid,* p. 561).

[34] The legal link established between the Framework Agreement and the FTA allows to consider such an option.

[35] See e.g. the possibility to challenge European Parliament's acts before the ECJ and the capacity of the European Parliament to bring an action for annulment before the ECJ (ECJ, 23 April 1986, *Parti écologiste 'Les Verts' v European Parliament,* case 294/83, ECLI:EU:C:1986:166; ECJ, 22 May 1990, *European Parliament v Council,* case C-70/88, ECLI:EU:C:1990:217).

exercise,[36] and beyond some references to possible public consultations,[37] participatory democracy is mainly addressed through the involvement of civil society[38] in the implementation of FTAs. Included first in the EU-South Korea FTA, this democratic dimension is perfectly in line with the European Commission's commitment in its *Trade for all* Communication[39] and answers the "increasing demand for a constructive dialogue with civil society on trade."[40]

However, the features of this dialogue are not obvious, mainly for two reasons. First, the involvement of civil society can vary from one agreement to another. For instance, civil society is addressed a dozen times in CETA compared with only once in the EU-Singapore FTA. Second, the involvement of civil society can take various forms, which can create some confusion.[41]

Despite this, the following comments highlight that the involvement of civil society is significant. First of all, both EU self-standing FTAs (with the exception of the EU-Japan EPA and the EU-Colombia/Peru/Ecuador Trade agreement) and Association Agreements – that establish a DCFTA – contain a general reference to the role of civil society under their institutional and final provisions. On the one hand, the EU self-standing FTAs state that the joint (or trade) committee established by the FTA may communicate with all interested parties, including private sector and civil society organisations.[42] On the other hand, the recent Association Agreements concluded with Ukraine, Georgia and Moldova provide for the establishment of a 'Civil Society Platform'[43] as a forum to meet and exchange views. This

[36] See e.g. Chapter 27 CETA; Chapter 17 EU-Japan EPA; Chapter 12 EU-South Korea FTA; Chapter 13 EU-Singapore FTA; Chapter 14 EU-Vietnam FTA.

[37] See e.g. Articles 22.1.3.e) CETA; Article 18.7 EU-Japan EPA; Article 4.4.1.e) EU-South Korea FTA; Article 4.8.a) EU-Singapore FTA; Article 5.7.a) EU-Vietnam FTA.

[38] The meaning of "Civil society" is not detailed in the agreements, with the exception of the EU-Japan EPA (Article 16.13: "For the purposes of this Chapter, 'civil society' means independent economic, social and environmental stakeholders, including employers' and workers' organisations and environmental groups"). From a general point of view, "civil society" is not subject to a clear definition. According to the EESC, "Civil society is a collective term for all types of social action, by individuals or groups, that do not emanate from the state and are not run by it" ("The role and contribution of civil society organisations in the building of Europe", OJ C 329, 17.11.1999, p. 30, pt. 5.1). According to C. GREWE, civil society is the « lieu où se forment un certain nombre de consensus politiques, sociaux, culturels qui peuvent ensuite s'intégrer dans l'espace plus proprement politique » (« Article I-47 – Principe de la démocratie participative », *in Traité établissant une Constitution pour l'Europe – Commentaire article par article,* L. BURGORGUE-LARSEN, A. LEVADE, F. PICOD (dir.), Bruylant, Bruxelles, 2007, Tome 1, 1106 p., p. 628).

[39] European Commission, Communication, *Trade for All – Towards a more responsible trade and investment policy,* above-cited, pp. 12-13.

[40] European Economic and Social Committee, "The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements", Opinion, REX/510, January 2019, pt. 1.2.

[41] This variety is addressed in J. ORBIE, D. MARTENS, L. VAN DEN PUTTE, "Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation", *CLEER Papers,* 2016/3.

[42] Article 26.1.5.b) CETA; Article 15.1.4.b) EU-South Korea FTA; Article 16.1.4.b) EU-Singapore FTA; Article 17.1.4.b) EU-Vietnam FTA. The same logic should apply to the FTAs which are currently under negotiation with Australia and the New-Zealand. Indeed, Both negotiating directives (p. 5) mention, under the "General principles", the "commitment of the parties to communicate with all relevant stakeholders from civil society, including the private sector, trade unions, and other non-governmental organisations."

[43] It shall consist of representatives of civil society on the side of the EU, including Members of the European EESC, and representatives of civil society on the side of the associate partner. The EU-Central America does not provide for such a Civil Society Platform.

Platform shall receive information from the Association Council – especially regarding the decisions and recommendations it adopts – and may also make recommendations to the Association Council.[44]

The second dimension of civil society involvement is even more eloquent. It is enshrined in the FTAs/association agreements' "Trade and Sustainable Development" (TSD) Chapter and, therefore, only applies when this specific Chapter is being implemented.[45] This dimension is rolled out on two levels: one specific to each Party; one common to both Parties. On the one hand, the EU FTAs/association agreements request each Party to establish (or to rely on already existing) domestic advisory group(s) (DAG) on sustainable development, which shall comprise independent representative organisations of civil society in a balanced representation of economic, social and environmental stakeholders. These stakeholders include employers, unions, labour and business organisations, as well as other relevant stakeholders as appropriate.[46] From the EU side, the DAGs under the FTAs with South- Korea, Colombia/Peru/Ecuador, and Canada have already been set up. So have been the DAGs under the Association Agreements with Ukraine, Georgia, Moldova and Central America.[47] On the other hand, according to almost all FTAs/association agreements,[48] the Parties shall convene a Joint Dialogue with civil society organisations situated in their territories, including their above-mentioned domestic advisory group(s).[49] These joint dialogues, conducted according to a frequency specific to each partnership and, for some of them, structured in a Civil Society Forum,[50] shall also ensure a balanced representation of relevant stakeholders, including independent organisations which are representative of economic, environmental and social interests as well as other relevant organisations as appropriate.[51] In view of these elements, the new generation of EU FTAs provides for a *structured organisation* of civil society representatives. Beyond this 'structuring', EU FTAs/association agreements grant civil society organisations an *array of means to get involved in the implementation* of these agreements. First, civil society – through the DAGs and/or the joint dialogues – is provided with *information* by the Parties and/or by the

[44] Articles 469 and 470 EU-Ukraine AA; Articles 442 and 443 EU-Moldova AA; Articles 412 and 413 EU-Georgia AA.

[45] In the CETA, 'Trade and Sustainable development' is addressed in three chapters ("Trade and Sustainable development" – Chapter 22 –, "Trade and labour" – Chapter 23 –, "Trade and environment" – Chapter 24 –).

[46] Article 23.8.4 CETA; Article 16.15.1 EU-Japan EPA; Article 13.12.5 EU-South Korea FTA; Article 12.15.5 EU-Singapore FTA; Article 13.15.4 EU-Vietnam FTA; Article 281 EU-Colombia/Peru/Ecuador FTA; Article 299 EU-Ukraine AA; Article 376 EU-Moldova AA; Article 240 EU-Georgia AA; Article 294 EU- Central America AA. As underlined in its recent opinion, "the EESC is a permanent component in the membership of DAGs" (EESC, "The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements", Opinion, above-cited, pt. 2.7).

[47] See the page on the European Commission website dedicated to TSD committees and civil society meetings: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1870.

[48] With the exception of the EU-Singapore FTA.

[49] Depending on the agreement, it is not always clear whether the joint dialogue exclusively comprises members from the DAGs or can also include external stakeholders.

[50] In CETA, EU-South Korea FTA, and the Association Agreements with Ukraine, Moldova, Georgia and Central America.

[51] Article 22.5 CETA; Article 16.16 EU-Japan EPA; Article 13.13 EU-South Korea FTA; Article 13.15.5 EU-Vietnam FTA; Article 282 EU-Colombia/Peru/Ecuador FTA; Article 377 EU-Moldova AA; Article 295 EU-Central America AA; Article 299 EU-Ukraine AA; Article 241 EU-Georgia AA.

Committee on Trade and Sustainable Development. Such information can cover updates on any matter related to the TSD Chapter – including its implementation,[52] the communications the Parties may receive from the public,[53] the report drafted by the Panel of Experts in case a dispute arises between the Parties,[54] or any follow-up action or measure to be implemented by a Party following the report of the Panel of Experts.[55] Hence, the information supplied allow civil society organisations to *monitor* the implementation of the TSD Chapter. It is all the more important as, beyond monitoring, civil society is also enabled to actively participate in implementing the (DC)FTAs. Indeed, the DAGs and/or the Joint forums have the capacity to present to the Parties and/or the Committee on TSD their *views, opinions, or recommendations*. Such participation can result from the DAGs/Joint Forums' own initiative. It may, in that case, concern any matter related to the TSD Chapter, including the identification of areas of cooperation, an issue that gave rise to government consultations, or the follow-up to the final report of the Panel of Experts.[56] For instance, in December 2016, the EU DAG under the EU-Korea FTA called on the European Commission to open consultations with the Korean government pursuant to Article 13.14 of EU-Korea FTA given persistent and serious concerns regarding trade union rights in South-Korea.[57] The active participation of civil society can also result from the consultation of the DAGs and/or the Joint Forum by the Party(ies) and/or the Committee on TSD. In that case, civil society organisations become explicit *advisory bodies*, as expressly underlined in some agreements.[58] The Parties/TSD Committee – or even the Panel of Experts –[59] may seek views and advice on any matter related to the TSD Chapter,[60] including here again on an issue that gave rise to consultations between the governments.[61] Even if the opinions presented by the DAGs/Joint Forums are not legally binding, the Parties/TSD Committee must give them due consideration.[62] The CETA even requires the TSD Committee to report annually on the follow-up to the communications presented by the Civil Society Forum.[63] Hence, there is no doubt the involvement of civil society organisations goes beyond merely monitoring the implementation of EU FTAs. It also includes the possibility to influence it.

[52] Article 22.4.4.b) CETA ; Article 16.16.3 EU-Japan EPA; Article 13.13.3 EU-South Korea FTA; Article 377(3) EU-Moldova AA; Article 299(5) EU-Ukraine AA; Article 241(3) EU-Georgia AA.

[53] Articles 23.8.5 and 24.7.3 CETA.

[54] Article 13.15.2 EU-South Korea FTA.

[55] Articles 23.10.12 and 24.15.11 CETA; Article 13.17.9 EU-Vietnam FTA; Article 16.18.6 EU-Japan EPA.

[56] Articles 22.4.4.b), 23.8.4, 23.10.12, 24.15.11, 24.13.5 CETA; Articles 16.15.3, 16.16.4, 16.18.6 EU-Japan EPA; Articles 13.13.3, 13.14.4 EU-South Korea FTA; Article 12.15.5 EU-Singapore FTA; Articles 13.15.4, 13.17.9 EU-Vietnam FTA; Articles 377(3), 376(4), 379(8) EU-Moldova AA; Articles 294(4) and 295(2) EU-Central America AA; Article 299(5) EU-Ukraine AA; Articles 240(4), 241(3), 243(8) EU-Georgia AA; Article 281 EU-Colombia/Peru/Ecuador FTA.

[57] Letter available at https://www.epsu.org/sites/default/files/article/files/EU%20DAG%20letter%20to%20Commissioner%20Malmstrom_signed%20by%20the%20Chair%20and%20Vice-Chairs.pdf.

[58] Article 13.12.4 EU-South Korea FTA; Article 13.15.4 EU-Vietnam FTA; Article 376(4) EU-Moldova AA; Article 299(1) EU-Ukraine AA; Article 240(4) EU-Georgia AA.

[59] Article 13.15.1 EU-South Korea FTA.

[60] Article 23.8.4, 24.13.5 CETA; Article 12.15.5 EU-Singapore FTA; Article 13.15.4 EU-Vietnam FTA ; Articles 281, 282 EU-Colombia/Peru/Ecuador FTA; Article 240(4) EU-Georgia AA; Article 299(1) EU-Ukraine AA; Article 294(4) EU-Central America AA; Article 376(4) EU-Moldova AA.

[61] Articles 23.9.4, 24.14.4 CETA ; Article 13.14.4 EU-South Korea FTA ; Article 13.16.5 EU-Vietnam FTA.

[62] Article 23.7.2 CETA.

[63] Article 22.4.4.b) CETA.

Despite those legal provisions in favour of a significant involvement of civil society, the actual impact of civil society on the implementation of EU FTAs must be nuanced for several reasons. First, the frequency of the DAGs/Joint civil society forums meetings seems too low[64] to allow civil society to quickly react to challenges that may arise throughout a year. Second, if the Joint civil society dialogues usually end with the adoption of a joint statement, the EU DAGs do not seem to systematically adopt conclusions or opinions.[65] This alters the visibility of their work and stances. Third, there is, to the best of our knowledge, no clear follow-up to the positions the DAGs/Joint Forums may adopt.[66] This prevents from assessing how their work is taken into account by the Parties/the TSD Committee. It is true that practice shows that DAGs/Civil Society Forums stances are not ignored. In this regard, when the EU launched with the South-Korean government consultations over labour commitments under the trade agreement (2019), the concerns raised by the domestic advisory groups and the Civil Society Forum established under the EU-Korea FTA were recalled.[67] Nevertheless, assessing the actual impact of civil society on the implementation of FTAs requires a case-by-case analysis. Hence, it remains difficult to get the global picture. Consequently, there is a room for improvement. Establishing a systematic follow-up to the DAGs/Joint Forums work is, from our point of view, a path that is worth exploring. Furthermore, the recent opinion issued by the European Economic and Social Committee (EESC) offers some options to enhance, if needed, this democratic dimension in future EU FTAs.[68] Taking stock of the benefits of civil society involvement,[69] the EESC notably recommends not to limit the scope of DAG monitoring to the Chapter on Trade and Sustainable Development anymore, but to extend it to all aspects of the agreement, “also not related to sustainable development while keeping a special attention to these aspects”.[70] This reflection, for now specific to EU FTAs, could even be extended to non-trade agreements.

In conclusion, in spite of some weaknesses, the new generation of EU FTAs initiates a trend to favour participatory democracy in the implementation of EU International

[64] The EU DAGs meet from one to three times a year. The Joint meetings usually take place once a year (sometimes even less frequently). The dates of EU DAGs meetings and of Joint meetings are available on the website of the EESC https://www.eesc.europa.eu/en.

[65] We only found three opinions on the EESC website. They were adopted by the EU DAG under the EU-Korea FTA on the Corporate Social Responsibility (2014), on Fundamental rights at work (2013), and on green growth (2013).

[66] With the above-mentioned exception of the CETA.

[67] “EU and the Republic of Korea launch government consultations over labour commitments under the trade agreement”, EEAS, Press release, 21 January 2019.

[68] EESC, “The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements”, Opinion, above-cited.

[69] The EESC notably underlines that “Civil society participation through DAGs contributes to maintaining and improving consumer protection, considering environmental implications and ensuring the full respect of the sustainability goals, as well as examining the opportunities for small and medium-sized companies. DAGs can also check for possible negative social consequences as regards equal opportunities for women and men, the rights of disabled people and other minorities as well as equal access to services of general interest. (…)” (para. 3.9 of the opinion).

[70] EESC, “The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements”, Opinion, above-cited, para. 3.11.

Agreements. This trend is even encouraged by the European Parliament.[71] The point here is not to call into question the merit of involving civil society in the implementation of EU FTAs. It is to highlight the sharp – and questionable? – contrast it creates with the weak parliamentary dimension, whereas nothing in the EU Treaties – including in Articles 10 and 11 TEU – seems to justify this imbalance between participatory and representative democracy. In any case, this conclusion needs to be nuanced since the means of action the European Parliament and civil society organisations have, go beyond what the EU FTAs provide for. These actors can also use "classical" powers and means offered by EU Law understood more broadly. From this point of view, there is, to some extent, a rebalance towards representative democracy.

3. Democracy beyond EU FTAs: A rebalance towards representative democracy

Beyond what EU FTAs state, EU Law provides the European Parliament, European citizens and civil society organisations with various tools that let them monitor and/or actively participate in the implementation of EU international agreements generally – including EU FTAs specifically. To some extent, these instruments result in rebalancing the above-studied gap between participatory and representative democracy. Indeed, whereas the involvement of European citizens and civil society is, overall, fragile from that perspective (III.1), the involvement of the European Parliament is more obvious (III.2).

III.1. A fragile involvement of European citizens and Civil society

The EU Treaties provide for an array of instruments that "feed participatory democracy"[72] in general and may be used by European citizens and civil society organisations to get involved in the implementation of EU FTAs specifically. However, their exercise is not straightforward and their success is not guaranteed. In any case, practice shows that, at least for now, these instruments have rarely – or never – been used.

First of all, there are "means by which European citizens are enabled to exercise [by themselves] their direct civic rights",[73] which include the right to address a petition to the European Parliament, the right to submit a complaint to the European Ombudsman, and the European Citizens' Initiative. According to Articles 20(2)(d), 24, and 227 TFEU, European citizens have the *right to address a petition to the European Parliament* "on a matter which comes within the Union's field of activity." The petition is therefore "an important way for individuals to be formally heard and their concerns considered within the institutions of the

---

[71] See e.g. European Parliament non-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, para. 19.

[72] We translated from « nourrissent la démocratie participative » *in* C. FLAESCH-MOUGIN, « Commerce et démocratie – Quelques réflexions sur l'ère post-Lisbonne », above-cited.

[73] Opinion of Advocate General JÄÄSKINEN delivered on 17 July 2014 *in* Case C-261/13 P, *Peter Schönberger v. European Parliament*¸ pt. 30.

EU."[74] Nevertheless, the outcome is uncertain and the petitioner has no other choice than accepting the decision made by the PETI committee – which can be negative – since the European Parliament "has a broad discretion, of a political nature, as regards how [a petition that meets the conditions laid down in Article 227 TFEU] should be dealt with."[75] In any case, whereas the FTAs negotiations have been subject to a great amount of petitions,[76] their implementation has obviously not. To the best of our knowledge,[77] only one petition has been addressed to the Parliament regarding specifically the implementation EU FTAs. It concerned the EU-Colombia/Peru agreement and requested that this agreement be renegotiated "in order to ensure social rights, respect for the environment, and lawfulness".[78] Besides the right of petition, Article 228 TFEU allows European citizens to *submit a complaint to the European Ombudsman* concerning "instances of maladministration in the activities of the Union institutions (…)." In view of this definition, the possibilities to submit a complaint regarding the implementation of FTAs are rather limited. Beyond transparency and access to documents issues,[79] one may imagine that the lack of reaction from the European Commission – e.g. the launch of consultations with a view to trade sanctions – in spite of human rights violation by the partner country could be considered as maladministration.[80] In any case, to the best of our knowledge, no complaint has been submitted to the Ombudsman regarding specifically the implementation of free trade agreements. The closest – and only – case concerned a complaint regarding the application by Germany of the EU-Ukraine visa facilitation agreement.[81] In addition to these two first tools, European Citizens may also submit a *European Citizens' Initiative* (ECI) in order to invite "the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties" (Article 11(4) TEU).

[74] European Parliament, Report on the deliberations of the Committee on Petitions during the parliamentary year 1999-2000, A5-0162/2000, p. 9.

[75] ECJ, Grand Chamber, 9 December 2014, *Peter Schönberger v. European Parliament,* case C-261/13 P, ECLI:EU:C:2014:2423, para. 24.

[76] C. RAPOPORT, « La participation du public à l'élaboration des partenariats transatlantiques », above-cited.

[77] See the webpage of the European Parliament dedicated to Petitions https://petiport.secure.europarl.europa.eu/petitions/en/home.

[78] Petition No 1994/2014 by F. M. (Italian) on renegotiating the free trade agreement between the European Union and Columbia and Peru. We only found two other similar cases that concerned EU-Ukraine and EU-Israel association agreements. Petitioners called for the suspension of the agreement or for an appropriate response from the EU, following alleged human rights violations by the partner country. See petition No 0540/2016 by S.V.D. (Ukrainian/Romanian), on behalf of the company Industrial Export SA, on measures to monitor and control implementation of the Association Agreement by the state of Ukraine; petition 0362/2013 by C.V. (French) on the suspension of EU-Israel Agreement.

[79] On the basis of Regulation (EC) n° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L 145, 31.05.2001, p. 43. This issue has already been raised during the negotiations of FTAs, in particular the EU- Korea FTA. See decision of the Ombudsman closing his inquiry into complaint 1302/2009/TS against the European Commission, 15 December 2010.*

[80] In the context of the negotiations of the EU-Vietnam FTA, the Ombudsman concluded that the Commission's failure to carry out a specific human rights assessment, in relation to Vietnam – whereas there were serious concerns regarding the protection of the human rights in Vietnam – constituted maladministration (Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26.02.2016).

[81] Case 851/2011/(BEH)KM against the European Commission.

Legally speaking, the ECI is likely to be used to influence the implementation of an FTA – including its suspension or its termination.[82] For instance, European citizens could submit an ECI to request the adoption of a decision pursuant to Article 218(9) TFEU, i.e. a decision "suspending application of an agreement [or] establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement." Indeed, as requested by the 'ECI Regulation',[83] decisions adopted on the basis of Article 218(9) TFEU are 'legal acts' (as understood in Article 288 TFEU) subject to a proposal from the European Commission. European citizens should also be able to submit an ECI to ask for the termination of an FTA. Indeed, according to the rule of parallelism of forms, the procedure for terminating an International Agreement shall follow the procedure for concluding it. Therefore, since the procedure for concluding International Agreements is subject to the ECI, as detailed by the General Court in the *Efler* case,[84] the same should apply to the termination process. As a matter of fact, the European Commission *did* register in 2012 an ECI that requested the termination of the European Community-Switzerland Agreement on the Free Movement of Persons signed in 1999.[85] Despite these legal possibilities, using an ECI to influence the implementation of an FTA may not be always appropriate in practice. Regarding for instance the Council decisions establishing the EU position to be adopted in a treaty body (Article 218(9) TFEU), their technical nature may not be of great popularity, which may hinder the gathering of one million statements. [86] Even if the ECI is registered, the citizens have no legal guarantee that their request will actually be successful since the European Commission is not bound to take any action.[87] Above all, even if the European Commission takes an action, the success of the ECI would not only require the adoption of the EU position according to Article 218(9) TFEU. It would also require convincing the partner country so that the content of the ECI can actually be reflected in the decision that will finally be adopted by the treaty body...In any

[82] See in this regard. L-M. CHAUVEL, "The Role of the European Citizens' Initiative in FTA Negotiation and Implementation", *to be published.*

[83] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.03.2011, p. 1; replaced by Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130, 17.05.2019, p. 55 (this latter regulation shall apply from 1 January 2020). According to Article 4(2)(b) of the ECI Regulation, the European Commission will not register the ECI if it "manifestly fall[s] outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the treaties."

[84] General Court, 10 May 2017, Case T-754/14 *Michael Efler v. Commission,* ECLI:EU:T:2017:323. The General Court asserted that the ECI can be used to invite the European Commission to open or to close the negotiations of a free-trade agreement. On this case, see e.g. L-M. CHAUVEL, "The Role of the European Citizens' Initiative in FTA Negotiation and Implementation", *to be published;* A. KARATZIA, "New Developments in the Context of the European Citizens' Initiative: General Court rules on 'Stop TTIP'", *EU Law Analysis,* 18 May 2017; C. DELCOURT, « Le tribunal ouvre la voie à une reactivation de l'initiative citoyenne "Stop TTIP" », *RTDEur,* 3/2017, p. 597; M. INGLESE, "Positioning *Efler* in the Current Narrative European Citizens' Initiative", *European Papers*, 2017/2.

[85] ECI(2012)000015, *Kündigung Personenfreizügigkeit Schweiz*. This ECI was withdrawn in 2013.

[86] See, in this regard, L-M. CHAUVEL, "The Role of the European Citizens' Initiative in FTA Negotiation and Implementation", *to be published.*

[87] Article 10(1)(c) ECI Regulation. It shall only, "within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action."

case, to date, no ECI regarding the implementation of an FTA has been submitted. The 'Stop TTIP' Initiative therefore remains, for the moment, the only ECI on trade matters.

Second of all, the TEU also provides for instruments of participatory democracy which are triggered by the EU institutions. Article 11 TEU more precisely states that the European Commission shall "maintain an open, transparent and regular dialogue with representative associations and civil society", and shall "carry out broad consultations with parties concerned (…)." Given its wide wording, this provision shall apply to issues related to the implementation of EU FTAs. As a matter of fact, from December 2016 to March 2017, the European Commission organised a public consultation on the implementation of the EU- South Korea Free Trade Agreement, regarding notably the sustainable development dimension.[88] In April 2019, the European Commission carried out a Civil Society Dialogue on Trade and Sustainable Development, with a view to ensure a more effective implementation and enforcement of the TSD Chapter of EU trade agreements.[89] In the end, public consultations and dialogue with civil society seem to be the most privileged instruments of participatory democracy even if their actual impact on the implementation of EU FTAs is hard to assess.

Overall, EU Law undeniably provides for instruments of participatory democracy that *can be used* when EU FTAs are being implemented. Nevertheless, these instruments are not necessarily easy to activate, they are non-legally binding, and their actual impact on the implementation of EU FTAs is not obvious. To date, they *have rarely – or not – been used in practice.* Therefore, the involvement of European citizens and civil society organisations remains, for now, quite fragile. The conclusion is different regarding the involvement of the European Parliament.

III.2. An obvious involvement of the European Parliament

Whereas the new generation of EU FTAs gives the European Parliament a weak – or no – role,[90] this EU institution finds compensation through its traditional powers and means of action that can be specifically used when FTAs are being implemented. It mainly covers four dimensions. First, the European Parliament can – and does – use its *legislative power* anytime the implementation of a FTA requires the adoption of an EU legislative act. As above-mentioned, this situation can raise concerns when the EU legal act is 'dictated' by a FTA joint body which is subject to no parliamentary scrutiny.[91] Such a pattern is nevertheless not systematic and the European Parliament can, in other scenarios, enjoy a full leeway. The recently adopted regulation implementing the bilateral safeguard clauses of the free trade agreements proves it.[92]

---

[88] Available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=227.

[89] Information available at http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11537.

[90] See *supra* 2.1.

[91] See *supra* 2.1.

[92] Regulation (EU) No 2019/287 of the European Parliament and of the Council of 13 February 2019 implementing bilateral safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain trade agreements concluded between the European Union and third countries, *OJ L 53,*

Second, the European Parliament's *budgetary powers* are of indisputable relevance. Indeed, the implementation of EU FTAs implies conducting cooperation programmes with the partner country which may be financed under the External Financing Instruments – i.e. under the EU budget. Consequently, the European Parliament is involved in three regards: it annually co-decides with the Council of the EU the amount of appropriations intended for the concerned headings in the following year's budget; it monitors the implementation of the EU budget through the discharge procedure (Article 319 TFEU); it scrutinizes the European Commission's draft implementing decisions on the financing of these cooperation programmes – the latter being adopted according to the examination procedure.[93] To give a recent example, the Commission Draft Implementing Decision on the financing of the 2019 Partnership Instrument Annual Action Programme for cooperation with third countries includes, among various actions, an 'EU-Republic of Korea Policy Dialogue Support Facility'. The latter is provided with 2 500 000 Euros and is designed to notably help implementing the EU-South Korea FTA, for instance via supporting "the Korean government in its efforts to improve legislative and administrative environment for SMEs in the [Republic of Korea], as this would also benefit the European companies' market access to the [Republic of Korea], and facilitate linkages and internationalisation between SMEs on both sides."[94]

Third, the European Parliament can fully use its *instruments of political scrutiny* and take advantage of its permanent and direct relationship with the European Commission and with the Council. These include *'public instruments'*, such as the adoption of initiative reports and resolutions. In this regard, the European Parliament has already adopted resolutions on the implementation of the EU-South Korea FTA[95], the EU-Colombia/Peru/Ecuador trade agreement,[96] and the Association Agreements with Ukraine,[97] Georgia,[98] and Moldova.[99] This is, for the assembly, an occasion to raise awareness about concerns (e.g. regarding human rights) that can also be directly discussed with the European Commission/Council through debates in the hemicycle or in the INTA committee. No doubt the European Parliament will

22.02.2019, p. 1. See also Regulation (EU) No 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea, *OJ L 145, 31.05.2011, p. 19.*

[93] Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ *L 77, 15.03.2014, p. 95. See also* Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ L 55, 28.02.2011, p. 13 (particularly Articles 10 and 11).*

[94] See the comitology dossier CMTD(2019)0281, Annex 10. For another example, see Annex 12 in the same comitology dossier on the "EU-Malaysia and EU-Singapore Facility" (2 500 000 Euros) designed to notably support the implementation of the EU-Singapore Partnership and Cooperation Agreement and FTA.

[95] European Parliament resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea, P8_TA(2017)0225.

[96] European Parliament resolution of 16 January 2019 on the implementation of the Trade Agreement between the European Union and Colombia and Peru, P8_TA(2019)0031.

[97] European Parliament resolution of 12 December 2018 on the implementation of the EU Association Agreement with Ukraine, P8_TA(2018)0518.

[98] European Parliament resolution of 14 November 2018 on the implementation of the EU Association Agreement with Georgia P8_TA(2018)0457.

[99] European Parliament resolution of 14 November 2018 on the implementation of the EU Association Agreement with Moldova P8_TA(2018)0458.

issue similar reports/resolutions when an assessment of the most recently signed FTAs is possible. Member of the European Parliaments (MEPs) can also use parliamentary questions to get information and express their views about the implementation of EU FTAs. For example, in May 2017, an MEP underlined that South-Korea was lagging behind in implementing the TSD Chapter and in ratifying International Labour Organisation core conventions. He consequently asked if the Commission intended to launch government consultations under the FTA's dispute settlement system in order to address this issue.[100] Beyond these 'public instruments', MEPs can also benefit from *more 'discrete' exchanges* –
e.g. through INTA in camera meetings – and a *privileged dialogue* with the other institutions. This dialogue undoubtedly encompasses the implementation of EU trade agreements. For example, the European Commission committed in the 2010 Framework Agreement to "inform the Council and Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement [including a trade agreement] and of the reasons therefor." [101] The Commission also committed, for international agreements which fall under the consent procedure – i.e. including free trade agreements – to "keep Parliament fully informed before approving modifications to an agreement which are authorised by the Council, by way of derogation, in accordance with Article 218(7) TFEU."[102] The "practical arrangements" that are currently being negotiated between the Commission, the Parliament and the Council regarding their cooperation and information-sharing throughout the process for negotiating and concluding international agreements, [103] may also include provisions on the implementation stage of trade agreements. The channels of communication between the Parliament and the other institutions may therefore be renewed and lead to a better involvement of the European Assembly in the implementation of free trade agreements.

Lastly, the European Parliament relies on its *Parliamentary Diplomacy*[104] to directly monitor the implementation of EU FTAs. This, first of all, covers the traditional *interparliamentary cooperations*, i.e. the permanent dialogue the European Parliament conducts[105] with its counterpart in the partner countries. As above-mentioned,[106] the interparliamentary dialogues with Ukraine, Georgia, and Moldova take place in a Joint Parliamentary Committee set up in compliance with the respective Association Agreements.[107] These JPCs "shall meet and exchange views on all aspects of the relations between the EU and [respectively Ukraine, Georgia, Moldova] arising within the framework

[100] S. SIMON, Question for written answer E-003479-17 to the Commission, "Free Trade Agreement with Korea", 23 May 2017. For another example, see K. KUNEVA, Question for written answer E-000433-17 to the Commission, "Labour rights in the Republic of Korea", 26 January 2017.

[101] Framework Agreement on relations between the European Parliament and the European Commission, *OJ* L 304, 20.11.2010, p. 47, Annex III, para. 8.

[102] *Ibid*, para. 9.

[103] The establishment of such practical arrangements is required by the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, *OJ L 123, 12.05.2016, p. 1, para.* 40.

[104] We understand 'Parliamentary Diplomacy' as the international relations the European Parliament develops with actors which are external to the European Union and its Member States.

[105] Through its standing interparliamentary delegations (Article 212 Rules of Procedure of the EP).

[106] See *supra* 2.1.

[107] The EU-Central America Parliamentary Association Committee has not been set up yet.

of the Association Agreement [including the DCFTA] and any other issues of mutual interest."[108] Regarding the other EU trade partners, the interparliamentary dialogue is conducted through regular meetings between the European Parliament's interparliamentary delegations and their counterparts. According to the 2015 decision of the Conference of Presidents, these interparliamentary delegations shall, on the basis of their geographic areas of responsibility, notably deal with "the assessment of international agreements concluded between the European Union and third countries."[109] This obviously includes EU free-trade agreements and the assessment of their implementation. For instance, the meeting of the EU- Ukraine Parliamentary Association Committee held on 18-19 April 2018 dealt with the implementation of the trade part of the EU-Ukraine Association Agreement. MEP Jaroslaw WALESA "described the (…) DCFTA as an optimal instrument for better trade and investment climate, that is part of a reform process based on good governance. He expressed his expectation that Ukraine would appoint arbitrators for the dispute-settlement process foreseen in the DCFTA and would lift the wood ban."[110] Ukrainian MP Viktor GALASIUK also "highlighted positive trade signals from the DCFTA implementation and huge untapped potential both on the trade side and on the investment side."[111] Such interparliamentary meetings can also be the occasion of inviting other EU institutional actors – e.g. members of the European Commission – and members of the government of the partner country, as was the case during the above-mentioned meeting of the EU-Ukraine JPC.[112] Hence, these meetings are a new source of information as well as a new channel of discussion that strengthens the European Parliament's monitoring over the implementation of FTAs. In addition to interparliamentary cooperations, the EP's International Diplomacy covers *committee missions in the partner countries.*[113] They allow parliamentary committees to meet various actors – e.g. members of parliaments, members of government, civil society organisations –, to directly observe how FTAs are being implemented in the partner countries and to assess what progress could be made. For instance, an INTA delegation was sent to Seoul in May 2016. The committee met with key-interlocutors and stakeholders in Korea regarding the implementation and possible revision of the EU-Korea FTA – e.g. the Deputy Minister for trade negotiations in the Ministry of Trade, Industry and Economy, the European Chamber of Commerce in Korea, and the Korean Automobile Importers & Distributors Association (KAIDA).[114]

Overall, the European Parliament enjoys a wide range of instruments that lead it to monitor and participate in the implementation of EU FTAs. This goes from legislative and

[108] Article 1 of the Rules of procedure of the EU-Ukraine, EU-Georgia and EU-Moldova JPCs.

[109] Article 4, Conference of Presidents Decision of 29 October 2015, "Implementing Provisions governing the work of delegations and missions outside the European Union", PE 422.560/CPG.

[110] Delegation to the EU-Ukraine Parliamentary Association Committee, Draft Minutes of the meeting of 18-19 April 2018, D-UA_PV(2018)181904, p. 3

[111] *Ibid,* p. 6.

[112] See e.g. the presence of M. MINGARELLI (Head of EU Delegation to Ukraine).

[113] When the missions take place outside the EU, the candidate countries, and the EEA countries, they are subject to the above-mentioned Conference of Presidents Decision of 29 October 2015, "Implementing Provisions governing the work of delegations and missions outside the European Union" (Article 21(2)).

[114] European Parliament, INTA Committee, Mission Report following the INTA delegation to South-Korea, 23.5.2016, CR\1095601EN.doc.

budgetary powers to scrutiny instruments and Parliamentary Diplomacy. In practice, the European Parliament fully uses these tools, which creates a contrast with the current fragile involvement of European citizens and civil society organisations.

IV. Conclusion

Exploring the links between Democracy and Trade at the implementation stage of the new generation of EU free trade agreements is no easy task. First, it requires analysing the role of various democratic actors, mainly the European Parliament, European citizens and civil society organisations. Second, it implies examining law, including EU FTAs specifically as well as EU Law more broadly. Third, it entails investigating and assessing practice, which can be particularly delicate, as has notably been underlined regarding the actual impact of domestic advisory groups on the implementation of EU FTAs. In spite of these difficulties, the analysis reveals, on the whole, that the new generation of EU free trade agreements possesses at first sight a multi-faceted, multi-level and multi-speed democratic dimension. EU FTAs themselves create a discrepancy between a weak involvement of the European Parliament and a significant involvement of civil society organisations: they clearly favour participatory democracy over representative democracy. On the contrary, EU Law understood more broadly as well as recent practice rebalance this gap to some extent as they reveal a fragile involvement of European citizens and civil society on the one hand, and an obvious involvement of the European Parliament on the other. In the end, this overall picture softens the fragmented expression of the democratic principles laid down in Articles 10 and 11 TEU: representative and participatory democracy certainly have different features and cannot be put on an equal footing, but they are *both involved* in the implementation of EU FTAs. They form two – unequal but indisputable – pillars of the democratic dimension at the implementation stage of EU FTAs that mirror the active involvement of democratic actors during their negotiations.

This conclusion encourages to extend the analysis. First, it incites to go beyond EU Law and to explore the role of national democratic actors – e.g. national parliaments – in implementing EU FTAs, as provided for in the national constitutional systems. Second, it invites to go beyond EU FTAs and to explore the democratic dimension of EU non-trade agreements. In this regard, it is true that the specific and unprecedented involvement of the European Parliament, European citizens and civil society *during the negotiation* of the new generation of EU FTAs explains why our analysis is focused on *the implementation* of those same agreements. Nevertheless, even if some democratic features are specific to EU FTAs – such as the establishment of domestic advisory groups –, others are cross-cutting issues – such as the use of the European Parliament’s legislative, budgetary and scrutiny powers – that would justify widening the perspective. Enlarging the study beyond EU Law and beyond EU FTAs would therefore result in a global overview of how the principles of representative and participatory democracy apply whenever EU international agreements are being implemented.

Upgrading the Internal Dimension of EU Intellectual Property Rights? Possible Effects of EU NGFTAs on the (Blank) Fair Balance Conundrum

Federico Ferri[1]

I. Introduction

At the heart of the present paper is the growing importance of intellectual property ("IP") and, more specifically, intellectual property rights ("IPRs"), as showed by the evolving EU policy, legislation and case law.

The EU institutions repeatedly underlined that IPRs play a major role for the creativity, innovation and competitiveness of the EU as a global player[2]. IPRs have acquired more relevance in view of ongoing and forthcoming large-scale challenges and are being prioritized in many broad-spectrum multilevel EU strategies addressing core stages of the envisaged transformation of the European society's way of functioning. Just to give a couple of examples, the completion of the Digital Single Market ("DSM") aims at reducing the fragmentation and barriers affecting cross-border online activities and entails the rethinking of the EU's approach to IPRs[3] and to fundamental rights in general. It also thus paves the way for a new governance based on a broader participation "from the bottom", a robust coordination of different internal market sectors, the introduction of standards by means of legislative acts and the need to duly consider different interests/concerns. Similarly, the evolution of artificial intelligence ("AI")[4] will rise concerns in terms of IPRs, as AI "will have enormous technological, economic, and social consequences and is going to transform the way we produce and distribute goods and services, as well as the way we work and live"[5] and is thus expected to impact over IP-related aspects, like ownership and accountability.

Due to likely overlaps between interconnected sectors, substantive and enforcement norms on IPRs frequently come into collision with norms protecting other rights and freedoms. That pushed the ECJ not only to bring into play the Charter of Fundamental Rights ("the Charter") in an ambiguous way, but also to apply the fair balance test without putting forward clear criteria.

At the same time, the EU promotes and enters into multifaceted commitments with third countries in order to achieve IP-related goals. In doing so, the EU also relied on free trade agreements ("EU-FTAs") and, more recently, the so called "new generation free trade

[1] Research Fellow in European Union Law at the University of Bologna, Department of Legal Studies.

[2] In particular, IPRs are crucial for the EU's economy. As reported by the European Commission, according to recent studies "IPRs are one of the principal means through which companies, creators and inventors generate returns on their investment in knowledge and creation. Studies estimate that IPR-intensive sectors account for around 42 % of EU GDP (worth some EUR 5.7 trillion annually), generate 38 % of all jobs, and contribute to as much as 90 % of EU exports". See European Commission, "A balanced IP enforcement system responding to today's societal challenges", COM (2017) 707 final, p. 1.

[3] See, for instance, *European* Commission, "A Digital Single Market Strategy for Europe", COM (2015) 162 final, in particular pp. 6-8.

[4] See, for example, European Commission, "Artificial Intelligence for Europe", COM (2018) 237 final, p. 16. Artificial Intelligence still constitutes a rather new domain, but the EU has already started to analyze how it should be addressed: see European Commission's High-Level Expert Group on Artificial Intelligence, "Draft Ethics Guidelines for Trustworthy AI", 2018.

[5] 'Artificial Intelligence and Intellectual Property: an Interview with Francis Gurry' (WIPO Magazine n. 5/2018).

agreements" ("EU-NGFTAs").[6] In both instances, IP chapters provide for high standards of protection and enforcement of IPRs. Indeed, IPRs are particularly important compared to other rights, since they fall within the scope of rules supporting free and fair trade in a context of digital and technological progress.

Against this background, the paper focuses on how relevant provisions of EU-NGFTAs IP chapters could be used to foster (or further harmonizing) EU IPRs in the internal dynamics. Above all, it is argued that in cases of clashes between IPRs and other fundamental rights those provisions might as well lead the ECJ to update its interpretative approach. The paper presents a circular structure. In Paragraph II the underlying issue is explained. Paragraphs III and IV respectively consider IPRs in EU-NGFTAs and the new relation involving IP and the EU common commercial policy ("CCP"). Options to mitigate or bypass the potential limits originated from the lack of direct effects of recent EU-NGFTAs are illustrated in Paragraph **V.** Finally, in Paragraph VI possible constitutional and substantial effects for the EU and Member States are envisaged. For the sake of clarity, the analysis is not designed to explore the subject matters of IP as a whole (e.g. specific forms of protection and their core manifestations), even though reference will be made mostly to copyright because of its leading role in the framework of the EU law on IP. Likewise, given the very aim of the paper, EU-NGFTAs investment chapters as well as the external implications of EU-NGFTAs IP chapters will not be investigated.

II. The ECJ and IPRs: the Fair Balance Short Circuit

Nowadays IP still remains a rather uncertain expression. However, despite the promotion of IPRs in the EU was long associated to possible risks for the well-functioning of the internal market,[7] two aspects stand out as the EU legislative acts on IP are considered. First, types of protection included in the IP realm are broadening: typical instances such as copyright,[8] trademarks,[9] patents and designs[10] have step by step been sided by other sub-categories of

[6] Reference is primarily made the NGFTAs stressed by the European Commission in the last report on the implementation on EU-FTAs (European Commission, "Individual reports and info sheets on implementation of EU Free Trade Agreements Accompanying the document 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 2017 – 31 December 2017", SWD (2018) 454 final, p. 15. Therefore, the present work mainly focuses on NGFTAs between the EU and the following countries: Canada, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (2017) OJ L 11/23 (CETA): Colombia-Ecuador-Peru, Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (2012) OJ L 354/3; South Korea, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011), OJ L 127/6; Vietnam, Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (2016), L 329/8. For reasons of analytical consistency, see also the texts of the envisaged EU-NGFTAs between Japan (http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684) and Vietnam (http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 accessed on 7 July 2019).

[7] See for example, P. Craig, G. De Burca (eds) *EU Law: Texts, Cases and Materials* (Oxford University Press, 2003), pp. 1088-121.

[8] See in particular Directive 2011/77/EU, 27 September 2011, OJ L 265/1; Directive 2001/29/EC, 22 May 2001, OJ L 167/10; Directive 93/98/EEC, 29 October 1993, OJ L 290/9.

[9] See in particular Directive 2015/2436/EU, 16 December 2015, OJ L 336/1 (Repealing Directive 2008/95/EC).

[10] See in particular Directive 98/71/EC, 13 October 1998, OJ L 298/28.

IP[11] and by "centralized" legal titles.[12] Second, from the 1990s on, IPRs were gradually enhanced, developed and broadened by the EU,[13] with a focus on the exclusive rights of use and reproduction; in this regard, the main piece of legislation on copyright, namely Directive 2001/29/EC, is paradigmatic since it introduces a "defensive" approach in favor of the rights of the authors. To tell the truth, this trend did not result in comprehensive harmonization patterns; multiple different domestic regulations keep existing which cover many aspects of IP and inevitably reduce the level of legal certainty in this field on the European scale. However, the pursuit of a "high level of protection" of IPRs by the EU legislature intersected with the evolution of a variety of needs and sectors and exacerbated conflicts between IPR holders' prerogatives and users' rights: most notably, right to private and personal life, right to protection of personal data, freedom of expression and information, freedom of the arts and sciences, right to education, freedom to conduct business. Not by chance, the ECJ in the last decade has increasingly found itself in the situation of adjudicating on cases characterized by such contrasts.[14]

The case law of the ECJ on this subject is vast and embraces a wide range of individual and collective interests. Nevertheless, one recurring issue comes out which mainly – although not exclusively – concerns the protection of copyright. The ECJ has often resorted to the fair balance test to decide which of the competing rights invoked in certain cases had to prevail.[15] Now, the fair balance is typically encompassed by the proportionality test; as far as IPRs are involved only in a few cases its legal foundation lays in EU legislative acts, with the result that it is up to the ECJ, of necessity, to strike a fair balance.[16] However, it is out of question that in many of those judgments the ECJ failed to provide guidance on how to resolve conflicts by means of the EU law. The (blank) fair balance test was criticized by some scholars[17] because lack of helpful criteria ends up leaving the final word to badly equipped

[11] Trade secrets (Directive 2016/943/EU, 8 June 2016, OJ L 157/1), undisclosed information, website domains and databases, geographical indication (see in particular Regulation 510/2006/EC, 20 March 2006, L 93/12) and plant varieties.

[12] Regulation (EU) 2017/1001, 14 June 2017, OJ L 154/1, and Regulation (EU) 2015/2424, 16 December 2015, OJ L 341/21 (trademark); Regulation (EC) 6/2002, 12 December 2001, OJ L 3/1 (designs and models).

[13] See in particular Directive 2004/48/EC, 29 April 2004, OJ L 157/45.

[14] It was said that the IP case law of the ECJ "has exploded" in this period. M. Husovec, "Intellectual Property Rights and Integration by Conflict: The Past, Present and Future" (2016) 18 Cambridge Yearbook of European Legal Studies, pp. 239-40.

[15] See for example the following recent judgments: ECJ, C-275/06, *Pomusicae*, 29 January 2008, ECLI:EU:C:2008:54; C-324/09, *L'Oréal*, 12 July 2011, ECLI:EU:C:2011:474; C-70/10, *Scarlet Extended*, 24 November 2011, ECLI:EU:C:2011:771; C-360/10, *SABAM*, 16 February 2012, ECLI:EU:C:2012:85; C-461/10, *Bonnier Audio*, 19 April 2012, ECLI:EU:C:2012:219; C-283/11, *Sky Österreich*, 22 January 2013, ECLI:EU:C:2013:28; C-65/12, *Leidseplein Beheer*, 6 February 2014, ECLI:EU:C:2014:49; C-314/12, *UPC Telekabel Wien*, 27 March 2014, E CLI:EU:C:2014:192; C-201/13, *Deckmyn*, 3 September 2014, ECLI:EU:C:2014:2132; C-577/13, *Actavis Group*, 12 March 2015, ECLI:EU:C:2015:165; C-580/13, *Coty Germany*, 16 July 2015, ECLI:EU:C:2015:485; C-170/13, *Huawei Technologies*, 16 July 2015, ECLI:EU:C:2015:477; C-484/14, *Mc Fadden*, 15 September 2016, ECLI:EU:C:2016:689; C-161/17, *Renckhoff*, 7 August 2018, ECLI:EU:C:2018:634; C-149/17, *Bastei Lübbe*, 18 October 2018, ECLI:EU:C:2018:841; C- 469/17, *Funke Medien*, 29 July 2019, ECLI:EU:C:2019:623; C-476/17, *Pelham*, 29 July 2019, ECLI:EU:C:2019:624; C-516/17, *Spiegel online*, 29 July 2019, ECLI:EU:C:2019:625.

[16] E.g. Directive 2001/29 (n 7), rec. 31. References to the need to balance IPRs and other rights and freedoms are contained, for example, in European Commission, "Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights", COM (2017) 708 final.

[17] For further analysis, see P. Oliver, C. Stothers, "Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated?" (2017) 54 Common Market Law Review, pp. 517-66, A. Peukert, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature", in C. Geiger (eds), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), pp. 132-48, C. Sganga, "EU

national courts, to the detriment of legal clarity and the homogeneous application of EU law. On top of that, some negative consequences of this loophole threaten to expand beyond the IPRs sphere, especially if the clash is elevated to a "battlefield" between fundamental rights.[18]

Here it bears highlighting that since their first appearance within the fundamental rights landscape, IPRs have proved controversial. The problem revolves around the limits that protection of intangible outcomes necessarily imposes upon the overall society in a sort of private/public dichotomy. To sum up, "(i)t has not always been obvious to see intellectual property as a fundamental right".[19] Well, as a matter of fact, in recent years the ECJ started to introduce the fundamental right to (the protection of?) intellectual property in its argumentations. The attention is thus to be driven to Article 17(2) of the Charter. Indeed, references to IP in the Charter were not introduced because of o a natural link between this subject and fundamental rights, but mainly due to the growing importance of IP in the (then) Community legislation.[20] Article 17(2) of the Charter is quite an unclear provision; it simply states that intellectual property shall be protected.[21] Above all, it fails to indicate any limit to the right in question, so that the likelihood of abuses by IP right-holders is supposed to increase when IP is dealt with as a fundamental right at EU level. However, Article 17(2) of the Charter is deemed to be a specification of Article 17(1), enshrining everyone's right to (physical) property; accordingly, limits to the latter certainly apply to the former as well. Moreover, the formulation of Article 17(1) was in turn influenced by Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR").[22] Still, while Article 17(2) of the Charter must be read under the lens of the relevant case law of both the Luxembourg

Copyright Law Between Property and Fundamental Rights: a Proposal to Connect the Dots", in R. Caso, F. Giovannella (eds), *Balancing Copyright Law in the Digital Age: Comparative Perspectives* (Springer, 2014), pp. 1-26, G. Anagnostaras, "Balancing Conflicting Fundamental Rights: the Sky Österreich Paradigm" (2013) 38 European Law Review, pp. 111-24, J. Griffiths, "Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law" (2013) 38 European Law Review, pp. 65-78.

[18] It was argued either that fundamental rights might be useful tools to counter the excessive expansion of IPRs – C. Geiger, *Fundamental rights, a Safeguard for the Coherence of Intellectual Property Law?,* in *International Review of Intellectual Property and Competition Law*, 2004, p. 268 – or that human rights are drivers of IP – C. Godt, "Intellectual Property and European Fundamental Rights", in H. W. Micklitz (ed), *Constitutionalization of European Private Law*, (Oxford University Pres, 2014), p. 215 –.

[19] P. Torremans, "Art. 17(2)", in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), p. 494. See also M. Frigo, "Gli standard di tutela dell'UE a confronto con gli standard internazionali: la proprietà intellettuale", in L. S. Rossi (ed) La protezione dei diritti fondamentali: Carta dei diritti UE e standards internazionali. XV Convegno Convegno, Bologna 10-11 giugno 2010 / SIDI, Società italiana di diritto internazionale (Editoriale Scientifica, 2011), p. 155.

[20] See Explanations relating to the Charter of Fundamental Rights, Explanation on Article 17 — Right to property.

[21] While the English version of the Charter includes the expression "shall be", the wording of other linguistic versions looks less imperative: this applies to the French and Italian versions of the Charter: "(l)a proprieté intellectuelles est protégée"; "(l)a proprietà intellettuale è protetta".

[22] See Explanation on Article 17 — Right to property (n 19). For further reference on the topic, see A. Spagnolo, "*Bilanciamento tra libertà d'espressione su internet e tutela del diritto d'autore nella giurisprudenza recente della Corte europea dei diritti umani"* (2013) Federalismi.it, pp. 1-17 <https://federalismi.it/nv14/articolo-documento.cfm?Artid=22426&content=Bilanciamento+tra+libert%25C3%25A0+d%25E2%2580%2599espressione+su+internet+e+tutela+del+diritto+d%25E2%2580%2599autore+nella+giurisprudenza+recente+della+Corte+europea+dei+diritti+umani&content_author=Andrea+Spagnolo> accessed on 7 July 2019; L. R. Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights" (2008) 49 Harvard International Law Journal, pp. 1-52.

and Strasbourg Courts on the right to property, it is believed that its judicial consequences should not be overestimated.[23]

That said, the ECJ used the fair balance test to settle disputes where the fundamental right to IP was opposed to other fundamental rights and freedoms. Even if in those cases the ECJ basically abided by Article 52(1) of the Charter[24] and despite it is doubtless that Article 17(2) does not entail the existence of an absolute right,[25] the frequent implementation of the fair balance test first of all suggests that at the EU level a surreptitious boost to IPRs has occurred. On the one hand, the ECJ is to some extent "reconstructing IP regulation by putting itself in kind of a preregulatory situation", in particular when faced with vague legal provisions.[26] On the other, in the absence of an internal hierarchy in the Charter (and in the ECHR), the ECJ has seized the opportunity to equate the ranks of IPRs and a broad set of rights and freedoms. The point is that in the legal order of many Member States the latter category has generally enjoyed a superior status compared to IPRs.[27] Since IPRs are part of property rights and thus depend on their evolution, it has to be noted that property rights have long been subject to tight limitations justified by national Constitutions and Constitutional Courts, particularly due to the purely domestically-driven "social function" requirement.[28]

With this in mind, it is worthy emphasizing that after a series of judgments in which competing fundamental rights took precedence over the fundamental right to IP the ECJ has progressively reversed course in last few years. Chiefly, Article 17(2) of the Charter has become a counterbalance to reduce, at least in part, the large scope of application of rights and freedoms such as the protection of personal data (*Coty Germany*), the freedom to conduct a business and to receive information (*Mc Fadden*), the right to education (*Renckhoff*), the respect for private and family life (*Bastei Lübbe*). Unfortunately, the ECJ's approach leading to a more favorable orientation to the protection of IPRs has not been accompanied by the identification and application of significant criteria aimed at rendering more clear and

[23] A. Peukert, "Intellectual Property as an End in Itself?" (2011) 33 European Intellectual Property Review", pp. 67-71, C. Geiger, "Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope" (2009) 31 European Intellectual Property Review, pp. 115-16.

[24] The ECJ had implemented this rule years before the adoption of the Charter: ECJ, C-5/88, *Wachauf*, 13 July 1989, 1989 02609, para 18. For a broader analysis on the multilevel evolution of the fair balance test, see G. Pino, "La 'lotta per i diritti fondamentali' in Europa. Integrazione europea, diritti fondamentali e ragionamento giuridico", in I. Trujillo and F. Viola (eds), *Identità, diritti, ragione pubblica in Europa*, Giuffrè, 2007, pp. 109-41.

[25] *Scarlet Extended*, para 43.

[26] J. Drexl, "European and International Intellectual Property Law between Propertization and Regulation: How a Fundamental-Rights Approach Can Mitigate the Tension" (2016) 47 The University of the Pacific Law Review, p. 218 https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1095&context=uoplawreview accessed on 7 July 2019. See also Husovec, *supra* (n 13), pp. 261-62.

[27] That led some scholars to recognize that also in the Charter the status of the right to intellectual property is relatively weaker than the status of other (potentially conflicting) fundamental rights: see for example Torremans (n 18) pp. 489-517.

[28] This approach is particularly evident in Italy, where, according to Article 42 of the Italian Constitution, property is a mere economic right. Quite the same happens in other EU Member States. See Sganga, *supra* (n 16), p. 3 and pp. 9-11. For further analysis, see also R. Bin, *Critica della teoria dei diritti* (FrancoAngeli, 2018), pp. 105-107; G. Ghidini, *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm* (Edward Elgar, 2018), p. 54; F. Polacchini, "Il principio di solidarietà", in L. Mezzetti (ed), *Diritti e Doveri* (Giuffrè, 2013), pp. 242-43; F. López Quetglas, "El derecho a la propriedad privada como derecho fundamental (breve reflexión)" (2006) 39 *Anuario Juridíco y Económico Escurialense*, pp. 335-62, A. Moscarini, *Proprietà privata e tradizioni costituzionali comuni*, Giuffrè, 2006.

predictable the legal assessment behind the fair balance test between the fundamental rights at stake in each case.

III. IPRs in EU-NGFTAs

The importance of IPRs for the EU can be spotted also in the framework of some core initiatives involving third countries. That is not surprising, since a high degree of protection and enforcement of IPRs on the EU side could not be achieved without dedicated interventions in the realm of the external action. In particular, the EU is committed to strengthening IPRs in FTAs.

As is well known, the reference regime for IPRs at international level is represented by the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), which sets forth minimum standards for the regulation of many forms of intellectual property by the WTO members. Some provisions concerning its goals and principles chart the way, to some extent, towards the interplays between IPRs and possibly conflicting rights: chiefly, Article 7 includes the "balance of rights and obligations" within the main objectives of the TRIPS Agreement itself. However, other TRIPS provisions are intended to give priority to IPRs in case of clashes with different rights and freedoms. For brevity, here it should be stressed that, although the TRIPS Agreement opens up to possible limitations to IPRs, it fails to list and illustrate the set of exceptions allowed. Furthermore, while the enforcement of those exceptions ultimately depends on State parties, they are either limited (e.g. Article 17, 26 and 30) or liable to be invoked in very specific cases and in narrow circumstances (e.g. Article 13).

Bearing in mind the above, the minimum standards provisions of the IP chapters of those EU-FTAs are more prescriptive and allow for less flexibility compared to the overall regime of the TRIPS Agreement,[29] which almost does not consider the issues stemming from the evolution of the digital environment. This is typical of the EU-FTAs concluded after 2006, as they incorporate more comprehensive IP chapters.[30] At the root of this shift is the EU's

[29] A detailed analysis on the content of EU-NGFTAs IP chapters can be found in S-J Kang's work. For further considerations on the stronger provisions on IPRs in EU-NGFTAs, see also S. Frankel, "The Fusion of Intellectual Property and Trade", in R. Cooper Dreyfuss, E. Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human Rights* (Cambridge University Press, 2018), p. 103; M. Burri, "The Regulatory Framework for Digital Trade in the Trans-Pacific Partnership Agreement", in P. Roffe, X. Seuba (eds), *Current Alliances in International Intellectual Property Lawmaking: the Emergence and Impact of Mega-Regionals* (CEIPI & ICTSD Paper Series. Global Perspectives and Challenges for the Intellectual Property System, 2017), pp. 76-77 <https://www.ictsd.org/sites/default/files/research/ceipi-ictsd_issue_four_final_0.pdf> accessed on 7 July 2019; C. Geiger, "Multilateralism vs Plurilateralism in International IP Law: Lessons to Be Learned from the Failure of the Anti-Counterfeiting Trade Agreement", in C. Geiger, X. Seuba (eds) *Rethinking International Intellectual Property Law: What Institutional Environment for the Development and Enforcement of IP Law?* (CEIPI & ICTSD Paper Series. Global Perspectives and Challenges for the Intellectual Property System, 2015), p. 45 < https://www.ictsd.org/sites/default/files/research/2015_12_CEIPI-ICTSD_no_1.pdf> accessed on 7 July 2019; T. Jaeger, "The EU Approach to IP Protection in Partnership Agreements", in C. Antons, R. M. Hilty (eds), *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Springer 2015), pp. 171-210; X. Seuba, *The Global Regime of Intellectual Property Rights*, (Cambridge University Press, 2017), p. 175; P. Roffe, "Intellectual Property Chapters in Free Trade agreements: Their Significance and Systemic Implications", in J. Drexl, H. Grosse Ruse-Khan, S. Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: for Better or Worse?* (Springer, 2014), pp. 21-4 and pp. 28-9.

[30] A. Moreland, "Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU?" (2017) 48 International Review of Intellectual Property and Competition Law, pp. 762-63.

strategy for enforcement of intellectual property rights in third countries and the European Commission's "Global Europe" strategy, launched in that period with the intent to move towards the raise of the EU competitiveness worldwide.[31] Basically, the EU "exported" part of its IP internal system, especially by using Directive 2004/48/EC as a benchmark.[32] For instance, IP chapters of recent EU-FTAs, including EU-NGFTAs, may establish a longer- lasting protection for IPRs, recognize and guarantee moral rights of the authors, regulate some topical subjects in detail (e.g. geographical indications) or in a proactive way (e.g. pharmaceuticals), identify the need for safeguarding IPRs as an explicit limit to certain freedoms and obligations (e.g. in the field of e-commerce). Besides, those agreements tend to enhance border measures, provide for award of damages in case of breach of IPRs and contain provisions on civil, administrative and criminal protection mechanisms which may impose stricter obligations than EU secondary law, no less.[33]

In sum, the agreements under consideration represent "a clear TRIPS+ or – as the EU's law enforcement regime is even broader than that of the TRIPS Agreement – acquis communautaire+ logic".[34]

IV. The EU's Exclusive Competence on IPRs in NGFTAs

Another aspect to consider when discussing the evolution of IPRs in EU-NGFTAs is the link between IP and CCP. Until a few years ago, the new version of current Article 207(1) TFEU was quite misleading since the provision states that "commercial aspects of intellectual property" are part of CCP. In *Daiichi Sankyo* the ECJ shed some light over the matter, by following a three-step approach. First, it stated that a EU law act falls within the common commercial policy scope of application if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade held. Second, focusing on the EU IP rules it added that only those with a specific link to international trade are acts capable to integrate the concept of "commercial

[31] European Commission, "Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy", COM (2006) 567 final, p. 6.

[32] As summarized by the European Commission, COM (2015) 162, p. 18 (n 2): "(t)he openness of the European market should be maintained and developed further in the digital sphere. The EU should continue to press for the same openness and effective enforcement of intellectual property rights from our trading partners. Barriers to global digital trade particularly affect European companies since the EU is the world's first exporter of digital services. To that end an ambitious digital trade and investment policy should be further developed including by means of the EU's free trade agreements". From a broader perspective, see also Council of the European Union, doc. 6681/18, Annex, para 16, and European Commission, "Strategy for the protection and enforcement of intellectual property rights in third countries", COM (2014) 389 final.

[33] See also T. Mylly, "Constitutional Functions of EU's Intellectual Property Treaties", in Drexl, Grosse Ruse-Khan, Nadde-Phlix, *supra* (n 28), p. 242. As noted by Geiger, an effect of this last point is that "legislatures are currently desperately looking for ways to introduce new, or to increase existing sanctions for intellectual property infringements, including criminal penalties". C. Geiger, "The Rise of Criminal Enforcement of Intellectual Property Rights…and its Failure in the Context of Copyright Infringements on the Internet", in S. Frankel, D. Gervais (eds), *The Evolution of Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014), p. 116.

[34] Although it was observed that in recent EU-NGFTAs the chosen level of protection of IPRs slightly varies according to the degree of development of the counterpart. P. Mezei, "Acquis Communautaire+: the Copyright Aspects of the EU's Free Trade Agreements" (2019) Social Science Research Network Papers, 2019, pp. 4-8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3321077>.

aspects of intellectual property" in Article 207(1) TFEU. Third, the Court finally concluded that this was the case of the TRIPS Agreement.[35]

Nowadays it can be said that, regardless of the formulation of the provision at stake, the EU's exclusive competence on CCP provided for by Article 3(1) TFEU also absorbs IPRs via the application of Article 207(1) TFEU as one of the main legal bases for the negotiation of NGFTAs. This theory was supported by the *Opinion 2/15* on the EU-Singapore FTA,[36] where the ECJ in practice adapted the *Daiichi Sankyo* findings to the landscape of NGFTAs. The conclusion reached by the Court is even more prominent given that, in its analysis on the connection between the IP chapter of the envisaged EU-Singapore FTA and Article 207(1) TFEU, the reasoning of Advocate General Sharpston was not endorsed in its entirety. While the Advocate General highlighted that certain IPRs, like authors' moral rights, are not commercially-oriented and fall under the shared competence regime,[37] the ECJ found out that all the provisions of the IP chapter of the envisaged agreement refer to "standards of protection of intellectual property rights displaying a degree of homogeneity and thus contribute to their participation on an equal footing in the free trade of goods and services between the European Union and the Republic of Singapore".[38]

Following *Opinion 2/15*, the EU can certainly enjoy more leeway in the negotiations of IP chapters of NGFTAs. It is expected to have better chance to keep securing its thresholds of protection and enforcement of IPRs and to promote more common standards on aspects that have traditionally been subject to different regimes from one Member State to another, as a result of the internal rank of the right to property and IPRs.

V. Fostering the Internal Dimension of EU-IPRs Through NGFTAs?

The high standards of IPRs protection and enforcement pursued by the EU when acting as a single player in the framework of its external action by means of NGFTAs are likely to make a remarkable impact in the internal dimension.

Actually, at first glance one would be led to believe that this is not the case, since recent EU-NGFTAs and draft texts contain a general clause excluding direct effects,[39] meaning that individuals are entitled to invoke treaty rights only by virtue of the international judicial mechanisms specifically set up. Under this perspective national judiciaries would hardly serve as autonomous drivers to further the standards transposed by the EU in NGFTAs. Notwithstanding, lack of direct effect is not meant to play the role of a "paralytic agent" for

[35] ECJ, C-414/11, *Daiichi Sankyo*, 18 July 2013, ECLI:EU:C:2013:520, paras 51-3. Some authors are of the view that the "specific link" test allows the ECJ "a great deal of room for manoeuvre in its application": see M. Cremona, "Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017" (2018) 43 European Constitutional Law Review, p. 242.

[36] ECJ, *Opinion 2/15*, *EU-Singapore FTA*, 16 May 2017, ECLI:EU:C:2017:376, in particular paras 111-30.

[37] *Opinion 2/15*, Opinion of Avocate General Sharpston, 21 December 2016, ECLI:EU:C:2016:992, paras 451-56.

[38] *Opinion 2/15,* para 122. For further analysis see G. Gruni, 'Towards a Sustainable World Trade Law? The Commercial Policy of the European Union After Opinion 2/15 CJEU', in Global Trade and Customs Journal, 2018, pp. 4-12; D. Kleimann, "Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General" (EUI Working Paper RSCAS 2017/23); H. Lenk, "Mixity in EU Foreign Trade Policy Is Here to Stay: Advocate General Sharpston on the Allocation of Competence for the Conclusion of the EU-Singapore Free Trade Agreement" (2017) 2 European Papers, pp. 357-82 <http://www.europeanpapers.eu/en/europeanforum/mixity-in-eu-foreign-trade-policy-is-here-to-stay-ag-sharpston-on-the-allocation-of-competence> accessed on 7 July 2019.

[39] For example, Article 30.6 CETA, Article 16.16 FTA EU-Singapore and Article 23.5 FTA EU-Japan.

the impact of EU-NGFTAs standards when IPRs are invoked within the EU. That is mainly due to the "infra-constitutional" status, in the supranational legal order, of the international agreements concluded by the EU.

In this scenario, international treaties to which the EU is party are binding upon the EU institutions, according to Article 216(2) TFEU. Their provisions form an integral part of the EU legal order,[40] as a consequence of an approach that, to some extent, can be defined as a monist one.[41] However, need for compliance with international agreements does not merely result in validity checks of EU secondary law provisions, especially where agreements lack direct effect. More importantly, international agreements in force in the EU rise the obligation to refer to those norms when interpreting EU (secondary) law. Accordingly, the ECJ is called on to take account of the content of baseline international agreements in order to ensure that any EU act is correctly applied in the case under scrutiny;[42] and even if the ECJ has often followed a self-referential approach when interpreting international law,[43] for the purpose of the principle of consistent interpretation lack of direct effects should be irrelevant.[44] So, whenever the ECJ is confronted with the issue of applying (or not) EU norms on IPRs, it will have to be careful not to disregard the far-reaching standards established by relevant treaty- based rules. Only where appropriate, the ECJ might decide otherwise, should it deem fundamental to protect another core interest of the EU and depending on specific and contingent priorities.[45] From this point of view, it has been said that already when dealing with the TRIPS Agreement the ECJ resolved some conflicts by internalizing the rules of that treaty and subjecting them to its own interpretation, so to create a sort of internal "artificial coherence".[46]

Those obligations bind in a similar way the competent authorities of the Member States in the event of alleged or existing clashes between domestic norms and EU law provisions, as showed also by some ECJ's judgments on the TRIPS Agreement.[47] With a view to respecting the primacy of the EU law over domestic laws and to ensuring that the interpretation of national law is consistent with supranational law, domestic courts would be even more

[40] ECJ, C-431/05, *Merck Genéricos*, 11 September 2007, ECLI:EU:C:2007:496, para 31. The *Merck Genéricos* judgment is particularly relevant, as it refers to the provisions of the TRIPS Agreement.

[41] K. Lenaerts, "Direct Applicability and Direct Effect of International Law in the EU Legal Order", in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds), *The European Union in the World, Essays in Honour of Marc Maresceau*, (Brill, 2014), p. 45; B. Van Vooren, R. A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), p. 231.

[42] ECJ, C-61/94, *Commission v. Germany*, 10 September 1996, ECLI:EU:C:1996:313, para 52, C-286/02, *Bellio F.lli srl*, 1 April 2004, ECLI:EU:C:2004:212, para 33.

[43] F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea* (Giuffrè, 2008), p. 336.

[44] Basing on the customary principle of good faith and the principle of loyal cooperation, this obligation was also recognized where the treaty had been concluded by all the Member States (and third countries) but not by the EU. ECJ, C-308/06, *Intertanko*, 3 June 2008, ECLI:EU:C:2008:312, para 52.

[45] See also R. Bin, "L'interpretazione conforme: due o tre cose che so di lei", in A. Bernardi (eds), *L'interpretazione conforme al diritto dell'Unione europea: profili e limiti di un vincolo problematico. Atti del convegno inaugurale del Dottorato di ricerca "Diritto dell'Unione europea e ordinamenti nazionali del Dipartimento di giurisprudenza dell'Università di Ferrara, Rovigo, 15-16 maggio 2014* (Jovene, 2015), pp. 31- 2.

[46] H. Grosse Ruse Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016), p. 248.

[47] The Court specified that this obligation for national judiciaries arises especially if the international agreement at hand covers sectors that have already been regulated by the EU:

see ECJ, C-300/98, *Parfums Christian Dior*, 14 December 2000, ECLI:EU:C:2000:688, para 47; C-53/96, *Hermès*, 16 June 1998, ECLI:EU:C:1998:292, para 28.

encouraged to trigger the ECJ by referring preliminary rulings,[48] as also relevant provisions of EU-NGFTAs would matter. This is all the more true when domestic courts have to balance IPRs and other rights, including fundamental rights and freedom recognized and guaranteed under the Charter.

VI. Conclusive Considerations

On the basis of the foregoing, the particular nature of EU-NGFTAs is such as to enable the EU to resort to this kind of instruments as an alternative means not only to secure its own rules in trade relationships with third countries, but also to bring about internal harmonization patterns for IP. The already mentioned "TRIPS+/ acquis communautaire+ logic" could be pushed forward by the "quasi EU-only" agreements backed by the ECJ in *Opinion 2/15*. In this way, obstacles capable to hinder the extension of internal harmonization on IPRs,[49] like typical decision making procedures or the lack of an explicit legal basis could be at least in part bypassed.[50] Moreover, the prohibition introduced by Article 207(6) TFEU[51] will not find place, given that it does not apply to IP.[52]

The EU would hence be in a position to overcome some of the gaps characterizing the existing fragmentation of its IP secondary law, thereby compressing Member States' powers in this domain, especially in an attempt to modernize and uniform the overall EU system of IPRs. That would happen in particular if it can be successfully demonstrated that further harmonization in the area of IP is vital to the well functioning of the EU's internal market.[53] In other words, if the development of new archetypes of free movement spaces, like the DSM, warrant a paradigm shift in the way of conceiving IPRs: from rights traditionally bearing an antagonist connotation vis à vis the internal market (and other freedoms) to rights serving new urgent and cross-cutting interests.[54] It seems no coincidence that the brand new Directive on copyright and related rights was adopted to adapt to the Digital Single Market and that it stresses the need for "striking a balance between the fundamental rights laid down in the Charter (…), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property"[55].

[48] This is also one of the consequences of the fact that the ECJ seems to be more demanding with Member States than with the EU institutions when it comes to the obligation to ensure conformity to international law as part of the EU law.

[49] For further references see, *inter alia*, C. Seville, "EU Intellectual Property Law: Exercises in Harmonization", in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union La*w (Oxford University Press, 2015), pp. 691-716; M. van Eechoud, P. Brend Hugenholtz, S, van Gompel, L. Guibaut, N. Helberger (eds) *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Walters Kluwer, 2009).

[50] It should be added that under this point of view EU-NGFTAs agreements are less burdensome than EU international agreements covering only trade aspects of IP, as only in this last case the Council must act unanimously for their negotiation and conclusion according to Article 207(4) TFEU.

[51] Article 207(6) TFEU: "(t)he exercise of the competences conferred by this Article in the field of the common commercial policy shall not (…) lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization". The word "harmonization" should not be interpreted "in a wide and non-technical sense": C. Pitschas, "Economic Partnership Agreements and EU Trade Policy: Objectives, Competences, and Implementation", in Drexl, Grosse Ruse-Khan, Nadde-Phlix, *supra* (n 28).

[52] See also Mylly (n 32) pp. 245-51 (the Author does not consider only "pure" IP treaties, but in his analysis also refers to EU-NGFTAs).

[53] M. Lamping, "Intellectual Property Harmonization in the Name of Trade", in H. Ullrich, R. M. Hilty, M. Lamping, J. Drexl (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer, 2016), p. 336.

[54] On the need to indirectly protect IP in order to safeguard other interests, see also Frigo (n 18).

[55] See Directive 790/2019, especially recital 70.

In sum, the overall system of EU IPRs would also comprise a set of infra-constitutional provisions tending to harmonize some IP issues "from outside" and aimed at implementing – inter alia – supranational strategies for the promotion of a more creative, innovative and competitive Europe.

Accordingly, IP chapters of EU-NGFTAs could produce additional consequences compared to the EU legislative acts currently regulating IP, in the sense that the former would influence the interpretation (and condition the legality) of the latter to the point that EU and national provisions departing from those international standards may no longer be accepted. Therefore, it can be argued that the reference framework of EU-NGFTAs could give fresh impetus to the internal development of IPRs, especially through the action of the ECJ where a balance between conflicting rights is to be struck as the last stage of the proportionality test. In any case, the state of the art and the possible evolutions of the interpretative trends illustrated so far could contribute – for better or worse – to producing the following consequences. First, it is likely that the backbone of an apparently weak norm, such as Article 17(2) of the Charter, will emerge strengthened as it would have better chance to prevail over other norms of the Charter protecting traditional rights and liberties in case of conflict. That may also indirectly reinforce the right to property enshrined in Article 17(1). Second, if the ECJ keeps furthering this approach in the place of the EU legislature (and contrary to the prevailing view expressed by scholars and practitioners)[56] a progressive lessening of the scope of the social function limit in national legal orders would probably occur, thereby fueling the fundamental rights de-politicization process[57] also at national level. Finally, it cannot be excluded that the growing need to protect and enforce at least certain IPRs in order to achieve some of the emerging goals mentioned above will be construed to fit in the wide category of the "general interest" objectives of the EU[58] (considered also in the framework of Article 52(1) of the Charter)[59] to justify limitations on the exercise of other rights and freedoms.

[56] For example, in two recent opinions the Advocate general suggested that the EU legislature is the main responsible for ensuring a fair balance between the competing rights of right holders and users and that, when striking this balance, the European Parliament and the Council enjoy a wide margin of appreciation: See *Pelham* (*supra*, n. 13), Opinion of Advocate general Szprunar, 12 December 2018, ECLI:EU:C:2018:1002, in particular para 94; Spiegel online (*supra*, n. 13), Opinion of Advocate general Szprunar (available in French), 10 January 2019, ECLI:EU:C:2019:16, in particular para 62. See also J Griffiths, "European Union copyright law and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) Funke Medien, (C- 476/17) Pelham GmbH and (C-516/17) Spiegel Online" (2019) 20 ERA Forum – Journal of the Academy of European Law, pp. 35-50 <https://link.springer.com/article/10.1007/s12027-019-00560-2#Fn61> accessed on 7 July 2019; J. Jütte , "Finding Comfort between a Rock and a Hard Place: Advocate General Szpunar on Striking the Balance in Copyright Law" (European Law Blog, 28 February 2019) <https://europeanlawblog.eu/2019/02/28/finding-comfort-between-a-rock-and-a-hard-place-advocate-general-szpunar-on-striking-the-balance-in-copyright-law/> accessed on 7 July 2019. It has to be noted that the recent reform of the EU copyright legislation seems to represent a step forward in this respect.

[57] For further analysis on this aspect, see G. Scaccia, "Proporzionalità e bilanciamento tra diritti nella giurisprudenza delle corti europee" (2017) 8(3) Rivista associazione italiana costituzionalisti, pp. 1-31 <https://www.rivistaaic.it/images/rivista/pdf/7.%203_2017_Scaccia_.pdf> accessed on 7 July 2019.

[58] For further details see G. Bronzini, "La giurisprudenza multilivello dopo Lisbona: alcuni casi difficili" (Europeanrighs.eu, relazioni 14 September 2011), p. 5 <http://www.europeanrights.eu/index.php?funzione=S&op=5&id=620> accessed on 7 July 2019. The "objectives of general interest recognised by the Union" constitute a group of priorities which is meant to be broader than the similar (although different) categories of grounds for limiting fundamental rights construed by the ECJ before the 2000s when addressing the issue of the balance between fundamental under the umbrella of the proportionality principle. See also P. Manzini, "La portata dei diritti garantiti dalla Carta dell'Unione europea: problemi interpretativi dell'art. 52", in L. S. Rossi (ed), *Carta dei diritti fondamentali e Costituzione dell'Unione europea* (Giuffrè, 2002), p. 130.

[59] They include the objectives mentioned in Article 3 TEU and the interests protected by Article 4(1) TEU and Articles 35(3), 36 and 346 TFEU: see Explanations relating to the Charter of Fundamental Rights, Explanation on Article 52 — Scope and interpretation of rights and principles. It was argued that the norms listed in the Explanations do not constitute a closed list: see F. Ferraro, Nicole Lazzerini, "Art. 52. Portata e interpretazione dei diritti e dei principi, in R. Mastroianni, O. Pollicino, S. Allegrezza, E. Pappalardo, O. Razzolini (eds), *Carta dei diritti fondamentali dell'Unione europea* (Giuffrè, 2014), p. 1067.

DATA PROTECTION PROVISIONS IN NEW GENERATION FREE TRADE AGREEMENTS: ADVANTAGES AND CRITICAL ISSUES

Gabriele Rugani[1]

I. Introduction.

In order to foster the expansion of international trade, it is necessary to promote cross- border transfers of personal data, which represent a key reality in a globalized and digitalized economy: free data flows are important not only to big tech firms, such as Google, Amazon, Facebook or Apple, but also to traditional industries, such as automobile manufacturers, banks, hospitals and grocery store chains, which depend on the ability to move data across borders and analyse them in real-time[2]. Moreover, international data transfers also benefit small and medium-size enterprises[3]. However, the need to favour transborder data flows must be balanced with other values and interests, such as, above all, the protection of personal data, which might require the provision of certain conditions and limitations to cross-border data transfers[4].

Therefore, first of all this paper analyses the EU law instruments aimed at reconciling data flows with data protection, which is considered as a fundamental right. Secondly, it highlights the limits of such instruments, in particular of the so-called “adequacy decision” of the EU Commission, which is the preferred one but has been adopted only in few cases: thus, the protection of personal data is often promoted and balanced with data transfers by including data protection provisions in the New Generation Free Trade Agreements (NGFTAs) between the EU and third countries. Thirdly, the paper underlines that also data protection articles in NGFTAs present critical issues: indeed, it is not clear to what extent the Commission is allowed to negotiate provisions that may affect privacy; moreover, the wording of such articles endangers the fundamental right to data protection. Finally, this paper analyses an instrument endorsed by the EU Commission and designed to be inserted in future trade agreements: the “Horizontal provisions for cross-border data flows and for personal data protection”, which might be a step forward in the solution of the abovementioned problems; however, they still present unresolved issues and a significantly different approach from the one of the adequacy decision in balancing the values at stake: data protection is more instrumental to the correction of a market failure rather than a fundamental right of individuals.

II. The Mechanisms to Balance Data Flows and Data Protection Provided by the GDPR.

Reconciling data flows and data protection is one of the main aims of the legal instruments dealing with the processing of information on individuals adopted by the European Union,

---

[1] PhD candidiate in EU Law and International Law, University of Pisa. E-mail address: gabriele.rugani@phd.unipi.it

[2] ROBERT D. ATKINSON, Testimony on *“International Data Flows: Promoting Digital Trade in the 21st Century”* before the House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet, 3 November 2015, http://www2.itif.org/2015-atkinson-international-data-flows.pdf

[3] Ibid.

[4] KRISTINA IRION, SVETLANA YAKOVLEVA, MARIJA BARTL, *“Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements”*, independent study commissioned by BEUC et al., Amsterdam, 13 July 2016, Institute for Information Law (IViR).

and more specifically of the well-known Regulation (EU) 2016/679 "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" (the "General Data Protection Regulation" or GDPR)[5]. According to Whereas n. 101 of the GDPR: "Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined [...]". Thus, Regulation (EU) 2016/679 devotes to "Transfers of personal data to third countries or international organisations" its whole Chapter V (articles 44-50). Actually, Chapter V contains provisions which are similar to the ones of articles 25 and 26 of the previously in force Directive 95/46/EC[6]; nevertheless, the Directive as such was not enough to harmonize the standards of the Member States in ensuring the protection of personal data of EU citizens, including when data were transferred outside the EU[7]. For this reason, as part of the strategy to create a Digital Single Market for Europe, which was adopted in 2015[8], was reviewed in 2017[9] and is aimed at complementing the single market for goods and services, the Commission decided to transform the data Directive into a Regulation[10]. Accordingly, such Regulation contains much more detailed and improved provisions if compared to the ones of the Directive, and this is also true for the articles concerning data transfers.

In particular, Chapter V provides a legal framework which is structured on two levels. First of all, one way to balance the promotion of data flows and the protection of personal data is on the basis of a Commission "*adequacy decision*": according to article 45 paragraph 1 of the GDPR, "A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an *adequate level of protection*". Moreover, article 45 paragraph 2 outlines the factors to be taken into account by the Commission when assessing the adequacy of other country's privacy regimes, including the existence of the rule of law; legislation, including public security, national security, criminal law; whether there are effectively enforceable rights including administrative and judicial redress for data subjects[11]; the existence and effective functioning of independent supervisory authorities[12]; and any international commitments

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council *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)*, of 27 April 2016, OJ L 119, 4 May 2016, p. 1-88.

[6] Directive 95/46/EC of the European Parliament and of the Council *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, of 24 October 1995, OJ L 281, 23 November 1995, p. 31-50.

[7] ROBERT WOLFE, "*Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP*", World Trade Review, Volume 18, 2019, p. 63-84.

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 6 May 2015, COM/2015/192 final.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the Mid-Term Review on the implementation of the Digital Single Market Strategy - A Connected Digital Single Market for All*, 10 May 2017, COM/2017/228 final.

[10] ROBERT WOLFE, "*Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP*", World Trade Review, Volume 18, 2019, p. 63-84.

[11] Regulation (EU) 2016/679, article 45, paragraph 2, letter a).

[12] Regulation (EU) 2016/679, article 45, paragraph 2, letter b).

entered into by the third country[13]. The adequacy decision is adopted by means of implementing act and is subject to a periodic review, at least every four years, which shall take into account all relevant developments[14]; furthermore, if necessary, the Commission shall repeal, amend or suspend the adequacy decision[15]. It is important to underline that, according to the case law of the Court of Justice of the EU and in particular to the "Schrems ruling", the word "adequate" admittedly means that a third country cannot be required to ensure a level of protection "identical" to that guaranteed in the EU legal order. Nevertheless, the expression "adequate level of protection" must be understood as requiring the third country to ensure a level of protection of fundamental rights and freedoms that is "essentially equivalent" to that guaranteed within the EU. If there were no such requirement, the high level of protection guaranteed by EU data protection legal instruments read in the light of the Charter of Fundamental Rights of the EU, and in particular of its article 8 which is devoted to the right to the protection of personal data[16], could easily be circumvented by transfers of personal data from the EU to third countries[17].

However, when there is no adequacy decision, articles 46 and following describe alternative mechanisms to transfer personal data to non-EU countries, taking into account the need to protect such data. Obviously, particular conditions must be met. According to article 46 paragraph 1, in the absence of an adequacy decision, "a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided *appropriate safeguards*, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available". Such "appropriate safeguards" are listed in article 46 paragraph 2: the main ones are binding corporate rules (BCRs)[18], standard contractual clauses (SCCs)[19], approved codes of conduct[20] and approved certification mechanisms[21]. Finally, if there is no adequacy decision and there are no appropriate safeguards, data transfers may be based on so-called "derogations for specific situations", listed in article 49. The most important ones are: explicit consent by the data subject[22]; transfers necessary for the performance of a contract between the data subject and the controller[23]; transfers necessary for important reasons of public interest[24]; transfers necessary for the establishment, exercise or defence of legal claims[25]; transfers necessary in order to protect the vital interests of the data subject or of other persons[26].

From such analysis of the EU legal framework, it is evident that the EU has created a "data realm" where personal data protection is a top priority and must be ensured under human

[13] Regulation (EU) 2016/679, article 45, paragraph 2, letter c).

[14] Regulation (EU) 2016/679, article 45, paragraph 3.

[15] Regulation (EU) 2016/679, article 45, paragraph 5.

[16] According to article 8 paragraph 1 of the Charter of Fundamental Rights of the European Union: "Everyone has the right to the protection of personal data concerning him or her".

[17] Court of Justice of the European Union, Judgment of 6 October 2015, Case C-362/2014, *Maximillian Schrems v Data Protection Commissioner*, paragraph 73.

[18] Regulation (EU) 2016/679, article 46, paragraph 2, letter b) and article 47.

[19] Regulation (EU) 2016/679, article 46, paragraph 2, letter c) and letter d).

[20] Regulation (EU) 2016/679, article 46, paragraph 2, letter e).

[21] Regulation (EU) 2016/679, article 46, paragraph 2, letter f).

[22] Regulation (EU) 2016/679, article 49, paragraph 1, letter a).

[23] Regulation (EU) 2016/679, article 49, paragraph 1, letter b).

[24] Regulation (EU) 2016/679, article 49, paragraph 1, letter d).

[25] Regulation (EU) 2016/679, article 49, paragraph 1, letter e).

[26] Regulation (EU) 2016/679, article 49, paragraph 1, letter f).

rights law[27]. Moreover, the intention is not only to guarantee a high standard of protection within the EU, but also to export such standard and bring other countries under its "realm" through incentives or coercion[28]. Since the transfers of personal data pertaining to an EU individual are only possible if the third country ensures a data protection standard which is very similar to the one provided by EU law, such transfers can be seen as the link to apply EU data protection law indirectly to other States[29]. This might be considered as an aspect of the so-called "Brussels effect": the EU unilaterally influences third countries' regulations through its central position in global economy[30]. In particular, if a non-EU country wishes to allow entities within its territory to maintain access to the EU market, such State will have to legislate EU-conformant data protection laws[31], which will concern not only personal data coming from Europe, but every kind of personal data: since separating non-EU data from EU data is difficult[32], or at least very costly[33], the best solution is to adopt the "highest common denominator"[34], represented by the European standard, and to treat all data as if it originated in the EU[35].

Therefore, through the instruments provided by the GDPR, and in particular through the adequacy decision, the EU spreads its data protection regulation to global economic partners[36] and projects its data protection laws globally[37]. Furthermore, it is essential to highlight that exporting standards based on the consideration of data protection as a fundamental right is not only important as a matter of principle, but it also responds to economic and commercial needs: indeed, it confers and incredible competitive advantage to EU enterprises, which can maintain their approach, while foreign companies are often forced to amend their business practices and to adjust their global operations in order to conform to the most demanding EU standards[38].

[27] SUSAN ARIEL AARONSON, PATRICK LEBLOND, "*Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*", Journal of International Economic Law, Volume 21, Issue 2, June 2018, p. 245-272, https://doi.org/10.1093/jiel/jgy019

[28] Ibid.

[29] CHRISTOPHER KUNER, "*Transborder Data Flows and Data Privacy Law*", Oxford University Press, Oxford, 2013, p. 125; CHRISTOPHER KUNER, "*Reality and Illusion in EU Data Transfer Regulation Post Schrems*", German Law Journal, Volume 18, 2017, p. 881-918.

[30] ANU BRADFORD, "*The Brussels Effect*", Northwestern University Law Review, Volume 107, 2012, p. 1-68.

[31] CORIEN PRINS, "*Should ICT Regulation be Undertaken at an International Level?*", in BERT-JAAP KOOPS, et al. (eds.), "*Starting Points for ICT Regulation. Deconstructing Prevalent Policy One-Liners*", T.M.C. Asser Press, The Hague, 2006, p. 172.

[32] ANU BRADFORD, "*The Brussels Effect*", Northwestern University Law Review, Volume 107, 2012, p. 1-68.

[33] DAVID BACH, ABRAHAM L. NEWMAN, "*The European regulatory state and global public policy: micro-institutions, macro-influence*", Journal of European Public Policy, Volume 14, Issue 6, 2007, p. 827-846.

[34] KENNETH A. BAMBERGER, DEIRDE K. MULLIGAN, "*Privacy on the books and on the ground*", Stanford Law Review, Volume 63, 2011, p. 247-316.

[35] BRANDON MITCHENER, "*Standard Bearers: Increasingly, Rules of Global Economy Are Set in Brussels*", Wall Street Journal, 23 April 2002.

[36] MICHAEL D. BIRNHACK, "*The EU Data Protection Directive: An engine of a global regime*", Computer Law and Security Report, Volume 24, 2008, p. 508-520.

[37] WILLIAM HÖGLUND, "*Exporting data protection law. The extraterritorial reach of the GDPR*", Independent Thesis Advanced Level, Umeå University, 2019.

[38] ANU BRADFORD, "*The Brussels Effect*", Northwestern University Law Review, Volume 107, 2012, p. 1-68

III. The Limits of the Instruments Provided by the GDPR and the Consequential Inclusion of Data Protection Provisions in New Generation Free Trade Agreements.

Obviously, the adequacy decision is the most preferable among the instruments provided by the GDPR: it is the least expensive, the most complete and the simplest one. Indeed, the "appropriate safeguards" present serious critical aspects: for example, BCRs involve a lengthy implementation and approval process, while also contracts have proven unwieldy, as they must be designed to deal *ex post* with all possible data transfers[39]. Moreover, even the "derogations for specific situations" have not proven suitable for enterprises transferring personal data outside the EU: for instance, it is not enough for the consent to be "explicit", since the data subject needs to be "informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards"; the necessity for performance of a contract is limited as a basis for data transfers, since in many cases the controller will not have a contract with a data subject; and the ability to transfer data outside the EU pursuant to a legitimate interest is heavily circumscribed and cannot be used for frequent and massive data transfers[40].

However, even if the adequacy decision is by far the best instrument available, it has its limits as well, since only thirteen countries have been recognized as "ensuring an adequate level of protection". In particular, these decisions only concern countries that are closely integrated with the EU and its Member States[41], such as Switzerland, Andorra, Faeroe Islands, Guernsey, Jersey and Isle of Man; countries that have a pioneering role in developing data protection laws in their region[42], such as New Zealand and Uruguay; and important trading partners of the EU[43], such as Argentina, Canada, Israel, United States and, since January 2019, Japan[44]. In the near future, the EU Commission will actively engage to adopt adequacy decisions concerning other key trading partners in East and South-East Asia, such as India; countries in Latin America, in particular MERCOSUR; and the European neighbourhood[45]. Nevertheless, adequacy findings could take years and they might not succeed.

Therefore, the instruments enshrined in Chapter V of the GDPR, which are aimed at balancing the need to promote data transfers with the interest in protecting personal data, are affected by significant weaknesses. A possible solution to such weaknesses is including provisions affecting directly or indirectly data flows and data protection in the New Generation Free Trade Agreements negotiated and concluded between the EU and third countries. One of the most relevant examples is represented by the CETA (Comprehensive Economic and Trade Agreement), a freshly negotiated NGFTA between the EU and

[39] AADITYA MATTOO, JOSHUA P. MELTZER, "*International Data Flows and Privacy: The Conflict and Its Resolution*", Journal of International Economic Law, Volume 21, Issue 4, December 2018, p. 769- 789, https://doi.org/10.1093/jiel/jgy044

[40] AADITYA MATTOO, JOSHUA P. MELTZER, "*International Data Flows and Privacy: The Conflict and Its Resolution*", Journal of International Economic Law, Volume 21, Issue 4, December 2018, p. 769- 789, https://doi.org/10.1093/jiel/jgy044

[41] Communication from the Commission to the European Parliament and the Council, *Exchanging and Protecting Personal Data in a Globalised World*, 10 January 2017, COM/2017/07 final.

[42] Ibid.

[43] Ibid.

[44] Commission Implementing Decision (EU) 2019/419 *pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information*, of 23 January 2019, OJ L 76, 19 March 2019, p. 1-58.

[45] Communication from the Commission to the European Parliament and the Council, *Exchanging and Protecting Personal Data in a Globalised World*, 10 January 2017, COM/2017/07 final.

Canada[46], and by its article 13.15, which is devoted to "Transfer and processing of information". In particular, such provision is inserted in the Chapter on "Financial Services" (Chapter 13), which are defined as services "of a financial nature, including insurance and insurance-related services, banking and other financial services […]" (article 13.1). Indeed, the sector at stake is one of the most pertinent for the digital economy[47], but it is also one of the sectors which raises most concerns, since surveys demonstrate that the public is particularly worried by the processing of personal financial data: most people understand that financial transactions are becoming more traceable over the time and they tend to feel that the protection of confidential information and the security of transactions are not sufficiently guaranteed[48]. Therefore, article 13.15 of the CETA provides that "Each Party shall maintain *adequate safeguards* to protect privacy, in particular with regard to the transfer of personal information".

Furthermore, it is possible to notice similar articles in the sections devoted to "Financial Services" of other agreements: some examples are article 7.43 of the Free Trade Agreement concluded with South Korea[49]; article 198 of the Association Agreement concluded with Central America[50]; article 157 of the Trade Agreement concluded with Colombia and Peru[51]; article 129 of the Association Agreement concluded with Ukraine[52]; article 8.54 of the FTA negotiated with Singapore[53]; and article 8.45 of the FTA negotiated with Vietnam[54]. Indeed, all the mentioned articles provide that the parties shall adopt "adequate" (or "appropriate") "safeguards", which are aimed at the protection of personal data: such interest, due to the limits of the adequacy decision, is promoted and balanced with the need to encourage data flows through the provisions included in NGFTAs.

[46] *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, OJ L 11, 14 January 2017, p. 23-1079.

[47] MIRA BURRI, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, University of California Davis Law Review, Volume 51, 2017, p. 65-132.

[48] ALFREDO SOUSA DE JESUS, Data Protection in EU Financial Services, ECRI Research Report No. 6, April 2004.

[49] *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, OJ L 127, 14 May 2011, p. 6-1343. Its article 7.43 letter (b) provides that "Each Party, reaffirming its commitment to protect fundamental rights and freedom of individuals, shall adopt *adequate safeguards* to the protection of privacy, in particular with regard to the transfer of personal data".

[50] *Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other*, OJ L 346, 15 December 2012, p. 3–2621. Its article 198 paragraph 2 provides that "Each Party shall adopt or maintain *adequate safeguards* to the protection of privacy and fundamental rights, and freedom of individuals, in particular with regard to the transfer of personal data".

[51] *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*, OJ L 354, 21 December 2012, p. 3–2607. Its article 157 paragraph 2 provides that "Each Party shall adopt *adequate safeguards* for the protection of the right to privacy and the freedom from inter- ference with the privacy, family, home or correspondence of individuals, in particular with regard to the transfer of personal data".

[52] *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part*, OJ L 161, 29 May 2014, p. 3–2137. Its article 129 paragraph 2 provides that "Each Party shall adopt *adequate safeguards* for the protection of privacy and fundamental rights and the freedom of individuals, in particular with regard to the transfer of personal data".

[53] *Free Trade Agreement between the European Union and the Republic of Singapore*, signed on 19 October 2018, received the consent of the European Parliament on 13 February 2019. Its article 8.54 paragraph 2 provides that "Each Party shall adopt or maintain *appropriate safeguards* to protect privacy and personal data, including individual records and accounts, as long as these safeguards are not used to circumvent the provisions of this Agreement".

[54] *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam*, signed on 30 June 2019. Its article 8.45 paragraph 1 provides that "Each Party shall adopt or maintain *appropriate safeguards* to protect personal data and privacy, including individual records and accounts".

IV. The Problems Arising from the Inclusion of Data Protection Provisions in NGFTAs.

The provisions on the protection of personal data in FTAs are more elaborate if compared, for example, to the 1994 "Understanding on Commitments in Financial Services" ("Understanding")[55], which is a part of the Final Act of the Uruguay Round (but not of the GATS) and represents a voluntary "high" standard of commitments in the financial services sector. The Understanding is a completely different agreement from those analysed so far, since it is multilateral and not bilateral; still, it can be useful for a comparison: its article B.8, in order to counterbalance the provision on the free flow of financial information included in the same article, provides that "Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement". Such article, however, is not formulated as a positive obligation to adopt or maintain safeguards to protect personal data[56]. Instead, the provisions subsequently included in FTAs require the adopted measures protecting privacy and personal data to be "appropriate" or "adequate" (as already mentioned): therefore, in these cases we are in front of positive obligations and there is an evident improvement on the Understanding.

Nevertheless, a more nuanced analysis paints a less positive picture[57]: indeed, the insertion of articles affecting directly or indirectly data transfers and data protection in FTAs presents relevant critical issues. First of all, according to articles 207 and 218 of the Treaty on the Functioning of the EU, international agreements in the area of the common commercial policy are negotiated by the Commission based on the mandates adopted by the Council. The Council's negotiating mandates contain references to several areas, providing, for example, that "The Agreement will include rules to ensure effective and adequate protection and enforcement of intellectual property rights" (Title 7 of the EU-Canada trade negotiating mandate)[58]; however, neither privacy nor data protection are mentioned in such mandates[59]. It is true that, at least according to Title 12 of the EU-Canada trade negotiating mandate, "The Agreement may include provisions regarding other areas related to the economic relationship where, in the course of negotiations, mutual interest was expressed in doing so". Still, it is not clear to what extent the Commission is allowed to negotiate provisions that may have an effect on privacy and data protection[60]. Moreover, since the right to the protection of personal data is a fundamental right of the EU, it cannot be negotiated in trade agreements, as stated by Jean-Claude Juncker in his Political Guidelines; in particular, in 2014, the then President of the Commission declared: "I will not sacrifice Europe's […] data protection standards […] on the altar of free trade. Notably, […] the protection of Europeans' personal data will be non-

[55] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[56] Ibid.

[57] Ibid.

[58] 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*, EU Council Doc 9036/09 EXT 2, 24 April 2009, made public on 15 December 2015.

[59] KRISTINA IRION, SVETLANA YAKOVLEVA, MARIJA BARTL, *"Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements"*, independent study commissioned by BEUC et al., Amsterdam, 13 July 2016, Institute for Information Law (IViR).

[60] GIOVANNI BUTTARELLI (European Data Protection Supervisor), "*Trade agreements and data flows*", joint hearing of the INTA and LIBE committees, European Parliament, Brussels, 16 June 2015.

negotiable for me as Commission President"[61]. Such idea is also embodied in Regulation (EU) 2016/679: as previously mentioned, Chapter V of the GDPR only provides unilateral mechanisms to transfer personal data to non-EU countries, while it makes no reference to provisions in agreements. Thus, dialogues on data protection and trade negotiations with third countries can complement each other but, in principle, must follow separate tracks[62]. The best example of this approach is represented by the case of Japan: on the one hand, as already mentioned, the dialogue on data protection resulted in the adoption of an adequacy decision, in January 2019; on the other hand, the trade negotiations resulted in the conclusion of the Economic Partnership Agreement (EPA)[63], which entered into force on 1 February 2019. The approach of separating the two tracks is the correct one also because, if data protection in Japan deteriorates, the EU can revoke the adequacy status[64]. On the contrary, there are serious doubts concerning the consistency with EU law of the opposite practice of including data protection provisions in FTAs instead of adopting an adequacy decision: indeed, such possibility is not mentioned in the GDPR, neither in the mandates adopted by the Council.

Secondly, there are also critical aspects concerning the wordings of such provisions. Article 13.15 paragraph 2 of the CETA, similarly to the correspondent articles in the agreements with South Korea, Ukraine, Singapore and Vietnam, provides that parties shall maintain "adequate safeguards". In the "Schrems ruling", the Court of Justice gives a strong meaning to the word "adequate", which must be understood as requiring a level of protection of personal data that is "essentially equivalent" to the one guaranteed within the EU. Obviously, the Court interprets in such way the expression "adequate" by reading it in the light of the Charter of Fundamental Rights of the EU. Anyhow, supranational arbitrators can decide that they do not have to read the word "adequate" in the light of the Charter, since the cited trade agreements do not mention it[65]. As a consequence, the notion of "adequacy" in the trade agreements provides a lower protection than the notion of "adequacy" as interpreted in the "Schrems ruling", and under such agreements the abovementioned countries can give personal data of European citizens a lower protection than under the standard set by the EU Court of Justice[66]. More generally, it is true that the articles in FTAs are formulated as positive obligations; but, given the fragmentation of standards on privacy and data protection and the absence of a single reference point, the interpretation of terms such as "adequate" or "appropriate" have no precise obligational content[67]. Therefore, the fundamental right to the protection of personal data, as enshrined in article 8 of the Charter of Nice, is endangered by the text of the provisions at stake.

[61] JEAN-CLAUDE JUNCKER, "*A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*", Political Guidelines for the next European Commission, Strasbourg, 15 July 2014.

[62] European Commission, Press Release, *European Commission endorses provisions for data flows and data protection in EU trade agreements*, 31 January 2018.

[63] *Agreement between the European Union and Japan for an Economic Partnership*, OJ L 330, 27 December 2018, p. 3–899.

[64] VRIJSCHRIFT, "*EU-Japan trade agreement not compatible with EU data protection*", European Digital Rights (EDRi), 10 January 2018, https://edri.org/eu-japan-trade-agreement-eu-data-protection/

[65] ANTE WESSEL, "*CETA will harm our privacy*", Foundation for a Free Information Infrastructure Blog, 15 April 2016, https://blog.ffii.org/ceta-will-harm-our-privacy/

[66] Ibid.

[67] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

V. The “Horizontal Clauses”: a Step Forward.

A partial solution to the analysed problems could be represented by the so-called “Horizontal clauses”. Indeed, the EU Commission has looked for a formula which, on the one hand, advances the EU’s interests when an adequacy decision cannot be reached in parallel to ongoing trade negotiations[68] and, on the other hand, is more consistent with EU law. The work was carried out by a project team guided by the First Vice-President of the Juncker Commission, Frans Timmermans. The result was the endorsement, on 31 January 2018, of the “Horizontal provisions for cross-border data flows and for personal data protection”[69], to be inserted in future trade agreements in place of the “old style” articles. On 9 February 2018, such clauses were appended to a letter from the Commission to the Chair of the Working Party on Information Exchange and Data Protection (DAPIX, a preparatory body of the Council of the EU). In July 2018, in the context of negotiations of the Free Trade Agreement with Indonesia, they were published on the Commission website with some revisions[70].

The Horizontal clauses, if agreed on by the EU Member States, could represent a sort of mandate for the Commission: they could serve as the starting point for talks on provisions to be included in NGFTAs[71], in particular the mentioned one with Indonesia, which has been negotiated since 18 July 2016; but also the one with the Philippines, the negotiations of which were launched on 22 December 2015, the one with MERCOSUR, the negotiations of which were resumed in 2016, and the ones with Australia and New Zealand, the negotiations of which were authorized by the Council of the EU on 22 May 2018.

As regards the content, the Horizontal clauses are aimed at allowing the EU to tackle protectionist practices in third countries and promoting international data transfers, while ensuring that trade agreements cannot be used to challenge the strong EU rules on the protection of personal data[72]. In particular, according to article 1 of such clauses, “The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy”; to that end, cross-border data flows shall not be restricted, for example, by requiring the use of computing facilities or network elements in the Party's territory for processing; requiring the localisation of data in the Party's territory for storage or processing; or prohibiting storage or processing in the territory of the other Party. More important still, according to article 2 paragraph 1, “Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade”; in addition, article 2 paragraph 2 contains a broad exemption for measures that each of the contracting parties deems “appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data”. Such paragraph further stipulates that “nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties’ respective safeguards”: thus, the Proposal foresees a self-judging exception from

[68] European Commission, Press Release, *European Commission endorses provisions for data flows and data protection in EU trade agreements*, 31 January 2018.

[69] European Commission, Press Release, *European Commission endorses provisions for data flows and data protection in EU trade agreements*, 31 January 2018.

[70] http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf

[71] DILETTA DE CICCO, DYLAN GERAETS, CHARLES-ALBERT HELLEPUTTE, PAULETTE VANDER SCHUEREN, “*Exporting EU Privacy Regime Through Trade Instruments?*”, Mayer Brown, 19 March 2018, https://www.mayerbrown.com/exporting-the-eu-privacy-regime-through-trade-instruments-03-19- 2018/#_edn1

[72] European Commission, Press Release, *European Commission endorses provisions for data flows and data protection in EU trade agreements*, 31 January 2018.

the prohibition of data flows restrictions[73]. Furthermore, according to article 2 paragraph 5 of the clauses "For greater certainty, the Investment Court System does not apply to the provisions in Articles 1 and 2": such exclusion of the articles on data flows and data protection from the Investment Court System ensures that data protection issues will be under the jurisdiction of the EU's highest court[74]. Ultimately, the instrument at issue represents without any doubt an improvement on the current framework: in a letter to a member of the European Parliament, the EU Commission wrote even that "These horizontal provisions – once included in future trade and investment agreements – will for the first time provide for a straightforward prohibition of protectionist barriers to cross-border data flows, in full compliance with and without prejudice to the EU's data protection and data privacy rules"[75].

VI. The Divergence Between the Approach of the Adequacy Decision and the One of the "Horizontal Clauses"

In brief: the adequacy decision, which should be the preferred instrument in the EU to balance data transfers and data protection, very often cannot be realistically adopted in parallel to ongoing trade negotiations. The difficulties have been circumvented by including in NGFTAs between the EU and third countries provisions which promote data protection; nevertheless, such practice presents problems of consistency with EU law. Therefore, in 2018 the EU Commission endorsed the Horizontal clauses, to be inserted in future NGFTAs, which are aimed at tackling the main problems of the articles on data protection in trade agreements. Indeed, on the one hand, they give to the Commission a more explicit and clear mandate to negotiate and include in future NGFTAs the provisions at stake; on the other hand, they ensure in such NGFTAs a level of protection of personal data which is higher than the one guaranteed by the articles included in current trade agreements.

Nevertheless, it is important to highlight that also Horizontal provisions present unresolved issues. First of all, the clauses were framed by means of a letter: accordingly, both their exact legal basis and their precise legal *status* remain uncertain[76], since for sure they are not part of the Council's negotiating mandates mentioned in articles 207 and 218 TFEU. Secondly, the provisions must be agreed upon also by the EU Member States[77], in particular when NGFTAs are concluded as mixed agreements, which require the participation of all Members, and not as EU competence only agreements. Thirdly, the consent of the counterparts is required as well: so, it is necessary to verify if and how such clauses will actually be included in NGFTAs. Fourthly, it is essential to ascertain if the Horizontal provisions will have the expected effects and if they will really promote international data flows, while ensuring a high standard of protection of personal data.

[73] DILETTA DE CICCO, DYLAN GERAETS, CHARLES-ALBERT HELLEPUTTE, PAULETTE VANDER SCHUEREN, "*Exporting EU Privacy Regime Through Trade Instruments?*", Mayer Brown, 19 March 2018, https://www.mayerbrown.com/exporting-the-eu-privacy-regime-through-trade-instruments-03-19- 2018/#_edn1

[74] JULIA FIORETTI, "*EU moves to remove barriers to data flows in trade deals*", Reuters, 9 February 2018, https://www.reuters.com/article/us-eu-data-trade/eu-moves-to-remove-barriers-to-data-flows-in-trade-deals-idUSKBN1FT2DC

[75] Ibid.

[76] DILETTA DE CICCO, DYLAN GERAETS, CHARLES-ALBERT HELLEPUTTE, PAULETTE VANDER SCHUEREN, "*Exporting EU Privacy Regime Through Trade Instruments?*", Mayer Brown, 19 March 2018, https://www.mayerbrown.com/exporting-the-eu-privacy-regime-through-trade-instruments-03-19- 2018/#_edn1

[77] Ibid.

Most importantly, however, it is possible to notice right now a significant divergence between the approach of the adequacy decision and the one of the Horizontal provisions. In order to understand such divergence, it is fundamental to highlight that there are two possible ways to look at personal data and at personal data protection: from an individual rights perspective and from an economic perspective[78]. From the individual rights point of view, personal data have intrinsic societal value and the same goes for the right to the protection of personal data, which is considered a "social structural imperative"[79]. From the economic point of view, personal data can be considered as a commodity and an ancillary factor of production of goods and services. Therefore, from such perspective, the protection of personal data is important mainly because it is a key building block of consumers' trust, which is an essential component of contractual relationships in general, and even more so in the context of electronic commerce. Trust is a public good[80] and as such it is a valuable and vulnerable resource the production of which cannot be fully supplied by the market[81]. Accordingly, rules which protect personal data with this purpose in mind have as their primary aim correcting a market failure and the supply of a public good. This stands in contrast to the protection of personal data as a fundamental right, because such protection is not instrumental to some other goal[82].

Obviously, the conception of personal data protection predetermines the desired optimal level of safeguard and consequently the design of the legal framework which balances such protection with data flows. If the protection is granted for its own sake, the level of safeguard tends to be high and the result is a "top-down regulatory design" of personal data transfers: in principle, data flows are prohibited; however, there are some derogations to such prohibition and the level of protection can be lowered, but only to the extent which is necessary to safeguard competing interests[83]. On the contrary, if there is an economic and instrumental goal, then data protection is justified only to the extent necessary to generate and preserve consumers' trust and the result is a "bottom-up regulatory design" of cross-border data flows: the starting point is a theoretical level at which data flows are always allowed and there is no protection; however, it is possible to increase such level, but just enough to achieve the stated objective[84]. Moreover, it is important to underline that trust is a subjective notion, which does not depend on the objective level of control over personal data, but rather on the level of control which is perceived by the consumers: therefore, the risk of an economic-based regulation is to have more an apparent than a true level of protection.

The individual rights perspective of data protection and the "top-down regulatory design" of data flows are embraced, for instance, by the Council of Europe, which in 1981 adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal

[78] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[79] CÉCILE DE TERWANGNE, "*Is a Global Data Protection Regulatory Model Possible?*", in SERGE GUTWIRTH et al. (eds.), "*Reinventing Data Protection?*", Springer, New York, 2009, p. 175-189.

[80] ANTHONY OGUS, "*Regulation: Legal Form and Economic Theory*", Clarendon Press, Oxford, 1994, p. 29.

[81] GEORGE M. COHEN, "*The Negligence-Opportunism Tradeoff in Contract Law*", Hofstra Law Review, Volume 20, Issue 4, 1992, p. 941-1016; HANS-BERND SCHÄFER, CLAUS OTT, "*The Economic Analysis of Civil Law*", Edward Elgar Publishing, Cheltenham, 2000, p. 360.

[82] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[83] Ibid.

Data, commonly known as Convention 108[85]. Indeed, such Convention was integrated by an Additional Protocol[86], which entered into force in 2004 and introduced supplementary provisions on transborder data flows: in particular, article 2 paragraph 1 of the Protocol provides that "Each Party shall provide for the transfer of personal data to a recipient that is subject to the jurisdiction of a State or organisation that is not Party to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer". Instead, paragraph 2 sets two exceptions[87]. Therefore, such legal framework represents a perfect example of "top-down regulatory design": in principle, personal data flows are not allowed; however, it is possible to transfer personal data to third countries if particular conditions are met: in particular, when the State (or organization) "ensures an adequate level of protection" (same wording of the EU law instruments); otherwise, when one of the two exceptions occurs.

The economic perspective of data protection and the "bottom-up regulatory design" of data flows are embraced, for instance, by the Organization for Economic Co-operation and Development (OECD). In 2013, the OECD adopted the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, which are an updated version of the 1980 OECD Guidelines, a non-legally binding (but extremely influential) instrument. One of the major objectives of the OECD being the promotion of the expansion of world trade, this organization has always been worried mainly about the possibility that national provisions could create barriers to the free flow of information, and, in this way, impede growth. Therefore, according to article 17 of the Guidelines, "A Member country should refrain from restricting transborder flows of personal data between itself and another country [...]". Instead, article 18 provides that "Any restrictions to transborder flows of personal data should be proportionate to the risks presented, taking into account the sensitivity of the data, and the purpose and context of the processing". Such legal framework is a paradigmatic "bottom-up regulatory design": the 2013 Guidelines clearly start from a degree of very low, even non- existent, protection and allow members to increase it only as much as is necessary[88]. Obviously, the primary purpose of such approach is to keep restrictions on personal data flows at minimum[89]. However, looking at different areas of the world, there are also other examples of the economic perspective of data protection: in particular, it is possible to mention the 2005 APEC (Asia-Pacific Economic Cooperation) Privacy Framework and its recently updated 2015 version, which treat personal data protection as a potentially harmful

[85] Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)*, which was published in April 1980, adopted by the Committee of Ministers on 17 September 1980, opened for signature in Strasbourg on 28 January 1981 and which entered into force on 1 October 1985.

[86] Council of Europe, *Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows*, which was opened for signature in Strasbourg on 8 November 2001 and which entered into force on 1 July 2004.

[87] Article 2 paragraph 2 of the *Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows* provides that "By way of derogation from paragraph 1 of Article 2 of this Protocol, each Party may allow for the transfer of personal data: a) if domestic law provides for it because of: – specific interests of the data subject, or – legitimate prevailing interests, especially important public interests, or b) if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found adequate by the competent authorities according to domestic law".

[88] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[94] Ibid.

restriction on cross-border data flows[90]. Indeed, the APEC Privacy Framework does not expressly allow restrictions of transnational data transfers to jurisdictions that lack protection for personal data: such flows are only governed by a general principle of "accountability" of the personal information controller[91].

And what about the European Union? Obviously, the EU legal framework on the processing of personal data embraces the individual rights perspective of data protection and the "top-down regulatory design" of data flows: this was true under Directive 95/46/EC and it is even more so under Regulation (EU) 2016/679. Indeed, such instruments adopt a "prohibition with derogations" approach[92]: in principle, data flows to non-EU countries are not allowed. Nevertheless, it is still possible to transfer personal data to such States, but only in specific situations: in particular, in the presence of an adequacy decision, of an appropriate safeguard or of a derogation for specific situations. Therefore, the choice of the EU legal instruments is evident: data protection is a constitutional principle of EU law[93] and personal data must be protected as such, since they have intrinsic societal value. However, the Horizontal provisions endorsed by the EU Commission do not embody at all the same approach, since they represent a clear example of "bottom-up regulatory design". As already mentioned, according to article 1 paragraph 1, "The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties […]"; instead, article 2 paragraph 2 provides an exception from the prohibition of data flows restrictions: the starting point is a situation where data transfers are always permitted and only at a later stage it is possible to increase the protection. Thus, even if the Horizontal provisions would improve the level of data protection in comparison to the articles currently included in NGFTAs, such clauses are the consequence of a conception of personal data which is very different from the one of the GDPR: notwithstanding the fact that article 2 paragraph 1 of the clauses nominally defines the protection of personal data and privacy as a "fundamental right", data are still conceived as a commodity and data protection is only instrumental to generating trust in the consumers. The adequacy decision and the Horizontal provisions represent two completely different ways of balancing data protection and data flows, and such divergence makes unclear the intentions of the EU in the field at stake: on the one hand, the adequacy decision is inspired by the clear purpose of granting a high level of data protection and of exporting such level towards third countries; on the other hand, there is the risk that an economic approach to data protection will enter the scene through the back door of international trade law, and in particular through the Horizonal clauses, undermining the fundamental rights approach to personal data protection[94].

VII. Concluding Remarks

To sum up, it is possible to notice the tendency of the EU to gradually improve and upgrade the level of data protection provided by its international agreements. If compared to

---

[90] LEE A. BYGRAVE, "*Data Privacy Law: An International Perspective*", Oxford University Press, Oxford, 2014, p. 76.

[91] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[92] Ibid.

[93] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of*

the 1994 "Understanding on Commitments in Financial Services", which contains no positive obligation to adopt or maintain safeguards to protect personal data, the post-GATS FTAs concluded by the EU reveal an evolution of provisions mentioning privacy and personal data protection[95]: indeed, the agreements concluded by the EU with Canada, South Korea, Central America, Colombia and Peru, Ukraine, Singapore and Vietnam include positive obligations to adopt "adequate" or "appropriate" safeguards, which are aimed at the protection of personal data. Moreover, if compared to such articles, the Horizontal provisions, designed by the EU Commission in 2018 to be inserted in future NGFTAs, represent a further step forward: indeed, article 2 of the Horizontal clauses provides a self-judging exception from the general prohibition of data flows restriction and it excludes data protection issues from the jurisdiction of the Investment Court System; obviously, the aim is to ensure a standard of protection of personal data which is higher than the one guaranteed by the provisions included in current agreements.

It is interesting to highlight that such tendency of the EU to reinforce data protection in trade agreements has also been criticized by someone for sacrificing too much the need to promote data flows: for example, EU Information Technology (IT) service companies with operations in third countries consider that the broadly phrased exception provided by the Horizontal clauses could undermine the value of having a prohibition of data flows restrictions[96]. Moreover, others believe that such prohibition is not worded strongly enough and should include such concepts and phrases as "non-discriminatory" and "not more trade restrictive than necessary"[97].

However, notwithstanding the improvements in trade agreements from the point of view of data protection, the main problem is still related to the philosophical approach of the EU to personal data: do such data have intrinsic societal value or are they a commodity and an ancillary factor of production of goods and services? Is data protection a fundamental right or is it instrumental to generating trust in the consumers? The EU's internal legal framework leaves no room for doubt and it clearly embraces the human rights perspective. First of all, article 8 of the Charter of Nice recognises the right to the protection of personal data as a fundamental right of the EU. Secondly, the EU legislation on data protection does not use anymore as legal basis a provision on the functioning of the internal market: while Directive 95/46/EC was adopted on the basis of article 100 A of the EC Treaty, aimed at the approximation of the national provisions which had as their object the establishment and functioning of the internal market[98], Regulation (EU) 2016/679 has as its legal basis article 16 of the TFEU; such article, which is one of the innovations of the Lisbon Treaty, reaffirms that "Everyone has the right to the protection of personal data concerning them" (paragraph 1) and

[95] Ibid.

[96] DILETTA DE CICCO, DYLAN GERAETS, CHARLES-ALBERT HELLEPUTTE, PAULETTE VANDER SCHUEREN, "*Exporting EU Privacy Regime Through Trade Instruments?*", Mayer Brown, 19 March 2018, https://www.mayerbrown.com/exporting-the-eu-privacy-regime-through-trade-instruments-03-19- 2018/#_edn1

[97] DILETTA DE CICCO, DYLAN GERAETS, CHARLES-ALBERT HELLEPUTTE, PAULETTE VANDER SCHUEREN, "*Exporting EU Privacy Regime Through Trade Instruments?*", Mayer Brown, 19 March 2018, https://www.mayerbrown.com/exporting-the-eu-privacy-regime-through-trade-instruments-03-19- 2018/#_edn1

[98] After the Maastricht Treaty, article 100 A paragraph 1 of the EC Treaty provided that "By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7a. The Council shall, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

provides that the EU's institutions shall lay down the rules relating to the protection of individuals with regard to the processing of personal data (paragraph 2)[99]: therefore, it is clear that personal data must be protected as such, and not only because their protection is functional to the internal market. Finally, the GDPR adopts a "prohibition with derogations" approach in regulating data flows: in principle, data transfers to third countries are not allowed, but in specific situations it is possible to derogate to the general rule, and such approach is typical of the individual rights perspective of data protection[100]. Moreover, from the analysis of the EU's legal framework, it emerges the intention to export such high standard of data protection to third countries: if non-EU States want to continue targeting the European market, they have to adopt similar data protection legislations. Obviously, this is not only aimed at spreading EU principles and values globally, but also at obtaining an economic and commercial advantage over foreign companies.

Given the above, there is a risk: indeed, the whole individual rights approach might be seriously endangered by the data protection provisions in NGFTAs, including the Horizontal clauses, which nominally define the protection of personal data and privacy as a "fundamental right", but in truth adopt a "bottom-up regulatory design" of data transfers: in principle data flows are allowed, and it is possible to increase the level of protection only as much as is necessary. Obviously, such legal framework is typical of the economic perspective of data protection, which mainly considers data as a commodity. Furthermore, it is also important to underline that the coexistence of the two different ways of balancing data protection and data flows, i.e. the individual rights perspective and the economic perspective, might result in a predominance of the latter at the expense of the former: since at international level FTAs have much stronger enforcement mechanisms than human rights law, this creates a significant risk of a *de facto* supremacy of trade law[101]. Therefore, in conclusion, if the EU wants to remain totally faithful to the approach of the Charter of Nice, of the Treaties and of the GDPR, it should maintain its autonomy to protect privacy and personal data as fundamental rights, not just as instruments to generate consumer's trust[102].

[99] Article 16 paragraph 2 of the TFEU provides that "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities".

[100] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

[101] SARAH JOSEPH, "*Trade Law and Investment Law*", in DINAH SHELTON (ed.), "*The Oxford Handbook of International Human Rights Law*", Oxford University Press, Oxford, 2013, p. 841-870.

[102] SVETLANA YAKOVLEVA, "*Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?*", World Trade Review, Volume 17, Issue 3, July 2018, p. 477-508.

PART II
EXTERNAL ASPECTS: GLOBAL ISSUES AND ARTICULATION WITH MULTILATERAL AGREEMENTS

SUSTAINABLE DEVELOPMENT IN CETA — A WAY TOWARDS REFORMING INTERNATIONAL ECONOMIC LAW?

Kenza Teffahi[1]

I. Introduction

The Comprehensive Economic and Trade Agreement (CETA or "the Agreement") between the European Union (EU) and Canada provisionally entered into force on September 21, 2017, despite controversies surrounding negotiations. Whilst CETA was negotiated, the EU had also started to negotiate the Transatlantic Trade and Investment Partnership (TTIP) with the United States, a far more controversial agreement as per the Civil Society. As a result, Civil Society has started to pay attention to the New Generation of Free Trade Agreements (NGFTAs) negotiated by the EU. CETA has been under the spotlight and the Parties had to modify their initial agreement to take into account the major criticisms.

Looking at the provisions, specifically those relating to non-economic purposes, CETA is perhaps the most ambitious of the NGFTAs so far. Considering its breadth and political importance, the CETA's provisions relating to sustainable development and all references to this notion are a major political stance from both Parties.

The Agreement is composed of thirty Chapters covering traditional economic purposes such as technical barriers to trade, subsidies, custom and trade facilitation; new economic purposes such as intellectual property, telecommunications, electronic commerce and non-economic purposes such as regulatory cooperation, transparency, sustainable development. Since the Lisbon Treaty, the EU has acquired competences over investments, more specifically foreign direct investments[2] (FDI). Hence, CETA is covering the two legs of International Economic Law (IEL): trade and investment.

Although the introduction of sustainable development appeared in the eighteenth-century forestry laws in Central Europe[3], its meaning remains controversial. The 'Brundtland Report'[4] published in 1987, defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It is clear that sustainable development is a multifaceted notion. This broad definition contributed to the understanding of the need to protect non-economic purposes that have been undermined by the current globalization process. Besides, moving forward, in the mid-1990's, several States interpreted sustainable development as being composed of two pillars: economic and environmental[5]. However, in light of the principle of integration, sustainable development is now defined and supported by Agenda 21[6] as constituting at least three pillars, economic,

[1] Student, Université Rennes 1.

2 As clarified by the Opinion 2/15

3 Markus W. Gehring and Andrew Newcombe, 'Chapter 1: An Introduction to Sustainable Development in World Investment Law', in Marie-Claire Cordonier Segger, Markus W. Gehring, et. al., *Sustainable Development in World Investment Law, Global Trade Law Series*, (© Kluwer Law International; Kluwer Law International 2011), at 6.

4 Report of the World commission on Environment and Development: 'Our Common Future' Report, published in 1987, available at: <https://sswm.info/sites/default/files/reference_attachmentsUN%20WCED%201987%20Brundtland%20Report. pdf>, accessed 14 March 2019

5 See P. Reis 'Commerce international, clause sociale et développement durable' in *Le commerce international entre bi- et multilatéralisme (*Larcier, 2010) at 308 « il a fallu attendre le sommet mondial du développement social de Copenhague en 1995 pour que soit expressément ajouté à la notion de développement durable un volet social».

6 Marie-Claire Cordonier Segger and Andrew Newcombe, 'Chapter 6: An Integrated Agenda for Sustainable Development in International Investment Law', in Marie-Claire Cordonier Segger, Markus W. Gehring , et al.,

environmental and social[7]. Regardless of the definition, it is clear that sustainable development must reconcile economic growth with environmental sustainability and the protection of labour rights[8]. Consequently, opening International Economic Law to sustainable development means finding the right balance between opposite interests which leads to compromises as seen in CETA.

Even though there are other aspects in sustainable development, CETA has adopted the three pillars' approach resulting from Agenda 21. Consequently, this article will only focus on those aspects covered by CETA. The aim of this article is to offer a new perspective on how CETA might have set the basis to reforming International Economic Law (IEL) in view of sustainable development objectives and requirements. Since the Agreement is rooted in some recent practices that have emerged in IEL reflecting a reconciliation between economic purposes and sustainable development; it was possible for the Parties to deepen their approach and to clarify some key provisions to safeguard their public interest in relation to the sustainable development components (III). The current multilateral trading system has undermined social and environmental protections to the extent that it has threatened the necessary balance between economic and non-economic purposes. The Agreement tries to offer an alternative to the current rules by creating a more suitable approach of sustainable development in NGFTAs (IV). This observation is also supported by TEU Article 21 which imposes to the EU, the respect and the promotion of its own values in its trade policy (II). CETA might also appear as a model for future NGFTAs thanks to the recent Opinion 1/17 issued by the European Court of justice (V). Thus, CETA unveils a more complex strategy beyond a simple bilateral agreement towards reshaping IEL.

II. Translating Article 21 Within NGFTAs — The CETA Example

According to the TEU Article 21 (2) and (3), the European Commission has to herald "a trade policy that is based on transparency and on European values like sustainable development […]."[9]. Hence, the 'Trade for All' communication has established a roadmap for integrating

Sustainable Development in World Investment Law, Global Trade Law Series, (© Kluwer Law International; Kluwer Law International 2011 at 108 "Agenda 21, emphasized that economic development, social development, and environmental protection are three interdependent and mutually reinforcing 'pillars' of sustainable development."

7 Following the Rio Earth Summit that took place in Rio de Janeiro in 1992 under the framework of the United Nations Conference on Environment and Development (UNCED), see also: H., P., Aust, "Investment Protection and Sustainable Development: What Role for the Law of State Responsibility?" in S. Hindelang, and M. Krajewski (Eds.) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) *Oxford Scholarship Online* at 205, "If there is anything approaching a common denominator between various understandings of the concept, it may be said that contemporary conceptions of sustainable development follow a multi-dimensional approach which aspires to bring together ecological, economic, and social development".

8 J. Anthony VanDuzer, 'Chapter VII: Sustainable Development Provisions in International Trade Treaties What Lessons for International Investment Agreements?' in S. Hindelang, and M. Krajewski (Eds.) *Shiftin Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) Oxford Scholarship Online, at 144, [Sustainable development] "has an economic aspect: achieving sustainable development entails liberalizing trade and investment policy in order to facilitate the access of goods to markets and stimulate foreign investment flows that will generate economic development. But encouraging economic growth must be reconciled with the protection of the natural environment to ensure that future generations can continue to enjoy it as present generations do. Increasingly, however, sustainable development's meaning is considered to be broader than environmental sustainability. Sustainable development is understood as having a social dimension, including the protection of human and labour rights."

9 See: Verena Madner, 'Chapter 15: A New Generation of Trade Agreements: An Opportunity Not to Be Missed?' in Stefan Griller, Walter Obwexer & Erich Vranes, (Eds.) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations,* (Oxford University Press, 2017) at 307, "a trade policy that is based on transparency and on European values like sustainable development; a trade policy that

sustainable development into NGFTAs[10]. Consequently, the European Union is attempting to impose its concept of sustainable development in accordance with the integration principle through its NGFTAs[11]. CETA is a great example of the EU's influence over its partner. Indeed, for Canada, according to the *Canadian Federal Sustainable Development Act*[12], sustainable development is a "development that meets the needs of the past without compromising the ability of future generations to meet their own needs." But nothing has been said on what is actually covered by this notion and if Canada understands sustainable development as composed of three components like the EU. However, looking at the Agreement's approach to sustainable development, it appears as though Canada shares the European Union's vision of sustainable development[13].

An examination of other Free Trade Agreements (FTAs) concluded by Canada again reveals that the EU's influence on the CETA's approach of sustainable development is blatant. For instance, in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership's[14] (CPTPP) preamble[15], the components of sustainable development seem divided into three rather than perceived as a whole. This lack of cohesion between the three elements of the CPTPP illustrates the EU's strong influence on sustainable development negotiations with Canada. Alternately, Canada may have proceeded in this fashion as a result of the strong influence exerted by the United States over Canada. This example highlights the influence of the European Union when it comes to imposing its own values and objectives in encouraging partners to adhere to Article 21 TEU's objectives.

The Agreement reflects the EU's attempt at reconciling non-economic objectives with economic purposes in NGFTAs. The sustainable development approach of the EU followed by CETA is multifaceted and unveils a further, less conspicuous, goal: reforming IEL in compliance with TEU Article 21 paragraph 2 (e, f and h). In so doing, the European Union intends to safeguard the multilateral system while shaping trade and investment towards a more sustainable and fairer globalization based on sustainable development objectives and requirements. The EU has successfully imposed its new vision of trade and investment with Canada but Parties must be cautious not to use the Agreement as an alternative to

will safeguard the European social model at home and address the concerns of those who are afraid to be left behind by globalization"

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions Trade for All Towards a more responsible trade and investment policy COM/2015/0497 final, at 22 "One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy"

11 Stefanie Schacherer, 'The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development' (Christine Kaddous, Ed.), Geneva Jean Monnet Working Paper, 01/2017 (2017) Online: <https://www.ceje.ch/files/9715/1057/7250/Schacherer_Stefanie_FINAL.pdf> at 8-9 "The practice of sustainable development chapters has already been used by the EU in various FTAs prior to the Lisbon Treaty, but the focus here shall be on the so described 'new generation' of comprehensive EU FTAs adopted post-Lisbon. These FTAs, which contain, "in addition to the classical provisions on the reduction of customs duties and of non- tariff barriers to trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development"

12 Federal Sustainable Development Act (S.C. 2008, c. 33)

13 Following the CETA's preamble its Parties understand sustainable development '[...] in its economic, social and environmental dimensions;[…]'

14 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, 2016

15 "[...] PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices.[...] PROTECT and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues; [...]"

multilateralism but rather as a tool to overcoming the current World Trade Organization (WTO) stalemate. By offering a new vision of trade and investment, the Parties expect to respond to previous criticisms while assessing the increased awareness of the drawbacks to globalization.

III. The Catch and Clarification of Past Practices Relating to Sustainable Development — The Founding Principles to Reform the IEL's Current System

A. A 'Codification' of the Most Common Recent PTIAs' Principles

CETA is a great illustration of this phenomenon. It also clearly indicates the ambition of the EU and its partner to settle the basics for the revival of IEL through the codification of recent practices. The taxonomy created by professor VanDuzer[16] recounts the most common provisions relating to sustainable development in recent Preferential Trade and Investment Agreements (PTIAs) as applied to CETA and highlights this codification.

1. 'Provisions Intended to Ensure That Treaty Parties Are Not Prevented by Their Treaty Obligations from Acting to Protect Labour Rights and Environment'[17]

Those appear in different forms in CETA[18]. First, its preamble heralds an active contribution by the Parties to achieve sustainable development through the implementation of the CETA's provisions[19]. Consequently, the Parties will seek to elevate their standards while implementing 'this Agreement in a manner consistent with the enforcement of their labour and environmental laws'. As such, Canada and the EU will also ensure the implementation of sustainable development within their domestic legislations. Plus, the Agreement has 'more specific standards for State treatment of foreign investors that preserve the ability of States to take measures to protect labour rights and the environment'[20]. These provisions preserve the Parties' regulatory space. FDIs are likely to impact the environmental and social pillars leading States to include these types of provisions into their BITs and PTIAs. Parties to the Agreement have done this through the CETA's preamble[21].

The substantial provisions of the Agreement also grant a general right to regulate[22]. Nonetheless, it is an unusual practice to have as many references to the right to regulate in NGFTAs. This highlights the ambition of the Parties to actively restore balance between

16 See J. Anthony VanDuzer, 'Chapter VII: Sustainable Development Provisions in International Trade Treaties What Lessons for International Investment Agreements?' in S. Hindelang, and M. Krajewski (Eds.) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) Oxford Scholarship Online pp. 143-176

17 Following professor VanDuzer's taxonomy

18 The Agreement contains three of those provisions

19 "[...] REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions; […] IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters; […]".

20 Following professor VanDuzer's taxonomy

21 Emphasis added: "RECOGNISING that the provisions of this Agreement *preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives*, such as public health, safety, environment, public morals […];

RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, *without undermining the right of the Parties to regulate in the public interest within their territories*;"

22 Indeed, CETA Articles 8.9, 23.2 and 28.3 are explicitly preserving the right to regulate

investors' rights and the regulatory space of the host State. Additionally, Article 8.9 of the investment Chapter also provides for the Parties' right not to limit sustainable development to its three dedicated Chapters[23]. By preserving the right to regulate, the Parties have effectively circumvented the 'regulatory chill effect'. Furthermore, looking at past awards, arbitral tribunals — particularly through the investors' legitimate expectations — previously used to make the investors' rights prevail over the host State's public welfare, will no longer be in effect as the Parties have imposed a high threshold in recognition of legitimate expectations[24]. In this way, CETA is able to reconcile trade and investment with non-economic purposes[25].

Moreover, like many PTIAs, the Agreement contains 'exclusions to ensure the effectiveness of domestic laws related to labour rights and environmental protection'[26]. Hence, its Article 28.3 indicates that Article XX of the General Agreement on Tariffs and Trade (GATT) is part of CETA. The Parties are allowed to take measures protecting their public welfare, within certain limitations[27]. This is also a manner for the Parties to remain within the multilateral trading system framework by integrating provisions that have emerged from the WTO, and which have attempted to create a derogation justified by public interest.

2. 'Commitments to Ensure the Effectiveness of Domestic Laws Related to Labour rights and Environmental Protection'[28]

The Agreement contains two 'no derogation'[29] clauses[30]. Parties are prevented from lowering their protection of labour rights or the environment under domestic law to attract investment. These clauses will also contribute to achieving sustainable development because Parties will be more willing to pass more protective legislations since 'race to the bottom' has been eliminated. However, the inclusion of these clauses is seen as more of a symbolic gesture as Canada and the EU rarely engage in these kinds of practices. Consequently, the message is directed towards other actors of IEL and supports the idea of a codification of the most common principles relating to sustainable development within the Agreement's provisions.

Also, contained in CETA are 'commitments regarding the enforcement of existing labour and environmental standards in domestic law'[31]. As noted above, in light of the clause prohibiting the lowering of standards, it is not surprising that a provision imposing the enforcement of domestic law has been added[32]. Finally, the Parties have also confirmed a willingness to cooperate on enforcement of labour and environmental standards[33]. These provisions could be a determining factor for reforming the current rules of IEL.

Relying on more "sustainable development friendly" provisions, the Agreement reflects the need to modify the current international economic system in compliance with non-economic

23 CETA Chapters 22: 23 and 24

24 CETA Article 8.9 (2) 'For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.'

25 e.g. Article 21 paragraph 2 f)

26 According to professor VanDuzer's taxonomy

27 i.e 'public security or public morals or to maintain public order; human, animal or plant life or health'

28 Following professor VanDuzer's taxonomy

29 Also called the 'anti-social dumping' and 'anti-environmental dumping' clauses

30 See CETA Articles 23.4 and 24.5 clauses preventing parties from 'weakening or reducing the levels of protection'

31 According to professor VanDuzer's taxonomy

32 Its Articles 23.4 (3) and 24.5 (3) shall ensure the actual enforcement of domestic legislation relating to social standards and the environment

33 See Articles 21.1; 21.3; 22.3; 23.1; 23.7 or 24.12

purposes such as sustainable development without compromising economic purposes. A new paradigm is therefore emerging from CETA for the inclusion of sustainable development into pure economic matters so as to reshape IEL.

B. The Clarification of the Most Controversial Principles — an Attempt to Limit the Arbitrators' Discretion to Facilitate Sustainable Development Achievements

More than a simple codification, the Agreement confines the discretion of arbitrators through more precision. Several provisions, such as Article 8.4, begin with 'for greater certainty' and aid in the clarification of the scope of previous paragraphs so as to prevent arbitrators from ruling against a measure 'taken to ensure the conservation and protection of natural resources and the environment'[34]. This approach has also been taken in Article 8.9 which clarifies to what extent a host State's measure constitutes a breach of an obligation under the investment Chapter.

Moreover, the Annex 8-A indicates what should be understood as an indirect expropriation[35] with a narrow understanding[36] which makes it unlikely to occur. Consequently, the Parties will be free from fear of having to pay compensation for an indirect expropriation resulting from their non-discriminatory regulations protecting the environment or improving labour rights. When assessing an expropriation case, the arbitrators are invited to consider some elements[37]. CETA is not alone in adopting this methodology as it is for instance shared by CPTPP, only without reference to the duration of the measure[38].

This demonstrates consensus on an international scale as CETA attempts to impose a model for new standards towards arbitrators and to some extent negotiators of future agreements, a great solution to the side effects of past practices[39]. The precision in detailing intentions demonstrates that the Parties intend for CETA to be a new model for future NGFTAs. This novel approach is innovating as previously no guidance was given in investment treaties to frame arbitrators' discretion[40]. Such specific wording is hopefully the way of the future and will result in a general consensus over the meaning of key provisions. Moreover, by reducing the uncertainty surrounding the interpretation of arbitrators, CETA is indirectly safeguarding sustainable development as integrated in the Agreement. Parties are then invited to take measures whenever it is needed to protect their public interest, which covers environmental protection and social protection to some extent.

34 CETA Article 8.4

35 See Annex 8-A paragraph 3

36 To qualify as an expropriation, the investor will have to prove that the measure is discriminatory; mostly disproportionate in comparison to its objective and that it impacts the investors' rights in a too severe manner.

37 i.e the economic impact of the measure on the economic value of an investment; the interference caused by the measure with the legitimate exceptions of the investor and the character of the measure and the duration of the measure with details to what is relevant for reviewing the character of the measure

38 CPTPP Annex 9-B Expropriation paragraph 3 (a)

39 See e.g Jan Wouters and Nicolas Hachez, 'Chapter 25: The Institutionalization of Investment Arbitration and Sustainable Development', in Marie-Claire Cordonier Segger , Markus W. Gehring , et al., *Sustainable Development in World Investment Law*, Global Trade Law Series, (© Kluwer Law International; Kluwer Law International 2011) at 632, "For host States, the prospect of being faced with huge damage claims is likely to have a 'chilling effect' on their regulatory initiatives, especially when such initiatives seek to establish intrusive regulations aiming to protect the environment, to promote the domestic 'infant industry' by a set of favourable measures, or to raise social standards through affirmative policies."

40 Caroline Henckels, « Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP » (2016) Volume 19 Journal of International Economic Law, Issue 1 at 40 "[...] investment treaties generally do not provide any guidance to arbitrators as to where to draw the line between expropriation and police powers and customary international law is also unclear in this respect. This is an area of substantial incoherence in the decided cases."

The examples given thus far are all part of the investment Chapter demonstrating that the Agreement takes sustainable development into account in its entirety unlike the two agreements' method separating the investment part from the trade part. CETA as a whole is pursuing sustainable development as an overarching objective. Even if the investment Chapter does not directly mention it, its implementation shall comply with the sustainable development goals — or at least, shall not compromise them. As such, it is a model for integrating sustainable development into the two legs of IEL.

Finally, the Agreement refers to several International Labour Organization's conventions establishing fundamental labour rights to be implemented[41] or commitments to enforce domestic law regarding environmental protection and labour standards[42]. Those references have been spread in recent PTIAs. The rise of a minimal corpus of international Conventions referred to likewise, well-established provisions might contribute to a better implementation of the provisions relating to sustainable development. Consequently, the nexus between the multilateral level and the bilateral one is perhaps a key to take sustainable development into consideration when it comes to trade and investment.

Once again, the Agreement is rooted in the multilateral system. The CETA's recognition of interrelations between economic and non-economic purposes as well as bilateral and multilateral levels is a first step towards a better understanding of sustainable development in NGFTAs. By shaping the investment Chapter in compliance to sustainable development requirements —often criticized as threatening the environment and social standards—, the Agreement is demonstrating a will to create a new approach of international investment law. Accordingly, the action of the Parties should contribute to export these provisions on an international scale.

IV. CETA: diversifying the sustainable development approach in IEL

A. Encouraging sustainable development in International Economic Law through precursory clauses — the CETA's Example

CETA is not only codifying past practices but is also innovating. Its design reflects what professors GHERING and KENT have underlined:

"While FDI can support sustainable development, sustainable development can also support the interests of TNCs. The great economic potential embedded in the prospect of a 'green economy' is indeed noticeable."[43]

Besides traditional provisions, the Agreement has some features aiming to renew IEL rules. Since the EU's vision of trade and investment is stamped in the Agreement's provisions, there is a composite approach of sustainable development. Once translated in CETA, a mix of hard law and soft law appears. Indeed, different means have been used to pursue this overarching objective. The EU's method is based on the interrelations between sustainable development and

41 CETA Articles 22.1; 23.3 and 23.7

42 CETA Articles 23.4 (3) and 24.5 (3)

43 Markus W. Gehring & Avidan Kent, 'International investment agreements and the emerging green economy: Rising to the challenge' in (F. Baetens, Ed.) *Investment Law within International Law: Integrationist Perspectives*, Cambridge University Press 2013 at 189.

pure economic purposes. This is clear in the tacit recognition of the precautionary principle[44]. CETA Article 23.3 (3)[45] in the "trade and labour" Chapter implicitly mentions the precautionary principle46as does —to some extent— Article 24.8[47] in the "trade and environment" Chapter. According to the 1992 Rio Declaration on Environment and Development[48] principle 15:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, *lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*."[49]

CETA Article 23.3(3) states that "a Party shall not use the lack of full scientific certainty as a reason to postpone cost-effective protective measures."[50] It is therefore patent that this Article refers to the precautionary principle looking at their similar wordings. Although, It appears that the introduction of the precautionary principle in CETA is the product of compromises from the EU. This approach is not as ambitious as the European perception of this principle. In terms of environmental protection, the reference to the precautionary principle is even more subtle. CETA Article 24.8 (1) states:

"1. When preparing and implementing measures aimed at environmental protection that may affect trade or investment between the Parties, each Party *shall take into account relevant scientific and technical information and related international standards, guidelines, or recommendations*"[51].

This provision underlines a stronger nexus between economic interests and non-economic purposes. The governmental action has to be supported by scientific and technical information when the measure "may affect trade or investment". This latter seems closer to the WTO's understanding of the precautionary principle than the EU's. Indeed, the definition given by the WTO glossary is the following one:

"Member countries are encouraged to use *international standards, guidelines and recommendations* where they exist. When they do, they are unlikely to be challenged legally in a

44 According to this principle, when a risk is presumed, Parties are invited to take measures to prevent the suspected harm to happen. The CETA's provisions impose the measures to be scientifically justified —as much as possible— as long as they 'may affect trade or investment'.

45 Relating to 'Multilateral labour standards and agreement'

46 Emphasis added "developing a preventative safety and health culture where the *principle of prevention* is accorded the highest priority. When preparing and implementing measures aimed at health protection and safety at work, each Party shall take *into account existing relevant scientific and technical information and related international standards*, guidelines or recommendations, **if the measures may affect trade or investment between the Parties**. The Parties acknowledge that in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a natural person, *a Party shall not use the lack of full scientific certainty as a reason to postpone cost-effective protective measures*."

47 Relating to 'Scientific and technical information'

48 Report of the United nations conference on environment and development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (vol. I) <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

49 Emphasis added

50 Emphasis added

51 Emphasis added

WTO dispute. However, members may use measures which result in higher standards if there is *scientific* justification. They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary. And they can to some extent apply the "precautionary principle", a kind of "safety first" approach to deal with scientific uncertainty."[52]

Unsurprisingly, the precautionary principle as translated in CETA, mirrors the international understanding over the European one. Nonetheless, this could be explained by the will of the EU to export the Agreement's model into the multilateral trading system. Though, it might be a first step towards the recognition of the precautionary principle in NGFTAs. While both Parties were willing to include this sensitive principle within the Agreement's framework[53], it is still rare in NGFTAs. Thus, considering the design of CETA and the references to cooperation in international fora[54], the Parties can now lead change and impose the precautionary principle, encouraging other actors to follow suit until the principle is recognized in IEL through the expected reform.

The Agreement also references other international agreements and multilateral standards leaving the Parties to remain in the multilateral trading system without compromising it. Instead, this approach offers new perspectives to the multilateral trade by shaping new rules together and, given that the Parties already share the same vision, both Parties could become change- rulers, promoting a deeper inclusion of sustainable development into investment and trade matters. More cooperation begets more similarities and improving cooperation between the Parties will attract investors from one Party's territory onto another. Such cooperation may lead to the beginning of a new era based on a more sustainable and fairer globalization aware of the potential harms caused by economic activities. CETA is also different from other NGFTAs in terms of cooperation. It seems that the Agreement contains more provisions on cooperation than other NGFTAs[55]. This could be explained by the potential influence of Canada and the EU over the international stage. Besides, even if not explicitly provided by other EU NGFTAs, it is foreseeable that the EU and its partners will work together on common interest issues relating to sustainable development. Hence, a group of partners might be formed so as to move forward for integrating sustainable development into IEL. Furthermore, in an attempt to escape its current clinical isolation, CETA is disclosing a new approach of IEL by opening international investment and trade laws to other fields[56].

Moreover, the CETA's market access provision[57] is linked to sustainable development and is innovating by extending the Parties' regulatory power to the pre-investment phase. By allowing the Parties to make the protection of natural resources and the environment prevail over investors' interests[58], the Parties' ability to achieve sustainable development through

[52] https://www.wto.org/english/thewto_e/glossary_e/precautionary_principle_e.htm

53 It should be noted that Canada has integrated this principle to its Federal Sustainable Development Strategy of 2016-2019, p. 7 "The **precautionary principle**—that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost- effective measures to prevent environmental degradation—is integral to sustainable development and the FSDS. Our commitment to preventing environmental degradation is reflected throughout the FSDS—for example, in goals and targets related to climate action, wildlife, lands and forests, and coasts and oceans."

54 See CETA Articles 21.1; 21.3; 22.3; 23.1; 23.7 or 24.12

55 For instance, there are four Articles dedicated to cooperation relating to sustainable development in CETA (Articles 22.3; 23.7; 24.12; 25.1) while the EU-Singapore FTA contains 3 Articles on cooperation relating to sustainable development (Articles 12.4; 12.10; 12.11) and only one Article for the EU-Korea FTA (Article 13.11) and the EU-Japan EPA (Article 16.12)

56 E.g. international environmental law or international labour law

57 CETA Article 8.4

58 Article 8.4 (d) "a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban."

investments' screening has been broadened. Parties may now attempt to preserve the environment by regulating the flow of investments or limiting the amount of investments for a certain amount of time when they threaten the protection of the environment for instance[59]. This will lead to changes in investment practices giving the Parties a strong political stance in sustainable development. It is also rare to find such a provision in NGFTAs. This remark also supports the idea that CETA is attempting to open IEL to sustainable development while better balancing economic and non-economic purposes.

Moreover, the CETA's high recognition of soft law for sustainable development related matters has also shaped the dispute settlement mechanism created for the Chapters 23 and 24. Whilst Canada usually imposes a coercive mechanism especially for obligations relating to labour standards, CETA reflects the European approach. Indeed:

"The NAALC, the Canadian agreements and some US FTAs establish a compliance system that includes a mean for individuals to make complaints about a party's failure to enforce its labour laws and regulations. These systems are primarily diplomatic, although in principle under some side agreements and FTAs, certain disputes over labour issues could have led to the imposition of fines or, in some cases, even sanctions (e.g art. 28 and 29 NAALC)."[60]

However, in terms of sustainable development, CETA establishes a diplomatic system which excludes coercive outcomes. Meanwhile in the NAALC, "certain disputes over labour issues could have led to the imposition of fines or, in some cases, even sanctions"[61] (e.g art. 28 and 29 NAALC). As such, CETA has been criticized for its lack of coercion. However, the EU has used this softer mechanism in many agreements:

"While pre-CARIFORUM disputes on social issues could only be discussed by government representatives in so-called government consultations, in the new generation of FTAs the issue can, as a next step, be referred to a Panel of Experts. This is meant to make recommendations more professional and more transparent than before, which in turn should lead to more objective outcomes."[62]

The possibility to refer to a Panel of Experts is a subtle way to put pressure on the partner even though it remains a diplomatic system. This mechanism has been perceived as not sufficient to protect labour standards. However, it is not completely true looking at the EU- Korea FTA. Regarding the Korean implementation, the EU has asked for the opening of the formal governmental consultations "concerning certain measures, including provisions of the Korean Trade Union obligations related to multilateral labour standards and agreements under

59 It should be noted that in parallel with this approach, the European Union (EU) framework for the screening of Foreign Direct Investment (FDI) will soon enter into force and enable Member States under certain conditions to block FDI in companies or assets considered of strategic importance, on grounds of security or public order. See: Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1, OJ L 79I, 21.3.2019, p. 1–14

60 VanDuzer, J., A., Simons, P., Mayeda, G., Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators, Commonwealth Secretariat, 2013, at 326-327

61 *Ibidem.*

62 Van den putte, L., Orbie, J., "EU bilateral trade agreements and the suprising rise of labour provisions", The International Journal of Comparative Labour Law and Industrial Relations, 2015, Vol. 31 n°3, at 268

the EU- Korea FTA"[63]. The will of the EU is clear. Having recourse to soft law does not equal a lack of efficiency. It might actually be a better way to control the implementation of the sustainable development Chapters since there is no direct confrontation. Opening a dialogue with the partner unveils a softer approach when it comes to sustainable development. Partners can actually help each other to effectively respect sustainable development requirements. This might also be an answer to the current coercive approach crisis observable in the WTO.

B. Opening International Economic Law to Non-Static Actors — Paving the Way Towards a New Approach of Trade and Investment

For a long time, international trade and investment laws have only focused on State to State relations with no consideration for other actors such as investors or Civil Society. Whereas BITs are specifically made to protect investors' rights, the current system is perceived as exclusively imposing obligations to States. Investors are singularly irresponsible in IEL for the harms they cause to the environment and labour rights. CETA attempts to address this loophole while leading a change for reforming international economic law.

Through Corporate Social Responsibility (CSR) and the promotion of the 'green economy', the Agreement is commanding a change by involving new actors in IEL. Following the Agreement's preamble[64], the investors are invited to act in a more responsible manner to comply with established principles[65]. In spite of its hortatory wordings, the inclusion of CSR reflects a major paradigm switch. It breaks with the previous impunity of investors regarding the impact of their economic activities on social standards and the environment. The Agreement aims to actively involve investors in achieving sustainable development through voluntary principles. Parties have opted for a softer approach to progressively achieve sustainable development goals with the investors' help instead of imposing sanctions or social and environmental conditions[66].

Additionally, in matters relating to sustainable development, CETA is opening IEL to Civil Society through the use of transparency[67] and the mechanism of consultation[68]. These provisions will aid in legitimizing NGFTAs and creating a stronger nexus between sustainable development and IEL rules. Concerning transparency, the Agreement does not refer to the Aarhus Convention since Canada has not ratified it. However, CETA's provisions on transparency copy the Aarhus Convention's principles —despite the Canadian reluctance towards this Convention. This also partially highlights the action of the European Union in promoting rules to its partner. Regarding the role of Civil Society, the Agreement is timorously inviting civil society into its implementation. First and foremost, Civil Society has to catch this opportunity in order to put pressure on the Parties and command a real implementation. Nonetheless, the CETA's provisions do not seem sufficient to allow a positive action from Civil Society to exert a control over the Parties in respect of sustainable development. Plus, the composition of Civil Society does not actually reflect citizens but mainly other private interests. This drawback has been highlighted by the use of the European Citizenship Initiative for example. Nonetheless, the rise of a transnational/international civil society can be expected from

63 Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement, Request for the establishment of a Panel of Experts by the European Union, Brussels, 4 July 2019, Ares(2019)4194229. http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf

64 Parties are: "ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct;"

65 e.g the OECD Guidelines for Multinational Enterprises and best practices as also stated in Article 22.3 (2a).

66 i.e. '*conditionnalité environnementale et sociale*'

67 See CETA Articles 23.6 and 24.7

68 See CETA Article 24.13 (5)

the CETA's provisions even though the appropriation of those mechanisms by lobbies threatens the entry of citizens in IEL

A further tool used by CETA is to encourage trade and investment in environmental goods and services by having sustainable development stem from investments. The CETA Article 24.9 (1) is establishing a preferential treatment to trade and investment in environmental goods. The Parties are suggesting a re-orientation of investments and trade flows towards more sustainable goods, services and investments. Such a strategy could be even more relevant from an economic point of view inasmuch as explained by professors Gehring and Kent:

"An increase in the demand for low- carbon technologies is therefore expected, and consequently also great economic gains to the owners of these technologies."[69]

Although the translation of sustainable development in CETA might seem too feeble; it is important to bear in mind that CETA is more of a first attempt to integrate this notion in a better way into NGFTAs through a multifaceted approach. The combination of different means used in the Agreement has to be perceived as an experimentation. Therefore as a model to reshape IEL in case of success.

V. The Confirmation of The CETA's Approach to International Trade — Opinion 1/17

The CETA's model has been confirmed by the European Court of Justice (ECJ) in its Opinion 1/17[70]. The precautions taken by the Parties to frame the CETA Tribunals' competences (e.g Article 8.31) have been understood by the Court to declare the system compatible with the EU judicial organization. Plus, since the AECG tribunals are outside the EU judicial system, there is no need to establish a re-examination procedure by a domestic court or by the ECJ[71].

Moreover, the most salient aspect of the decision regarding sustainable development concerns the reference to the 'regulatory chill effect'. The ECJ provides a reminder that the dispute could potentially concern a measure of general application. If the Tribunal were "to issue awards finding that the treatment of a Canadian investor is incompatible with CETA because of the level of protection of a public interest established by the EU institutions"[72], the EU may try to avoid being forced to pay compensation by abandoning the "achievement of the level of protection"[73]. In addressing this risk, the Court noted that the Parties have clearly framed the competencies of the CETA Tribunals. They excluded the possibility for the Tribunal "to call into question the choices democratically made within a Party"[74]. As such, there is no incompatibility.

The CETA's investment-State dispute settlement mechanism is not questioned by the ECJ. Neither is the intention of the EU to establish a multilateral investment tribunal[75]. Consequently, the Commission can negotiate agreements with a similar ISDS and pursue its strategy for reforming IEL.

---

69 Markus Gehring and Avidan Kent, supra note n°43 at 189
70 Opinion of the Court (Full Court) of 30 April 2019, ECLI:EU:C:2019:341 "Opinion 1/17"
71 *Ibid.* Paragraph 135
72 *Ibid.* paragraph 149
73 *Ibid.*
74 *Ibid.* Paragraph 160
75 See CETA Article 8.29

VI. Conclusion

Through CETA, the Parties are nurturing a new approach to sustainable development in IEL. It is now also a way to increase trade and investment in new areas[76]. If followed by future NGFTAs, this method shall contribute to the achievement of sustainable development through IEL, a strategy far more flexible than using traditional methods. In sum, the Agreement leads a change from the negative prism of globalization to new IEL rules shaped in respect of non-economic purposes. Considering the will of the Parties to cooperate within international fora, they are contributing to the creation of a new standard to be incorporated within the IEL framework. The Agreement has therefore to be seen as an experimentation of how the EU can impose the respect of sustainable development to its partners, and even more, towards reforming IEL. If CETA is a success, the partners might use it as an example to command a major paradigm switch. The CETA's approach to trade and investment combined with sustainable development objectives proves the need to take into account the side effects of globalization in order to prevent them and to create a new approach to trade and investment. In spite of its apparent restraint in terms of sustainable development, the Agreement marks the start of a new era towards a greener and fairer economy.

If considered as a first encouraging step to reforming IEL in compliance with sustainable development, CETA appears as a major Agreement which tries to reconcile economic and non-economic purposes. That said, the Agreement has an economic purpose first and foremost. Consequently, its integration of sustainable development has to be seen as an encouraging step from a Free Trade Agreement point of view. This experimentation might therefore lead to reforming IEL on the basis of CETA. Especially since the Parties are intending to cooperate in international foras on many environmental aspects and other social issues. Plus, CETA has to be replaced in the more global strategy of the EU which aims to conclude bilateral agreements with different partners as a manner to circumvent the WTO crisis. This is also a way to deepen trade and investment rules in compliance with its values and objectives so as to offer an alternative to the current IEL rules. Thus, considering the political importance of the EU- Canada partnership, CETA might be the start to reforming international economic law towards a greener and sustainable economy even though it is far from perfect.

76 See e.g. CETA Article 24.13 (1f) 'environmental and green technologies and practices; renewable energy; energy efficiency; and water use, conservation and treatment.'

TRIPS-PLUS PROVISIONS IN THE EU NEW GENERATION OF FTAS WITH ASIAN COUNTRIES

Su-Ju Kang[1]

I. Introduction

In an era of knowledge-based economies, creativity, research and innovation are essential to technological development and industrial competitiveness. In this context, effective protection of intellectual property (IP) has been increasingly emphasized by different administrations around the world, including the United States, Japan and even China[2]. Over many years, the European Union (EU) has built a harmonized legal framework and intellectual property system[3] that contribute to the promotion of creativity and innovation. This harmonization of laws within the EU has been established by various legal instruments that aim to provide homogeneous protection for different types of IP, such as biotechnological inventions, designs, copyrights and related rights, geographical indications and trade secrets.

The IP protection is also characterized as a trade area of economic importance in European foreign trade policy, especially in view of the fact that the EU competiveness largely relies on strong export performance of the high-tech sector. However, intellectual property rights (IPRs) protection and enforcement are both governed by the principle of territoriality. In order to ensure appropriate levels of IP protection in non-EU countries, international trade deals have been defined by EU trade policy as one of the key external instruments[4]. Pursuing the goals set out in the "Global Europe" strategy[5], EU's future trade deals should include higher standards of intellectual property. These new trade deals, taking the form of a new generation of FTAs, do not only deal with IP issues; they address various areas of trade as well. Since then, the EU – South-Korea FTA[6], the first new generation of free trade agreements (NGFTA) implemented by the EU, contains an extensive chapter with a broader scope and more comprehensive norm-setting regarding IP, alongside other provisions on service, investment, public procurement, and sustainable development, etc.

Taking into account European economic interests in Asia, the EU is also engaged in deepening and consolidating economic relationships with certain Asian countries through the bilateral trade deals. Since the publication of "Global Europe" strategy in 2006, the EU has indeed reached five main NGFTAs with respectively South-Korea, Canada[7], Singapore[8],

[1] Assistant Professor, Wenzao Ursuline University, Taiwan

[2] Since China has been identified by the EU and also the US as first priority country in which IP protection is not considered adequate or effective. See European Commission, Report on the protection and enforcement of intellectual property rights in third countries, SWD (2018) 47 final, 21.2.2018, pp. 5-11.

[3] Such as European Union trademark (EUTM), Community design and Community plant variety rights.

[4] See European Commission, "Trade for all: Towards a more responsible trade and investment policy", October 2015, p. 14, available at: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (last visited July 10, 2019).

[5] See European Commission, Global Europe - Competing in the world - A contribution to the EU's Growth and Jobs Strategy, COM(2006) 567 final, 4.10.2006, p. 9.

[6] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127/6, 14 May 2011

[7] Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union 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, OJ L 11/1, 14.1.2017.

Vietnam[9] and Japan[10], in which four involve Asian countries. All of these NGFTAs incorporate the entire spectrum of IPRs, including copyright and related rights, patents, trademarks, geographical indications, etc. In particular, these trade agreements not only define IPRs protection rules but strengthen their enforcement as well. Since no significant progress has been made in the Doha multilateral trade negotiations within the World Trade Organization (WTO), it appears that the EU and its trading partners have expanded and intensified the use of bilateral trade agreements to achieve what cannot be agreed on in multilateral forums. These high levels of IP protection and enforcement standards represent further commitments beyond the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), referred to as TRIPS-plus provisions[11].

With regard to EU's recent FTAs with its Asian trading partners, the IP protection and enforcement has apparently become a crucial element. Although several research studies have been conducted to discuss the obligations derived from TRIPS-plus provisions in the EU and the US's FTAs[12], this study examines specially how the EU NGFTAs are articulated with other international instruments related to IP, notably the World Intellectual Property Organization (WIPO) treaties concluded post-TRIPS, such as the WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WPPT) (1996). The paper further aims to investigate if EU NGFTA is a relevant vector to reinforce its normative influence on international standards for IP protection, with specific focus on the provisions promoting stronger geographic indications (GIs) protection. Through the analysis of regulatory convergence on IP standards, this study allows the assessment of the EU's impact or limits vis-à-vis its Asian trading partners.

II. Standardization of the IP Chapters in NGFTAs

Prior to the implementation of "Global Europe" strategy, the IP provisions seemed to play a marginal role in the external agreements concluded by the European community (EC)[13], especially in the Economic Partnership Agreement (Cotonou Agreement) with African, Caribbean and Pacific (ACP) partners[14] and the Association Agreement with Chili[15]. These agreements mostly reaffirm multilateral commitments prescribed by TRIPS agreement and

[8] Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore, OJ L 267/1, 25.10.2018.

[9] For the text of the FTA, see European Commission, Proposal for a Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, COM(2018) 691 final, 17.10.2018. On 25 June 2019, the Council adopted decisions on the signature of the FTA and the investment protection agreement (IPA) between the EU and Vietnam.

[10] Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership, OJ L 330/1, 27.12.2018

[11] See Helfer, LR 2004, 'Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Making', *Yale Journal of International Law*, vol. 29, pp. 1-83 and Sell, SK 2007, 'TRIPS-Plus Free Trade Agreements and Access to Medicines', *Liverpool Law Review*, vol. 28, pp. 41-75.

[12] See for example Buckley, R, LO, VL & Boulle, L 2008, *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, Kluwer Law International, The Netherlands.

[13] See Jaeger, T. (2015), 'The EU Approach to IP Protection in Partnership Agreements', in Antons, C. & Hilty, RM. (ed.), *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region.* Berlin, Heidelberg: Springer, pp. 171-210.

[14] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, ofthe other part, signed in Cotonou on 23 June 2000 - Protocols - Final Act – Declarations, OJ L 317/3, 15.12.2000.

[15] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final act, OJ L 352/3, 30.12.2002

choose not to incorporate any TRIPS-plus enforcement measures. These IP provisions can also reflect the EU's flexible approach toward developing countries. The level of IP commitments is apparently modulated according to these countries' concerns in socio- economic development.

The emergence of EU's TRIPS-plus provisions coincides and is line with the implementation of its trade strategy "Global Europe". Pursuing the objective to foster Europe's competiveness in foreign markets, the EU has adopted a more aggressive trade policy by making the IP chapter an integral part of its trade deals[16] and bringing IP protection and enforcement standards broader and more rigorous than the requirements in the TRIPS agreement. As a result, the IP chapter in EU's NGFTAs is very detailed and deals with each IP individually. The overall chapter is built upon EU *acquis*. It aims to provide similar levels of IP protection to those existing in the EU and bring the IP law of its trading partners as close as possible to the EU-harmonised rules.

The examination of IP chapter in EU's recent FTA shows a nearly uniformed structure. In particular, the EU – South-Korea FTA represents a prime example containing the most ambitious IP chapter ever negotiated and concluded by the EU. Its IP chapter follows in principle the structure of the TRIPS agreement and consists of four main sections. The first defines the general provisions (nature and scope of obligation, exhaustion, etc.). The second sets the substantive protection of each IP (copyright and related rights, patents, trademarks, service marks, designs, layout-designs of integrated circuits, geographical indications, plant varieties and protection of undisclosed information), while the third prescribes the enforcement provisions that apply to all IP (civil, border and criminal measures, as well as liability of online service providers). The last section establishes bilateral cooperation to facilitate and support the implementations of the commitments and the exchange of information related to IP issues.

More specifically, the provisions on IP enforcement in the EU – South-Korea FTA are similar to those in the US – South-Korea FTA signed in 2007, two years earlier than EU. These provisions stipulate general obligations, civil and administrative procedures and remedies, broader measures, as well as criminal proceedings. Since the US, EU and Korea all have strong demand for enhanced IP enforcement, the FTAs reached by these parties not only reiterate minimum standards of TRIPS agreement, but add significant substantive and procedural rules, such as liability of internet providers and criminal procedures in case of wilful trademark counterfeiting and copyright and related rights piracy on a commercial scale as well[17]. The former requirement in digital environment falls under the category called TRIPS-extra[18] as going beyond the scope of the TRIPS agreement. The later, named as TRIPS-plus rules, seeks to increase the existing criminal enforcement stated in article 61 of

[16] Musungu, SF. (2009), 'Enforcement provisions of EPAs', in Melendez-Ortiz, R. & Roffe, P. (ed.), *Intellectual Property and Sustainable Development: Development Agendas in A Changing World*. Cheltenham, UK: Edward Elgar, pp. 390-404.

[17] Art. 10.54 of EU – South-Korea FTA.

[18] TRIPS-extra provisions add new commitments that are not covered by the TRIPS agreement. See Yu, Peter K 2007, 'The International Enclosure Movement', *Indiana Law Journal*, vol. 82, pp. 827-867.

the TRIPS agreement[19]. As highlighted in the Anti-Counterfeiting Trade Agreement (ACTA) rejection by European Parliament[20], the additional criminal measures are a controversial issue among civil society, especially in the EU. Consequently, the criminal measures in EU-Korea FTAs are less extensive than those in the US-Korea FTA, as they do not proceed far beyond the minimum standard required by article 61 of the TRIPS agreement.

Besides, it is worth noting the implication of ACTA rejection on the structure of the IP chapter contained in the subsequent FTAs. It could not be a simple coincidence to observe the lack of criminal enforcement provisions in all of the NGFTAs signed by the EU after the European Parliament's refusal in 2012. The non-existence of criminal proceedings in the EU's trade agreement respectively with Singapore, Vietnam and Japan, can be explained by its intention to avoid an ACTA-like fiasco during the procedure for concluding international trade agreements on the basis of article 218 TFEU.

The research on the EU's NGFTAs with Asian countries illustrates a brief evolution of the structure of IP chapter. The process of standardization began with the EU-Korea FTA, which sets the most complete IP provisions including criminal measures and penalties. After the setback in the concluding procedure of the ACTA agreement, the IP chapters in trade agreements with Singapore, Vietnam and Japan show uniformity in structure, which can be also found in the IP chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The standardization of the IP chapter in these NGFTAs serves as a model for future trade deals. It indicates the EU's demand on the IP issues and the level of commitments in this field.

III. Banalization of reference to WIPO treaties in NGFTAs

Apart from the bilateral trade agreements, the WTO and WIPO constitute two main multilateral frameworks competent to deal with IP issues[21]. Between the various systems of international IP law, different rules dealing with the same topic can be created at both multilateral and bilateral levels. It has become common practice that in order to regulate a specific IP, the EU's NGFTAs tend to refer to a related multilateral agreement previously concluded within the WIPO.

Making reference to other international agreements is in fact an approach adopted by the TRIPS negotiation during the Uruguay round[22]. A number of WIPO conventions[23] are

[19] Art. 61 of TRIPS agreement: "*Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.*"

[20] The Anti-Counterfeiting Trade Agreement (ACTA) was rejected by the European Parliament in July 2012. Therefore, this agreement cannot be concluded by the EU. This was the first time that Parliament exercised its Lisbon Treaty power to reject an international trade agreement. For more analysis about ACTA agreement, see Roffe, P. & Seuba, X. (2015), 'Introduction: ACTA and the International Debate on Intellectual Property Enforcement', in Roffe, P. & et Seuba, X. (ed.), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath*. New York: Cambridge University Press, pp. 1-30.

[21] Compared to the full membership to the WTO, the EU is granted the observer status to participate in the WIPO alongside the full memberships of all its 28 member states.

[22] The Uruguay Round was conducted within the framework of the General Agreement on Tariffs and Trade (GATT), which is now replaced by the WTO.

mentioned in the finalized text of TRIPS agreement. With regard to the industrial property rights, article 2(1) obligates WTO members to comply with certain provisions of the Paris Convention (1967)[24], which state the standards to protect patents, industrial design, mark and well-known mark against infringement and the practice of unfair competition. In respect of author's copyright, WTO members shall assure the minimum protection granted by articles 1 through 21 of the Berne Convention (1971) and the appendix thereto[25].

The EU's NGFTAs follows the same approach established in TRIPS agreement by referring to other international agreements, notably WIPO treaties concluded after the adoption of the TRIPS agreement. It is naturally understandable that the TRIPS Agreement is the most commonly mentioned agreement in EU's recent FTAs[26]. However, this multilateral agreement creates a basic legal framework that cannot meet the EU's higher objective specified in its own IP strategy[27]. This explains the reason why the EU seeks to deepen and expand the TRIPS commitments through its NGFTAs. It can be achieved by two means: by integrating TRIPS-plus provisions similar to European harmonized rules[28] and by making reference to existing international agreements.

The use of the second means can be interpreted as a convenient approach to introduce a set of TRIPS-plus norms already negotiated and agreed within other international organization. These norms can be used to extend the duration of copyright and related rights protection, strengthen patent rights and broaden the scope of trademark protection. In this regard, EU's recent trade agreements with Asian countries either reaffirm that both parties are obliged to comply with an international agreement or impose expressly an obligation to ratify an existing agreement.

The provisions determining the protection for copyright and related rights in EU-Vietnam FTA constitute an example to illustrate these two types of obligations. Firstly, both parties agree to comply with two WIPO conventions concluded before the TRIPS agreement: the Berne Convention (1971) and Rome Convention (1961). This commitment represents actually an element beyond what is required by TRIPS agreement, in the sense that the WTO commitment is limited to the requirements in accordance with a part of provisions stated in Berne Convention (1971) and Rome Convention (1961). Furthermore, the article 12.5(2) of EU-Vietnam FTA entails an obligation for Vietnam to accede to WIPO Copyright Treaty (WCT, 1996) and WIPO Performance and Phonograms Treaty (WPPT, 1996) no later than three years from the date of entry into force of the given FTA. These two post-TRIPS treaties,

[23] Such as the Paris Convention for the Protection of Industrial Property (Paris Convention, 1967), the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, 1971), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961) and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty, 1989).

[24] Article 2(1) of TRIPS agreement: "*In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).*"

[25] However, the article 9(1) of TRIPS agreement reserves an exception for article 6bis of the Berne Convention: "*Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.*"

[26] The EU's trade agreements with South-Korea (art.10.2.1), Singapore (art. 10.2.1), Vietnam (12.2.1) and Japan (art. 14.3.2) all reiterate the commitments under the TRIPS agreement.

[27] See European Commission, Strategy for the protection and enforcement of intellectual property rights in third countries, COM(2014) 389 final, 1.7.2014.

[28] For more discussion on this matter, please refer to part 4 of this contribution.

already ratified by the EU[29], both contain a series of provisions going beyond the scope of WTO multilateral commitment.

Contrary to EU's leaner attitude toward Vietnam, the number of referral international treaties in EU-Japan Economic Partner Agreement (EPA) is worth to be underlined. The article 14.3 of the EPA stipulates that both parties are obliged to comply with a list enumerating sixteen multilateral IP treaties[30], including six agreements to which they shall take all reasonable efforts to become parties by the date of entry into force of the EPA. It is interesting to emphasize that the later obligation applies only to the EU, since Japan has already ratified all of the six agreements, but the EU has only ratified two in accordance with its competence: the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1999)[31] and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013)[32].

Moreover, the EU's trade agreements with Japan and other Asian countries often refer to certain multinational treaties based on their subject matter. For instance, the sections on patent[33] and trademark[34] in the EU-Japan EPA are rather short, as they state the obligation to comply with the Patent Law Treaty (2000) and the Singapore Treaty on the Law of Trademarks (2006). The EU is also bound to accede to these two treaties.

Although the reference to other international agreements has been considered as a common practice used by the EU in trade negotiations, the FTA's relation to a referred international agreement could be problematic while certain provisions of the given agreement do not fall within the area covered by EU harmonized rules.

This question has been brought before the Court of Justice of the European Union (CJEU) in Opinion procedure 2/15[35], which requested determination of the nature of the EU's competence to conclude the FTA with Singapore. In order to delineate the scope of the common commercial policy (CCP) including "the commercial aspects of intellectual property" as provided in article 207(1) TFEU, the CJEU is required to examine what could be considered "non-commercial aspects of intellectual property" contained in the IP chapter of EU-Singapore FTA. With regard to copyright protection, its article 10.4 refers to Berne Convention (1971), which includes a provision (article 6bis) relating to moral rights of

[29] 2000/278/EC: Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ L 89/6, 11.4.2000

[30] TRIPS agreement, Paris Convention, Rome Convention (1961), Berne Convention (1986), WCT (1996), WPPT (1996), International Convention for the Protection of New Varieties of Plants (UPOV convention, 1991), Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), Protocol Relating to the Madrid Agreement Concerning the International Registration of Mark (1989), Patent Cooperation Treaty (1970), Patent Law Treaty (2000), Trademark Law Treaty (1994), Singapore Treaty on the Law of Trademarks (2006), Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1999), Beijing Treaty on Audiovisual Performance (2012) and Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013).

[31] 2006/954/EC: Council Decision of 18 December 2006 approving the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, adopted in Geneva on 2 July 1999, OJ L 386/28, 29.12.2006

[32] Council Decision (EU) 2018/254 of 15 February 2018 on the conclusion on behalf of the European Union of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled, OJ L 48/1, 21.2.2018

[33] Art. 14.33 to art. 14.35 of the EU-Japan EPA.

[34] Art. 14.18 to art. 14.21 of the EU-Japan EPA.

[35] Opinion 2/15 of the Court (Full Court), 16 May 2017, ECLI:EU:C:2017:376.

authors. It is important to stress that the provision in question is not incorporated into the TRIPS Agreement[36] and therefore represents a TRIPS-plus element.

Advocate general Sharpston used a two-step test to clarify whether the EU has the external exclusive competence for concluding the FTA including moral rights. Firstly, taking into account the fact that the article 6bis of the Berne Convention distinguishes itself moral rights from an author's economic rights, AG Sharpston considered that the moral rights were independent from economic IPR and applied therefore to non-commercial aspects of intellectual property rights[37]. In her opinion supported by some Member States of the EU, the moral rights did not fall within the scope of the CCP. Secondly, the Court's well-known "ERTA doctrine"[38], now codified in article 3(2) TFEU, was applied to determine whether the EU enjoys implied external competence to solely conclude the given FTA. According to AG Sharpston, the EU can have exclusive competence to conclude the FTA only "in so far as its conclusion may affect common rules or alter their scope"[39]. Since there has not been any harmonization yet in the area of moral rights, the EU has no competence in this regards[40], the IP chapter should fall within the shared competences between the EU and its Member States.

However, since the entry into force of the Lisbon Treaty in 2009, the exclusive external competence of the EU with regard to the commercial aspects of IP is viewed and interpreted by the CJEU in a less restrictive manner[41]. In Opinion 2/15, the Court did not adopt the AG's points of view and concluded otherwise. The Court relied on "direct and immediate effect on trade" criterion to determine an international commitment enters into commercial aspects of intellectual property, "*if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it*"[42]. The Court essentially held that the IP provisions aimed to create a degree of homogeneity between the levels of IP protection in the EU and Singapore, contributing to the creation of a level- playing field for trade of goods and services for economic operators[43]. As a result, the IP chapter falls within the exclusive competence of the EU[44].

In the Opinion 2/15, the focus of the CJEU is to approach the IP chapter in light of the Treaty of Lisbon, which has significantly broadened the scope of CCP. As mentioned above, the IP chapter has become a standardized and characteristic element in EU's NGFTAs. Before this ruling, the lack of EU harmonization in some IPR areas could complicate or limit the EU's ability to address some IP issues through bilateral trade negotiations. This ruling is important and emblematic for the reason that it ends the mixity of the IP chapter by including the entire IP provisions into the scope of CCP, even those regulating the areas that have not been subject to EU harmonized rules.

[36] Article 9(1) of the TRIPS agreement

[37] Para. 456 of Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15, ECLI:EU:C:2016:992.

[38] The "ERTA principle" offers a basis for the European Union to enjoy implied exclusive competence to conclude an international agreement. It was originally developed taking into account, on the one hand, the primary law requirement that the Member States take all appropriate measures to ensure fulfilment of their obligations arising out of the Treaties or resulting from action taken by the institutions, and on the other hand, the Member States' duty to abstain from any measure capable of jeopardising the attainment of the objectives of the Treaties. See para. 121 of Opinion of Advocate General Sharpston.

[39] See para. 120 of Opinion of Advocate General Sharpston.

[40] See para. 456 of Opinion of Advocate General Sharpston.

[41] See para. 72 of Judgment of the Court (Grand Chamber) on 4 September 2014, C-114/12, ECLI:EU:C:2014:2151.

[42] See para. 36 of the Opinion 2/15 of the Court.

[43] See para. 122 of Opinion 2/15 of the Court.

[44] See para. 130 of Opinion 2/15 of the Court.

IV. EU normative influence exercised via NGFTAs : case of international protection for geographic indications

Either European wines or agricultural and food industries give great priority to reinforce the protection for geographical indications (GIs) outside the internal market. A GI, recognized as IP, is a distinctive sign used to identify a product whose quality, reputation or other characteristic is essentially attributable to its geographical origin[45]. Consequently, this IP often includes the name of the place of origin. The GIs allow creation of value for local communities through products deeply rooted in tradition, culture and geography; for example, "*Champagne"* or "*Prosciutto di Parma"* are well-known GIs for wine and foodstuff in Europe. Due to the growing number of violations in foreign markets, the EU trade policy has set a guiding purpose to support these high-quality products by better protecting European GIs internationally[46]. The GIs thus constitute an important topic in EU's trade negotiations with other countries.

In fact, the EU plays an active role in multilateral and bilateral negotiations involving GI issues. At multilateral level, the GIs are mentioned in the mandate for the current Doha Development round of negotiations within WTO. The negotiation agenda is to establish a multilateral GI register system for wines and spirits and to extend the higher protection of article 23 to products beyond wines and spirits[47]. Compared to the minimum protection for agricultural products and foodstuffs as prescribed in article 22 of the TRIPS agreement, article 23 provides additional GI protection for wines and spirits. From the EU's point of view, the general protection under article 22 is insufficient to prevent the confusion caused by the use of a GI term, which may be difficult for consumers to distinguish the true origin from expressions such as "like", "style" or "kind" used together with the protected GI.

Even with the support from a group of countries called "Coalition W52"[48], the European initiatives[49] to enhance GIs protection have failed due to the nonacceptance by and antagonism from those countries having great trade interests on "New world wines", led by the US, South Africa, Argentina, Chili, Australia and New Zealand[50]. While the EU seeks to achieve higher protection for GIs, the US gives unilateral preference to protect them as

[45] Art. 22.1 of TRIPS agreement.

[46] See European Commission, "Trade for all: Towards a more responsible trade and investment policy", p. 14.

[47] See para. 18 of Doha Ministerial declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

[48] Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group, WTO document TN/C/W/52, 19 July 2008.

[49] Proposal for a multilateral register of geographical indications for wines and spirits based on article 23.4 of the TRIPS agreement - Communication from the European Communities and their Member States, WTO document, IP/C/W/107, 28 July 1998; Implementation of article 23.4 of the TRIPS agreement relating to the establishment of a multilateral system of notification and registration of geographical indications - Communication from the European Communities and their member States, WTO document, IP/C/W/107/Rev. 1, 22 June 2000 and Geographical indications – Communication from the European Communities, WTO document, TN/IP/W/11, 14 June 2005.

[50] See for example, Proposed draft trips council decision on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits - Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa and the United States, WTO document, TN/IP/W/10/Rev.4, 31 March 2011.

trademarks. As a consequence of the failure of several efforts within the WTO, the EU's strategy has gradually shifted from regulating GI protection primarily through multilateral agreement to using bilateral instruments[51].

As highlighted above, the EU and the US have been two of the most active promotors in international IP regulation. The US FTAs also contain a series of higher standards in most areas of IP covered by the TRIPS agreement, except for the GIs. The level of GIs protection provided in US FTAs is nearly the same as what is required by TRIPS agreement[52]. The EU's actions including the TRIPS-plus protection for GIs in the NGFTA correspond with its endeavors on the WTO multilateral platform. This also reveals its strategy to achieve the desired level of protection for GIs abroad. This difference of position between the US's modesty[53] and the EU's offensive proves that the GI topic represents a priority for the European trade policy, but is only of limited interest for US trade policy.

With clear preference for enhanced protection of GIs, EU's NGFTAs with Asian countries are meant to extent the protection not only for wines and spirits, but also for agricultural products and foodstuffs[54]. Furthermore, they establish a list of GIs to be protected in the partner countries[55]. It appears logical that the EU strives to include into the list, GI names that are likely to be usurped and/or for which there is evidence of potential economic interest in the specific market.

Taking the case of EU-Japan EPA, both parties commit to protect a list of GIs integrated into the Annexes 14-B thereto[56]. This annex consists of two separate parts: one for agricultural products and foodstuffs, and the other for wines, aromatized wines and spirits. The European GI names as well as their transcription into Japanese alphabet are expressly enumerated in the list, and *vice versa* for Japanese GIs. The list does not include all GIs protected in the EU. Nevertheless, the first part of the list includes 72 European GIs to be protected, including *Parmigiano Reggiano* (Italian hard cow milk cheese), *Roquefort* (French blue sheep milk cheese), *Huile essentielle de lavande de Haute-Provence* (French essential oil), *Feta* (Greek soft mixed milk cheese) and *Nürnberger Bratwürste* (German sausage). It shows the incorporation of extensive coverage of European types of cheese. The protection of 48 Japanese GIs ranging from types of matcha (*Nishio matcha*) to specific types of meat (*Kobe* beef) is also assured in the EU. The second part of annex focuses on GIs for 145 European names (e.g. *Swedish Vodka, Irish Cream, Armagnac or Saint-Emilion*) and only 8 Japanese names (e.g. *Nihonshu sake*). The number of names listed in annex (EU 28 Member states: 217 vs. Japan: 56) illustrates that both parties all have reciprocal and mutual benefits to protect their GIs in each other's market.

Additionally, the GI provisions in EU's NGFTAs with South-Korea, Singapore, Vietnam and Japan reflect an obvious similarity to European rules. The resemblance can be examined

[51] The EU not only seeks to include the topic into the FTAs, it also negotiates stand-alone agreements focusing exclusively on GIs, for example, with China.

[52] The US includes TRIPs-plus provisions on geographical indications only in NAFTA and TPP and at a very modest level. See Morin, JF & Surbeck, J 2019, 'Mapping the New Frontier of International IP Law: Introducing a TRIPs-plus Dataset', *World Trade Review*, pp. 1-14, specially p. 8.

[53] See Caenegem, VW 2004 'Registered GIs: Intellectual Property, Agricultural Policy and International Trade', *European Intellectual Property Review*, vol. 26, no. 4, pp. 170-181, specially p. 174.

[54] Art. 10.18 of EU-Korea FTA, art. 10.16 of EU-Singapore FTA, art. 12.23 of EU-Vietnam FTA and art. 14.22 of EU-Japan EPA.

[55] Art. 10.19 of EU-Korea FTA, art. 10.17 of EU-Singapore FTA, art. 12.25 of EU-Vietnam FTA and art. 14.24 of EU-Japan EPA.

[56] Art. 14.22 and art. 14.25 of EU-Japan EPA.

under three aspects. Firstly, the requirements to establish the system for registration[57] can be likely inspired from the EU's rules based on three regulations[58]. In this regard, the EU-Singapore FTA expressly states that the recognition of GIs for agricultural products, foodstuffs and wines shall be based on four fundamental elements: a domestic register, an administrative process verifying the origin of a given GI[59], an objection procedure allowing the legitimate interests of third parties to be taken into account[60], and a procedure for the rectification and cancellation of a protected GI[61]. Both parties shall create their respective system governing GIs in compliance with these elements listed above, as what is regulated in Council Regulation (EC) No. 510/2006.

Secondly, for the protection granted for GIs, all four trade agreements with Asian countries broaden the scope of the protection offered by the TRIPS agreement. The GI names listed in annex to the agreement shall be protected against the uses that are similar to the acts defined in EU regulation[62]. The protection covers mainly three areas. Both parties shall provide legal means to prevent any use that constitutes a practice of unfair competition and the use of any means in the designation or presentation of product which misleads the public as to the origin of the product[63]. The protection shall be provided against the use of a GI identifying a product for a like product whose origin is not the place indicated by the GI in question, even where the true origin of the product is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like. The wording used in last protection is nearly identical with article 23 of the TRIPS agreement, but this protection goes further than multilateral commitment as it applies not just to wines and spirits but agricultural products and foodstuffs as well.

Finally, in terms of the relation with trademarks, the EU considers GIs as a right of use, as oppose to trademark licensing. EU's trade agreements[64] allow coexistence with prior trademarks registered in good faith. As what is stated in EU regulation[65], the registration of a trademark shall be refused or invalidated *ex officio* in the case where a GI name is already protected. In other words, after the date of application for protection of a GI, a trademark identical with or similar to the GI in question cannot be registered. On the contrary, in accordance with the register requirements, a GI can be subsequently registered, protected and co-exist with an existing trademark.

[57] Art. 10.18.6 of EU-Korea FTA, art. 10.17 of EU-Singapore FTA, art. 12.24 of EU-Vietnam FTA and art. 14.23 of EU-Japan EPA.

[58] Two different procedures exist for the registration of a GI in the EU: one applicable to wines, agricultural products and foodstuffs, and another one applicable to spirits. See Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs; Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products and Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89.

[59] Similar to art. 6, 10 and 11 of Council Regulation (EC) No 510/2006.

[60] Similar to art. 7 of Council Regulation (EC) No 510/2006.

[61] Similar to art. 9 and 12 of Council Regulation (EC) No 510/2006.

[62] Art. 13 of Council Regulation (EC) No 510/2006.

[63] Art. 10.21 of EU-Korea FTA, art. 10.19 of EU-Singapore FTA, art. 12.27 of EU-Vietnam FTA and art. 14.25 of EU-Japan EPA.

[64] Art. 10.23 of EU-Korea FTA, art. 10.21 of EU-Singapore FTA, art. 12.30 of EU-Vietnam FTA and art. 14.27 of EU-Japan EPA.

[65] Art. 14 of Council Regulation (EC) No 510/2006.

This similarity in protection of GIs leads to a logical interpretation that the external trade agreements can be considered as a vehicle to export the EU's internal rules and to indirectly influence the law of partner countries on this issue. The analysis of provisions related to GIs further reveals the impact of European harmonized rules on the trading partner. From this perspective, the NGFTA constitutes a way to forge an alignment with the EU's protection for GIs. In this case, EU's normative influence on international IP standards can be exercised and reflected through its NGFTAs with Asian partners.

V. Conclusion

The analysis of the IP chapters has demonstrated that the level of protection requested by the EU has increased considerably since the application of "Global Europe" strategy. Its NGFTAs have become likened/similar to a TRIPS-plus nature. Under the EU's TRIPS-plus approach, the articulation between the NGFTA and multilateral agreements can be summarized in the following two points. First, the WTO TRIPS agreement represents a set of minimum standards, it can be used as a starting point from which the provisions in EU's FTA seek to raise the level of IP protection. Second point laid on the reference to other WIPO multilateral treaties. After the adoption of TRIPS agreement, several treaties have been concluded in the framework of WIPO, such as the Patent Law Treaty (2000), the Trademark Law Treaty (1994) and the Singapore Treaty on the Law of Trademarks (2006). The TRIPS- plus nature makes these treaties an alternative tool to enhance the international IP regulation. The EU can undertake the TRIPS-plus strategy by including the post-TRIPS multilateral treaties in its NGFTAs.

The content of NGFTAs reflects also the new focus on certain IP issues, particularly on the GIs protection and the IP enforcement. It appears that the EU has used bilateral trade agreements to achieve higher degree of protection for European GIs in foreign markets, such as French "*Comté*" cheese or Scottish "*Whisky*". This assertive stance in the EU's external IP strategy has been carried out firstly through the EU – South-Korea FTA and later, via the agreements with Singapore, Canada, Vietnam and Japan. Taking into consideration the significant progress of Sino-European negotiations regarding the future bilateral agreement on the protection of GIs[66], a certain number of European GIs will be better protected in Chinese market.

In regard to the IP enforcement, the TRIPS-plus measures are often accepted by one negotiating party as a trade-off for concessions by the other partner in other areas. The study of NGFTAs with Asian countries has shown a minor variation in matters of their scope and obligations included. The degree of consistency across these agreements remains relatively high. With varying bargaining powers under consideration, the South-Korea, Singapore and Japan represent currently developed countries and IP-demanding actors. Notably, the EU- Japan EPA illustrates remarkable regulatory convergence on IP issues. In this regard, the strong TRIPS-Plus provisions are correlated with the depth of trade agreement and the strength of their domestic IP law[67].

---

[66] In fact, the EU and China have recently reached provisional agreement on the text of the agreement and on protection for the majority of the GI names of each side. The bilateral negotiations may be formally concluded in 2019. See "EU-China Summit Joint statement, Brussels, 9 April 2019", point 6, available at: https://www.consilium.europa.eu/media/39020/euchina-joint-statement-9april2019.pdf (last visited July 10, 2019).

[67] See Morin, JF & Surbeck, J 2019, 'Mapping the New Frontier of International IP Law: Introducing a TRIPs-plus Dataset', pp. 13-14.

On the contrary, Vietnam should demonstrate less willingness to incorporate a high level of IP enforcement as the technology and creative industries in this country is still under development. However, the extensive IP chapter shows that Vietnamese negotiators were not able to limit the scope of TRIPS-plus provisions in a manner most appropriate to its specific interests. The fact that Vietnam accepts advanced demands from the EU does not result from the convergence of interests, but rather a concession to conclude a NGFTA satisfying the EU's criteria. It seems that the European bargaining power has taken place in order to provide a stronger IP protection in Vietnam. In this case, despite the asymmetry between trade partners, the NGFTA is a way to encourage the convergence of domestic IP regimes between Europe and Vietnam.

In conclusion, the research of TRIPIS-plus provisions allows to reveal the impact of European harmonized rules on its Asian trading partner. From this perspective, the EU's normative influence on international IP standards can be reflected through its NGFTAs, as the later can be used to forge an alignment with EU's IP law. This TRIPS-plus strategy has also been carried out in recent trade partnership agreements in Asia-Pacific region, namely the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[68] and negotiations of Regional Comprehensive Economic Partnership (RCEP)[69] including China. Under the direct or indirect impact of the EU and the US, major promotors of stronger international IP regulation, these two regional agreements are also involved in incorporating TRIPS-plus provisions. Taking into account the implication of the EU, it will be interesting to further observe its influence on the IP norm-setting in Asia-Pacific region, in particular the provisions relating to GI protection.

---

[68] Between Canada and 10 other countries in the Asia-Pacific region: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

[69] RCEP negotiations involve 10 member states of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and the 6 Asia-Pacific states, namely India, China, Japan, South Korea, Australia and New Zealand.

THE EU AND ITS MEMBER STATES AT THE UNCITRAL: PUSHING FOR THE MULTILATERAL INVESTMENT COURT AGAINST THE ODDS

Ondřej Svoboda[1]

I. Introduction

Since 2015, the European Union (EU) and its Member States have been working on the establishment of a Multilateral investment court (MIC). Such court is projected to be a permanent international adjudication body, which can settle investment disputes between investors and states. It should replace the current system of investor-state dispute settlement (ISDS), which suffers a "fundamental and widespread lack of trust" according to the EU Commissioner for Trade Cecilia Malmström.[2] The EU's effort to establish a MIC is evident in two forms. Firstly, the EU imposes its approach bilaterally by trying to include the investment court system in bilateral treaties with its partners. Secondly, at the multilateral front, the EU promotes its proposal at the United Nations Commission on International Trade Law (UNCITRAL), which has been discussing a topic of the reform of ISDS since 2017 and represents the main venue for the multilateral reform approach. The negotiation is also the first multilateral initiative in the field of investment since the failed work of the World Trade Organisation (WTO) on the relationship between trade and investment or the 1998 OECD Multilateral Agreement on Investment.

The task is perhaps even more challenging today because the international investment law is more fragmented than ever before. The EU's approach to the ISDS reform is only one of several alternatives, which are currently offered to policy-makers and investment treaty negotiators. The development of the last years has brought several models of institutional design diverging in three aspects: (I) the degree of institutionalisation of dispute settlement (ad hoc or institutionalised arbitration v. standing tribunal); (II) questions of standing and access to international investment dispute settlement (investor-state v. state-to-state); and (III) the relationship between domestic and international remedies.[3]

This state of affairs is echoed in the UNCITRAL context where we witness direct clashes of various approaches. Accordingly, this paper aims to identify the EU and its Members States' actions at this multilateral forum in pursing their ambitious investment policy goals. In other words, it explores how the EU actively seeks to influence international rules (generally termed 'regulatory diplomacy')[4] in the specific field of international investment law in the complex multi-polar international political constellation. Further, it examines how the EU internal co-ordination works and if the EU speaks with a single common voice in the traditionally high-sensitive area for Member States.[5]

[1] Phd candidate, Charles University of Prague. I would like to thank the organisers and discussants of the LawTTIP Young Researchers Workshop on 5-7 June 2019 at the University of Rennes 1 for valuable comments on the first draft of the paper. In addition, I am grateful to Jan Kunstýř for his input.

[2] Cecilia Malmström. Proposing an Investment Court System, Blog (16 September 2015). Available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

[3] A concept developed in SCHILL, Stephan W., VIDIGAL, Geraldo. *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*, Geneva: ICTSD and IDB (2018), p. 12.

[4] YOUNG, Alasdair R. Europe as a global regulator? The limits of EU influence in international food safety standards, *Journal of European Public Policy*, Vol. 21, No. 6 (2014), p. 906.

[5] As regards the mixed competence of ISDS and a possible obligation for Member States to compensate the foreign investor's ISDS claim under the Regulation (EU) No. 912/2014 of the European Parliament and of the

For this purpose, the article closely follows the multilateral development under the auspices of the UNCITRAL and especially the EU approach in promotion of the systematic reform in following four parts. Next part briefly introduces the development of the EU investment policy regarding ISDS, from the early European Commission's Communication Towards a comprehensive European international investment policy[6] to the setting of its reform goals in recent negotiating directives.[7] Attention which the EU devotes to the UNCITRAL process has been formally attested when the Council of the EU gave the European Commission a mandate to negotiate the creation of a new multilateral court for investment disputes at the UNCITRAL in 2018. It is further shown that the EU seeks a fundamental change against the smaller modifications of the status quo defended by some important opponents. This must be taken into consideration as the level of ambition of the EU as well as the preferences of other actors are highly relevant to fulfil the EU's goals. An analysis of the legal framework for the participation of the EU at the UNCITRAL further complements the picture. Under the analytic framework, part IV examines polarised and politicised negotiations at the UNCITRAL which provides the international context. The focus is particularly on positions presented by the EU and its Member States, both in its written submissions and oral interventions, because a success of regulatory diplomacy often depends on generating and presenting information and maintaining sustained engagement in highly technical discussions as well as a an ability to speak in one voice.[8] This part also draws its empirical data from the UNCITRAL's records, in order to assess Member States' activity. Part V explores how the EU engages with other stakeholders in the process. Conclusion summarises the identified EU's strategies to increase support for the MIC project and to exert the EU's regulatory influence in multilateral negotiations.

II. Background of the EU Efforts at the UNCITRAL

The emergence of the EU's investment policy and the growing role of the EU in this domain are still recent phenomenon.[9] Yet, as many other fields, the EU acts as a 'rule generator' or a 'normative power' which disseminates its norms and values through various means.[10] Correspondingly, it has developed a specific approach towards investment protection and investment dispute mechanism although it did not envision radical deviation at its very beginning. According to the initial documents such as the "European Commission's Communication Towards a comprehensive European international investment policy", the Union should have followed the available best practices of the Member states. [11] Despite this

Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to- state dispute settlement tribunals established by international agreements to which the European Union is party.

[6] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy, COM/2010/0343 final (7.7.2010).

[7] Council of the European Union. Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 (20 March 2018).

[8] YOUNG, Alasdair R. Europe as a global regulator? The limits of EU influence in international food safety standards, *Journal of European Public Policy*, Vol. 21, No. 6 (2014), p. 907.

[9] For historical account see BASEDOW, Johann R.. *The EU in the Global Investment Regime. Commission Entrepreneurship, Incremental Institutional Change and Business Lethargy*, Routledge: Abingdon and New York (2018).

[10] See e.g. CREMONA, Marise. The Union as a Global Actor: Rules, Models and Identity, *Common Market Law Review*, Vol. 41, No. 2 (2004), p. 553-573.

[11] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy, COM/2010/0343 final (7.7.2010).

declared goal, during the first bilateral negotiations with Canada and Singapore, several commentators observed a “NAFTA Contamination” of the European approach.[12]

The pivotal moment in constituting the EU’s investment policy came with the public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) with the United States. In response to results of the public consultation, the European Commission was forced to change its approach to ISDS radically and envisaged “the path for reform” with its ultimate goal – a standing international court for investment disputes replacing the current system of ad hoc investor-state arbitration.[13]

In pursuing this aim, the EU currently actively promotes the MIC project in several ways. Bilaterally, it successfully included in the recently concluded trade or investment treaties with Canada, Singapore, Vietnam, and Mexico with a “hybrid” mechanism between arbitration and court, standing two-tier adjudication body which is called the investment court system (ICS) and specific provisions on multilateralisation of investment dispute mechanism.[14] In this setting, it is easier for the EU as predominantly weaker partners are convinced to accept the EU’s approach. In the multilateral context, the EU has closely cooperated with Canada and together they presented a proposal of establishing an investment court at various fora such as the OECD in Paris (October 2016), the World Economic Forum in Davos (January 2017) or the UNCTAD conferences in Nairobi (July 2016) and in Geneva (October 2017), and finally at the UNCITRAL. However, such multilateral setting may enable to form the oppositions of states, which will reject or water down norms proposed by the EU.[15]

At some point between 2016 and 2017, the EU decided that the UNICTRAL is the most suitable forum for initiating formal negotiations for several likely reasons. In the first place, the representativeness of a greater range of the world’s states is an ideal environment for inclusive building international court which will seek for the broadest legitimacy as possible. The UNCITRAL also gives other international organisations a “right” to “observe” and “participate” in UNCITRAL proceedings. This is not important just for the EU, but for other organisations active in this field as well. The OECD or the ICSID thus have an opportunity to contribute to discussions with their experience and expertise. And in more limited way, meeting are open also for other stakeholders. Thanks to this policy, the UNCITRAL is considered “a center of global governance where states, networks, clubs, international governmental bodies, trade groups, among others, sat side-by-side in lawmaking chambers practically as deliberative equals.”[16]

[12] PETERSON, Luke E. EU Member States Approve Negotiating Guidelines for India, Singapore and Canada Investment Protection Talks; Some European Governments Fear “NAFTA Contamination”, *IA Reporter* (23 September 2011).

[13] European Commission. Concept Paper: Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court (5 May 2015); European Commission. Trade for All: Towards a more responsible trade and investment policy (14 October 2015).

[14] EU-Canada Comprehensive Economic and Trade Agreement, Article 8.29; EU-Vietnam Investment Protection Agreement, Article 3.41; EU-Singapore Investment Protection Agreement, Article 3.12; EU-Mexico Global Agreement, Article 14 of the Trade part draft.

[15] GÁSPÁR-SZILÁGYI, Szilárd. Quo Vadis EU Investment Law and Policy? The Shaky Path Towards the International Promotion of EU Rules, *European Foreign Affairs Review*, Vol. 23, No. 2 (2018), p. 173-174.

[16] BLOCK-LIEB, Susan, HALLIDAY, Terence C. *Global Lawmakers. International Organizations in the Crafting of World Markets*, Cambridge University Press (2017), p. 323.

Internal legal commitments set by the Treaties undoubtedly played its role and characteristics of the UNCITRAL were taken into account in the final decision.[17] In Art. 3(5) of Treaty of the European Union (TEU), the EU declares as one of its objectives "the strict observance and the development of international law, including respect for the principles of the United Nations Charter". Similarly, in Art. 21 TEU the EU commits itself to "promote an international system based on stronger multilateral cooperation and good global governance" while "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations". Considering this strong commitment to multilateralism, the United Nations and international law, the UNCITRAL was a logical choice for the EU. These 'structural principles' are designed to articulate the EU external relations and shape the EU international identity.[18] This leads to the concept of the EU as a normative actor promoting a rule-based international order. In practice, the approach is materialised in underpinning of existing institutions such as the WTO Appellate Body[19] or support to establishing new international judicial organs such as the International Criminal Court (ICC).[20]

The previous EU experience with an engagement in work of the UNCITRAL on issue of transparency in investment arbitrations could be another factor that could be considered in Brussels. In 2014, the Working Group II created Transparency rules, providing transparency in international investment proceedings, and as a next step an instrument called the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"), which was subsequently adopted by the UN General Assembly on 10 December 2014.[21] The EU and a majority of its Member States intensively advocated the progress in this area. It came with no surprise that the EU welcomed opening the Mauritius Convention for signatures and expressed its intention to sign it.[22] As a next step, it agreed with the UN to contribute to the operation of UNCITRAL Transparency Registry.[23] However, critics question genuine commitment of the EU, if it or its Member States have not been able to accede to the Mauritius Convention.[24] In similar vein, they may express doubts over EU efforts to the MIC.

In the next step, on 20 March 2018, the Council of the EU published negotiating directives authorising the European Commission to negotiate an international treaty, which would

[17] BROWN, Colin. The European Union's approach to investment dispute settlement [speech], 3rd Vienna Investment Arbitration Debate (22 June 2018), p. 13, 16. Available at: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf.

[18] CREMONA, Marise. Structural Principles and their Role in EU External Relations Law, *Current Legal Problems*, Vol. 69, No. 1 (2016), p. 46.

[19] European Commission. Press release - WTO reform: EU proposes way forward on the functioning of the Appellate Body (26 November 2018). At: http://europa.eu/rapid/press-release_IP-18-6529_en.htm.

[20] The EU and its Member States have played a significant role in the design and establishment of the ICC. Subsequently, in bilateral relations with third countries, the EU, seeking cooperation to strengthen support of the universality of the ICC, successfully proposes ICC clauses in international agreements, such as the Cotonou Agreement or the Framework Agreement on Partnership and Cooperation with Mongolia. See the whole list at: http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=106.

[21] UN General Assembly's Resolution of 10 December 2014, A/RES/69/116.

[22] European Commission. Press Release: EU welcomes more transparency in investor-to-state dispute settlement globally (17 March 2015).

[23] European Commission. Press Release: EU to continue its support of the operation of UNCITRAL Transparency Registry for a further three years (14 December 2016).

[24] Several Member States only signed the Mauritius Convention but did not ratify it. See also SVOBODA, Ondřej. Current State of Transparency in Investment Arbitration: Progress Made But Not Enough, In: DRLIČKOVÁ, Klára, KYSELOVSKÁ, TEREZA (eds.) *COFOLA INTERNATIONAL 2017: Resolution of International Disputes (Conference Proceedings)*, Brno: Masarykova univerzita (2017), p. 26-40.

establish a MIC in the future.[25] Traditionally, the designated negotiator for the EU in trade matters is the European Commission and the same logic was applied also in this case: "The Union shall be represented by the European Commission throughout the negotiations. In accordance with the principles of sincere cooperation and of unity of external representation as laid down in the Treaties, the Union and the Member States of the Union participating in the negotiations shall fully coordinate positions and act accordingly throughout the negotiations."[26]

The directives were also very specific regarding the UNCITRAL, saying openly that "[n]egotiations, based on preliminary analysis and discussions, should be conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)." They even anticipated situation when a consensus will not be reachable: "In the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law shall exercise their voting rights in accordance with these directives and previously agreed EU positions."[27] This part clearly reflects the duty of sincere cooperation enshrined in the EU law but the Treaties do not provide specific rules on practical arrangement in case of mixed competence for EU external action.[28] The principle, as developed in rich case law of the CJEU, applies to the shared competence situation as well. In case of international treaty- making, the Member States must act with due regard to the interests of the Union, which may involve "special duties of actions and abstention" for them.[29] The Treaties explicitly provide a commitment for coordination of Member States' actions in international organisations and at international conferences to uphold the Union's positions in such forums. It is further stressed that they have an obligation in international organisations and at international conferences where not all Member States participate.[30]

Still, it is notable how much Member States were willing to *a priori* limit their sovereign rights as members of the UNCITRAL, especially in a fiercely contested field of investment policy and investor-state dispute mechanism falling into the shared competence according to the recent opinion of the CJEU.[31] The division of competences usually contributes significantly to EU relevance in international organisations. Nevertheless, there were in the past analogous situations of the clear convergence of Member States and Commission's preferences when mandates given to the Commission by the Council put less emphasis on the division of competences and more on general support for key aims.[32]

The EU's actorness and the capacity to operate depends on the institutional settings of international organisation. Membership or participation in international organisations involve

[25] Council of the European Union. Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 (20 March 2018).

[26] Ibid, para 1.

[27] Ibid, para 2.

[28] In the field of international environmental law see VAN EECKHOUTTE, Dries, CORHAUT, Tim. The Participation of the EU and its Member States in Multilateral Environmental Negotiations post Lisbon, *Yearbook of European Law*, Vol. 36, No. 1 (2017), p. 749–809.

[29] C-266/03, Commission v. Luxembourg (2005) ECR I-4805, para 59; C-433/03 Commission v. Germany (2005) ECR I-6985, para 65. See also KLAMERT, Marcus. *The Principle of Loyalty in EU Law,* Oxford: Oxford University Press (2014); DE WITTE, Bruno. The European Union's Place among the International Cooperation Venues of its Member States, *Heidelberg Journal of International Law*, 2014, Vol. 74, No. 3 (2014), p. 460.

[30] Art. 34 of the Treaty on European Union.

[31] Opinion 2/15 Free Trade Agreement with Singapore, ECLI:EU:C:2016:992, para .

[32] E.g. in the case of the negotiations on the Cartagena Protocol on Biosafety. See RHINARD, Mark, KAEDING, Michael. The International Bargaining Power of the European Union in ‚Mixed' Competence Negotiations: The Case of the 2000 Cartagena Protocol on Biosafety, *Journal of Common Market Studies*, Vol. 44, No. 5, 2006, p. 1023-1050.

he right to attend the meetings, being elected for functions in the governing and executives organs, and exercising voting and speaking rights. At the UNCITRAL, the EU itself is not a full member. As an inter-governmental international organisation, it has only an observer status. As an observer, the European Commission representing the EU can attend meeting and it is not significantly limited in its interventions or making submissions although formal intervention may be only possible at the end of the interventions of states.[33] Member States are represented in two different regions and not every EU Member State is a member of the UNCITRAL. As of this writing (June 2019), 13 of 60 States members, [34] elected for six years, are held by the EU Member States. In practice, the presence of the EU at the UNCITRAL is ensured by several actors, including the European Commission and EU Member States' delegations present as members or observers.

III. First and Second Stage of the UNCITRAL Process

In July 2017, the UNCITRAL conferred an ambitious and broad mandate on the Working Group III (WG III) to elaborate the possible reform of ISDS. The mandate also required that it would be done through a consensus-based, government-led process in three steps.[35] However, it was not possible to reach the consensus already at the first meeting after its opening – an election of officers, particularly of the chair of the working group.[36] In this typically short and uneventful process, delegates turned to a voting process, for only the second time in UNCITRAL's history, in order to break the deadlock after a day-and-a-half "consultation break". Most of the delegates voted for Mr. Shane Spelliscy of Canada as a chair. Mr. Spellilscy was the main candidate for this role from the beginning but was opposed by several countries due to Canada's favourable position towards the MIC.[37] His rival candidate, Ms. Natalie Yu-Lin Morris-Sharma of Singapore, nominated by Chile and supported by the United States and Japan,[38] was subsequently elected as the rapporteur. From forty-five ballots cast

[33] See also WESSEL, Ramses A. The Legal Framework for the Participation of the European Union in International Institutions, *European Integration*, Vol. 33, No. 6 (2011), p. 629-630.

[34] The UNCITRAL States members can vote in the absence of consensus in decision-making of the UNCITRAL and its working groups.

[35] "The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed

that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organisations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s)." Report of the United Nations Commission on International Trade Law (UNCITRAL) (50th Session) (3-21 July 2017), UN GAOR 71st Session Supp No 17 UN Doc A/71/17 (2017), para. 264.

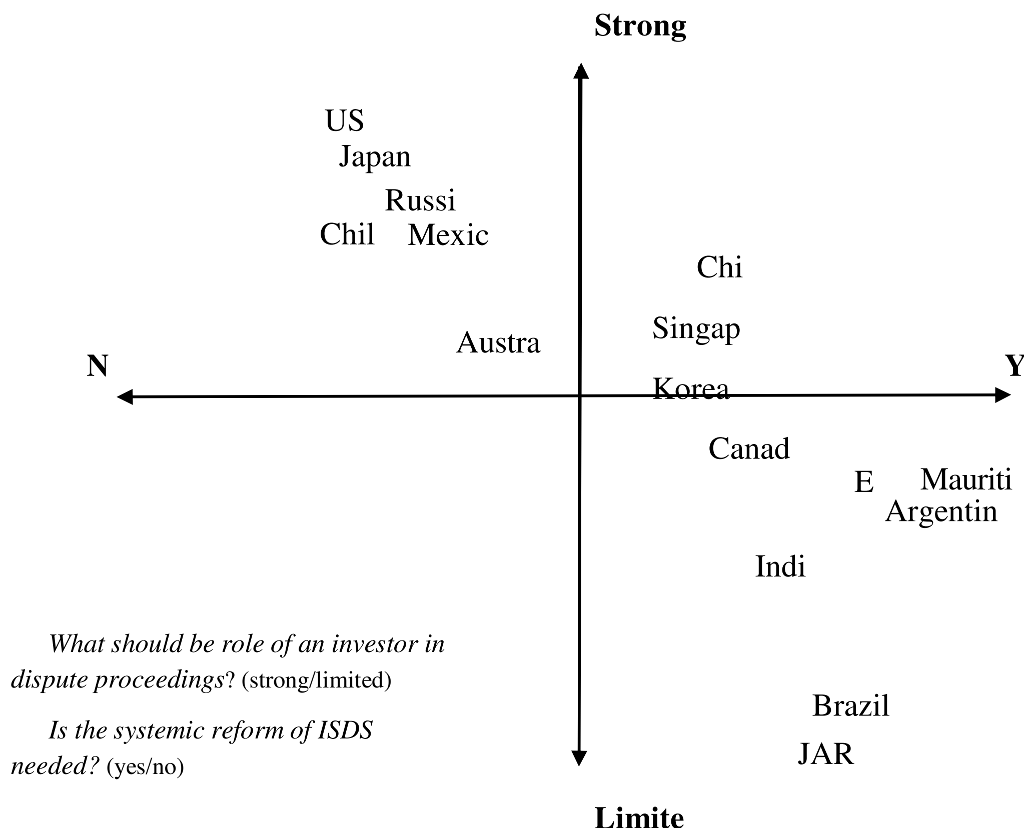
[36] PETERSON, Luke E. UNCITRAL meetings on ISDS reform get off to bumpy start, as delegations can't come to consensus on who should chair sensitive process – entailing a rare vote, IA Reporter (7 December 2017).

[37] In the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA), the EU and Canada committed themselves to "work expeditiously towards the creation of the Multilateral Investment Court."

[38] As admitted by a delegate of Mauritius in his intervention. UNCITRAL. Audio Records of the Working Group III (Dispute Settlement), 34th session - 27/11/2017. Available at: https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/2b83bb3f-f8d6-4ba5-b9a0-418377e18bcc

(including one invalid and three abstentions) the Canadian candidate received the majority of twenty-four votes.[39] Despite secret ballot, it is likely that more than half of these votes were provided by thirteen EU Member States that were members of the UNCITRAL at that time.

Positioning of selected states towards the ISDS reform



In following discussions, states participating in the UNCITRAL process have accepted the premise that the current criticism of the investment law regime "reflect[s] concerns about the democratic accountability and legitimacy of the regime as a whole."[40] The widespread concerns lead to the conclusion that it was necessary "to take a holistic view of the system, especially of whether it was achieving its purported objectives, when considering and designing any ISDS reform."[41] The debate in the WG III set the scope of reform focusing on three aspects of functioning of ISDS: (1) concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions;[42] (2) concerns pertaining to arbitrators and decision-makers;[43] and (3) concerns pertaining to cost, including third party funding, and

[39] UNCITRAL. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, Part I' (Vienna, 27 November-1 December 2017), A/CN.9/930 (19 December 2017), paras 13-15.

[40] UNCITRAL. Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): Note by the Secretariat, A/CN.9/917 (20 April 2017), para. 12.

[41] UNCITRAL. Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its 35th session (New York, 23-27 April 2018), A/CN.9/935 (14 May 2018), para. 97.

[42] UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters. Note by the Secretariat, A/CN.9/WG.III/WP.150 (28 August 2018).

[43] UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS. Note by the Secretariat,

duration of ISDS cases.[44] Growing discontent with the ISDS led to WG III consensus that reform in these areas is required. This is a significant achievement, which could seem impossible even a few years ago. As such, it is also an important evidence of the EU's ability to gain support from third countries in the initial two phases.

As consequence, one could consider such interim conclusions to have been very much in favour of the EU lines because they provided a strong rationale for systemic approach in the reform of ISDS. Nevertheless, despite the formal conclusions, the political resistance from a number of states remained unmoved. In addition, the geopolitical context of a changing global balance of economic power and insurgent economic nationalism weaken the leadership capacity of the EU as well as multilateralism as universally accepted approach.

The MIC project thus continues to lack support from the most central actors of the system, notably, the US, Japan and China. While the US and Japan oppose the EU proposal openly, China offers some solace to the EU as it generally recognises the need for a systemic reform. Moreover, the position of other important states is ambivalent at best. For example, it seems that Argentina favours only an appellate mechanism. Many developing countries, such as South Africa, Indonesia, Ecuador, Uganda, Tanzania, Venezuela and India have terminated their existing BITs and are cautious of any form of investor-state dispute mechanism. Some countries, such as Brazil or India, have now developed their own models, which include only very limited opportunity to use ISDS or have even excluded that option completely.

IV. The Latest Development and Next Workplan

In advance of the last meeting of UNCITRAL WG III in April 2019 in New York, the EU and its Member States had made a submission on establishing a standing mechanism for the settlement of international investment disputes, as well as a work plan towards this goal.[45] The submission not only demonstrated the commitment of the EU to a fundamental change in investment dispute settlement, but it is an example of applying an argumentative strategy based on persuasion and information sharing. Such approach is more promising in situation when the EU faces a strong opposition of other actors and uses well-reasoned arguments based on points of general concerns or related to universally accepted values.[46] This choice of strategy may show a focus rather on a wider audience of smaller states in order to ensure broader support and higher legitimacy proposed norms.[47]

In addition, the submission considered "an open architecture" of future standing mechanism. Such setting would permit states to use the appeal mechanism only, which would

A/CN.9/WG.III/WP.151 (30 August 2018); UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues. Note by the Secretariat, A/CN.9/WG.III/WP.152 (30 August 2018).

[44] UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Cost and duration. Note by the Secretariat A/CN.9/WG.III/WP.153 (31 August 2018); UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Third-party funding. Note by the Secretariat, A/CN.9/WG.III/WP.157 (24 January 2019).

[45] UNCITRAL. Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159 (24 January 2019); UNCITRAL. Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1 (24 January 2019).

[46] PANKE, Diana. The European Union in the United Nations: an effective external actor?, *Journal of European Public Policy*, Vol. 21, No. 7 (2014), p. 1061.

[47] ROMANYSHYN, Iulian. Explaining EU Effectiveness in Multilateral Institutions: The Case of the Arms Trade Treaty Negotiations, *Journal of Common Market Studies*, Vol. 53, No. 4 (2015), p. 887.

enable states to continue to use ad hoc arbitration under ISDS with the possibility of awards being appealed. This proposal is indeed an invitation by the EU to states which have reservations about a full-fledged international court but could consider an appeal mechanism.

In nuanced opposition against the EU proposal, Chile, Israel and Japan jointly submitted their idea of how the WG III should continue in its work. The submission focused on a prioritisation of identified concerns and pursuing reforms to address specific concerns for which there is a high degree of consensus.[48] This can be summarised as a piecemeal approach towards the reform. The submission had received an additional support from the US, Mexico and Russia during the session. If accepted, the proposed workplan could actually lead to the postponement of structural reforms until after "low hanging fruits" would have been harvested.

Based on interventions commenting tabled proposals on a way forward it was clear how difficult is for the EU to persuade other states to embrace the idea of a MIC and to focus on the project. Even Canada, a like-minded country and an initial "ally" in the MIC project, became more ambiguous in its interventions. Mauritius remained the only vocal supporter of a MIC alongside the EU.

A number of the EU Member states were, fortunately for their cause, vocally engaged, as many times before, in the discussion. Based on the UNCITRAL's records, the diversity of the EU Member States intervening is worth noting. A traditional "EU core group" consisted of big Member States such as France, the UK, Spain and Germany speaking frequently is easily identified. Still, many others with different background in terms of FDI flows (exporters X recipients) or experience with investment disputes took floor repeatedly as well. The content of their interventions was coherent and consistent with the overall position of the EU.[49] On the level of 28 Member States,[50] there have been so far a high degree of convergence of national preferences regarding sensitive issues of investment dispute settlement system. This unity gave additional strength in multilateral setting of the WG III under which helps if goals are consistently pursued by many voices.

Supportive interventions of EU Member States at the UNCITRAL WG III in main issues[51]

UNCITRAL WG III session	Issue in question	Intervening EU Member States

[48] UNCITRAL. Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): Submission from the Governments of Chile, Israel and Japan, A/CN.9/WG.III/WP.163 (15 March 2019), p. 4.

[49] General co-ordination takes place in established Council working group, Trade Policy Committee, in Brussels before each session of the WG III. Subsequently, in regular EU co-ordination meetings between delegates of EU Member States and officers of the European Commission at the seat of the UNCITRAL during the negotiations legal, technical, factual and normative arguments are exchanged in order to develop shared positions and react to new situations.

[50] More precisely, one Member State is in the process of withdrawing the EU.

[51] Based on author's personal account and UNCITRAL digital audio recordings. Available at: https://uncitral.un.org/en/working_groups/3/investor-state

34th session, 27 November - 1 December 2017, Vienna	Duration and cost	Austria, Belgium, Czech Republic, Finland, France, Germany, Italy, Malta, Netherlands, Poland, Romania, Slovakia, Spain, United Kingdom
	Transparency	France, Germany, Netherlands, Slovakia, United Kingdom
	Frivolous claims	Czech Republic, Germany, Spain, United Kingdom
	Coherence and consistency	Austria, Czech Republic, Finland, France, Germany, Italy, Netherlands, Slovakia, Spain, United Kingdom
35th session, 23-27 April 2018, New York	Coherence and consistency (cont.)	Austria, Cyprus, France, Germany, Romania, Spain, United Kingdom
	Arbitrators and decision makers	Belgium, France, Greece, Netherlands, Poland, Romania, United Kingdom
36th session, 29 October - 2 November 2018, Vienna	Consistency, coherence, predictability and correctness	Austria, France, Germany, Croatia Netherlands, Slovakia, Spain, United Kingdom
	Arbitrators and decision makers	Denmark, Germany, Netherlands, Poland, Romania, Slovakia, Spain, Sweden, United Kingdom
	Cost and duration	Belgium, Bulgaria, Czech Republic, Hungary, Poland, Romania, Spain,
37th Session, 1-5 April 2019, New York	Work on systemic reform	Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Romania, Slovakia, Spain, United Kingdom

[52] ROBERTS, Anthea, ST. JOHN, Taylor. UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest, *EJIL: Talk!* (30 April 2019). Available at: https://www.ejiltalk.org/uncitral-and-isds- reforms-the-divided-west-and-the-battle-by-and-for-the-rest/.

[53] Similar tactic was employed in the context of the negotiations on the Cartagena Protocol on Biosafety, the EU negotiators convinced developing countries to support its position and together they put pressure on the opposite Miami group led by the US. RHINARD, Mark, KAEDING, Michael, The International Bargaining Power of the European Union in ‚Mixed‘ Competence Negotiations: The Case of the 2000 Cartagena Protocol on Biosafety, *Journal of Common Market Studies*, Vol. 44, No. 5 (2006), p. 1040.

administered by the UNCITRAL to enable representatives from developing states to attend the meetings over the next three years until 2020.[54] The travel fund (also called 'Trust Fund') was established by the UN General Assembly's decision to grant travel assistance to developing countries for which a lack of financial resources is clearly a barrier to participating in the work of UNCITRAL[55] and until the start of WG III's on the reform of ISDS, only Austria, Cambodia, Cyprus, Kenya and Mexico contributed to the fund before. The European Commission's document on an allocation of allocation of financial resources describes a purpose of contribution of 75 000 EUR to the UNCITRAL as follows: "The multilateral reform leading to the establishment of a Multilateral Investment Court is of high importance to the European Commission. It is, therefore, in the interest of the Commission that delegates of as many governments as possible participate in the meetings of UNCITRAL Commission and Working Group III. However, many countries across the globe have limited funds to cover their delegates' attendance to these meetings. Therefore, the contribution to the UNCITRAL Trust Fund would ensure travel assistance to those developing countries."[56] It is therefore evident how the European Commission links a broader participation of developing countries and an eventual success of the MIC project.

Furthermore, the EU and its Member States support the idea of inter-sessional meetings of the WG III worldwide as another tool to engage developing countries. Those events aim to raise awareness about ongoing negotiations and share concerns on ISDS, particularly among countries which cannot attend the formal sessions in Vienna or New York. So far, intersessional meetings took place in and in Incheon, South Korea (September 2018) and in Santo Domingo, Dominican Republic (February 2019). The third inter-sessional meeting will happen in Conakry in Guinea (September 2019), co-organised by the Government of Guinea and the International Organisation of La Francophonie. The French language can serve as an additional bridge between the EU and some Member States like France or Belgium and many developing countries. Natural cultural proximity helps in diffusion of European ideas at regular side-meetings during WG III's sessions reserved for French-speaking delegates as a possible useful venue for closer coordination.

During the intense discussion at the last WG III session, the EU and its Member States together with mainly developing states leaning towards to an ambitious reform, thus restored the balance between incrementalists and systemic reformers.[57] The solution to "the key question for the week"[58] how the work plan will be structured, i.e. if delegates will work sequentially or concurrently on a series of reform proposals, came from Switzerland. This proposal became later a basis for a compromise that made everyone "equally unhappy" in words of the chair. The final compromise consists of two workstreams in parallel, initially described by Switzerland in following way:

[54] UNCITRAL. Possible reform of investor-State dispute settlement (ISDS): Information on options for implementing a workplan. Note by the Secretariat, A/CN.9/WG.III/WP.158 (25 January 2019), para 15.

[55] UN General Assembly's Resolution of 9 December 1993, A/RES/48/32, paras 5-6.

[56] European Commission. ANNEX to the Commission Decision on the adoption of the 2018 work programme for the financing of projects in the area of external trade relations, including access to the markets of non-European Union countries and initiatives in the field of trade related assistance, C(2018) 869 final (16.2.2018), p. 13.

[57] ROBERTS, Anthea. Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration, *American Journal of International Law*, Vol. 112 (2018). Author is aware of the possible simplification in using those terms as discussed in ROBERTS, Anthea, ST. JOHN, Taylor. UNCITRAL and ISDS Reforms: Battles over Naming and Framing, *EJIL: Talk!* (30 April 2019). Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-battles-over-naming-and-framing/.

[58] LANGFORD, Malcolm, ROBERTS, Anthea. UNCITRAL and ISDS Reforms: Hastening slowly, *EJIL: Talk!* (29 April 2019). Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-hastening-slowly/.

"The first stream could focus on preparing a code of conduct for arbitrators, developing solutions to address issues of cost (including allocation of cost, security for cost, third-party funding, and the creation of an advisory centre), and of duration (including early dismissal of frivolous claims), and addressing issues related to concurrent proceedings, counterclaims and dispute prevention.

The second stream could focus on structural reform options and cover issues relating to the jurisdiction of a multilateral investment court, its composition (including selection of members, qualifications and diversity), the establishment of an appeal mechanism (either as built-in or stand-alone), the enforcement of decisions as well as the legal framework (including an instrument similar to the Mauritius Convention on Transparency)."[59]

This likely represents the best possible outcome in effort to achieve a consensus (or in other words to avoid another voting). With this allocation of time, next steps of the WG III will be following: (1) delegations may submit solutions to be developed including a timeline of priorities to the UNCITRAL by 15 July 2019; (2) the WG III will discuss the submitted proposals and create a project schedule at the next session in October 2019 in Vienna; (3) discussion and development of potential solutions.

Despite repeated attempts to delay the work on a MIC by the group of incrementalists, the EU and other participants interested in more fundamental reform of ISDS have succeeded in securing resources and time-allocation within the UNCITRAL to work on systemic reforms. Nevertheless, the division of the WG III workload into two streams raises new questions concerning the role of the EU in further process. How strongly should the EU engage into work of the first stream? And if the EU fully engages on "other potential solutions", should it try to direct the work within this stream on those topics that will be also necessary in building the court, such as ethic rules for arbitrators of rules on third party funding)?

The situation is complicated by the fact that the dominant approaches to dispute settlement design are not only incompatible, but also ideologically-based choices, often developed under strong political influence and taking domestic public opinion into account. Non-negotiable red lines already led to an exclusion of an investment chapter from the EU-Japan Economic Partnership Agreement with no clear perspective that there will an investment treaty between the EU and Japan any soon.

V. The EU Engagement with Other Stakeholders

Not only support of states is important for the success of the EU proposal in the UNCITRAL process. The inclusion of all stakeholders is a crucial part of any result that will emerge from the deliberative process and it emulates the European conception of a broad international community, not only made up of states but also made up of non-state actors. This concept of the 'New Diplomacy' including close cooperation with civil society was already useful in the recent past when most EU Member States were part of the Like-Minded Group of countries and NGOs that coordinated their negotiating strategies on the Rome

[59] UNCITRAL 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37th session (New York, 1-5 April 2019)' (14 May 2018) A/CN.9/970, para 74.

Statute of the ICC.[60] The need for non-state partners in 'effective global governance' is broadly recognized in the 2016 EU Global Strategy (mentioning civil society 22 times and the private sector ten times) which states follows:

"[w]e will partner selectively with players whose cooperation is necessary to deliver global public goods and address common challenges. We will deepen our partnerships with civil society and the private sector as key actors in a networked world. We will do so through dialogue and support, but also through more innovative forms of engagement."[61]

Moreover, the reformist EU position has been in part a consequence of the pressure from the public, NGOs and press. Hence, the EU must be able to persuade other stakeholders that a MIC is the best solution in the ongoing reform debate, offering the right balance between business and non-business interests.[62] So far, the EU proposal has received mixed reactions from different stakeholder communities. Particularly, the arbitration community and the civil society have voiced their criticism.

It is not unusual among practitioners that the EU proposal is described as "remarkably divorced from reality", creating "the perfect storm: incompetence, non-diversity, political colouring".[63] For some, the proposed MIC will not likely be neutral and independent and at the end it will again raise questions about its legitimacy.[64] And finally, there are arbitrators who calls the EU as one of the chief sponsors today of the ISDS "Demolition Derby" and its proposal as a "radical movements devoid of a proper understanding of just how the world really works."[65] Those voices are also present in the room as they intervene as representatives of international professional associations.

Critics of ISDS on the other hand warn against narrow interpretation of the WG III mandate. As ISDS claims may have, according to those critics, a negative impact on good governance and the rule of law, a MIC, much like ISDS could undermine reforms

[60] GROENLEER, Martjin. The United States, the European Union, and the International Criminal Court: Similar values, different interests?, *International Journal of Constitutional Law*, Vol. 13 No. 4 (2015), p. 938- 939. Needless to say that cooperation was effective also thanks to provided financial support by the EU for NGOs activities campaigning for the establishment of the ICC.

[61] European External Action Service. Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy (June 2016), p. 18. For detailed analysis of the 2016 EU Global Strategy see FORSCH, Sebastian. The European Union's Changing Approach towards Multilateralism, *EU Diplomacy Papers*, 8/2017 (2017), p. 1-39.

[62] SCHILL, Stephan W. Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?. *Journal of World Investment & Trade*, Vol. 19, 2018, p. 3.

[63] GRILL, Anne-Karin. Mind the Label: Loyalists and Reformists and ISDS. *Kluwer Arbitration Blog*. 29 December 2017. Available at: http://arbitrationblog.kluwerarbitration.com/2017/12/29/uncitral-isds-working-group-vienna-11-12-2017/.

[64] ZÁRATE, José M. A. Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?, *Boston College Law Review*. Vol. 59, No. 8 (2018), p. 2 788-2 789.

[65] BROWER, Charles N., AHMAD, Jawad. The "Demolition Derby" That Seeks To Destroy Investor-State Arbitration?, *Southern California Law Review*. Vol. 91, No. 6 (2018), p. 1 141, 1 195.

strengthening domestic rule of law.[66] Similarly, for many NGOs, the EU proposal is just envisaged "too keep many of ISDS's most damaging features (and flaws) intact."[67]

The EU is well aware of the risks related to a possible denial of a MIC by large portions of some stakeholders and simultaneously it realises benefits of having them on its side.[68] By continuous engagement, the European Commission offers different groups various benefits of replacing ISDS by a standing court. For instance, Commission's representatives have recently presented the EU approach at the Herbert Smith Freehills and BIICL Investment Treaty Forum,[69] the Vienna Investment Arbitration Debate[70] or the EFILA Annual Conference.[71] Regarding civil society, the European Commission holds a regular stakeholder meeting on the reform of ISDS before each WG III session to "update stakeholders on the latest developments in this area at the EU and international level and to exchange views on the latest relevant EU policy developments."[72] In this respect, there is a huge improvement on the EU's side, compared with the situation of the TTIP public consultation.

In contrast to two previous stakeholders groups, the EU's proposal has received a considerable positive reaction from an academia. Many scholars agree that a MIC would improve the current mechanism, increasing its legitimacy, if rightly designed.[73] In 2018 the Geneva Center for International Dispute Settlement (CIDS) facilitated the creation of an "Academic Forum on ISDS" which assembles more than 120 academics active in the field of ISDS. During the 2019 April session of WG III the Academic Forum presented results of its project "Matching Concerns and Reform Options". According to the report, the MIC option "scored" as the best solution for most concerns.[74] Regarding the conclusions, a further engagement of the Academic Forum in the work of the WG III suggested by the EU is noteworthy. Based on the EU's suggestion, it is explicitly stated in the report that the UNCITRAL Secretariat prepares a topic of selection and appointment of adjudicators in

[66] VAN HARTEN, Gus, KELSEY, Jane, SCHNEIDERMAN, David. Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter, *Osgoode Hall Law School Research Papers, Working Papers, Conference Papers* (2019), p. 14-15.

[67] Global Civil Society Sign-on Letter on UNCITRAL's Investor-State Dispute Settlement Reform Discussions. In: Seattle to Brussels Network (30 October2018). Available at:
http://www.s2bnetwork.org/wp-content/uploads/2018/10/UNCITRAL-Global-Letter-Oct-30-2018.pdf.

[68] In the context of the Arms Trade Treaty negotiations, the EU became a natural ally of the civil society and worked directly with NGOs. ROMANYSHYN, Iulian, Explaining EU Effectiveness in Multilateral Institutions: The Case of the Arms Trade Treaty Negotiations, *Journal of Common Market Studies*, Vol. 53, No. 4, 2015, p. 887.

[69] Herbert Smith Freehills, Event – The future of investment arbitration: have we reached a high water mark?. Available at: https://hsfnotes.com/arbitration/2017/10/26/event-the-future-of-investment-arbitration-have-we-reached-a-high-water-mark/.

[70] BROWN, Colin. The European Union's approach to investment dispute settlement [speech], 3rd Vienna Investment Arbitration Debate (22 June 2018).

[71] The EFILA Annual Conference Programme. Available at: https://efila.org/wp-content/uploads/2019/01/EFILA-Annual-Conference-2019-Program-16-1-2019a.pdf.

[72] European Commission. Stakeholder meeting on the establishment of a multilateral investment court (22 March 2019). Available at: http://trade.ec.europa.eu/doclib/events/index.cfm?id=1983.

[73] HOWSE, Rob, Designing a Multilateral Investment Court: Issues and Options, *Yearbook of European Law*, Vol. 36, No. 1 (2017), p. 235; SAUVANT, Karl P., The state of the international investment law and policy regime, *Columbia FDI Perspectives*, No. 247 (2019), p. 2.

[74] Academic Forum. Concept Paper Project Matching Concerns With Reform Options – Summary Conclusions. Available at: https://www.cids.ch/images/Documents/Academic-Forum/8_Summary_conclusions_-_Table.pdf.

cooperation with the Academic Forum.[75] Assumingly, the EU perceives that methods and approach employed by the Academic Forum could be under academic objectivity and neutrality usefully utilised in further discussions for its aims.

VI. Conclusion

Discussions at the UNCITRAL may become a watershed moment for the investment protection regime. From the start, they are mainly the result of EU's efforts and the EU actively participates, pushing forward argument for systemic reform and pursuing the establishment of a MIC. On the other hand, support of such project in the international community remains unclear as it faces from the beginning a push back from a powerful group of states which do not favour substantial reform of ISDS.

To advance, the EU must play its strengths and act strategically, applying multiple strategies in course of a negotiation. Accordingly, the EU internally rallies its Member States present in the room and a unified EU negotiating team represents a strong actor. The complex legal framework in which the EU and its Member States work at the UNCITRAL has not so far had a negative impact. In supporting the EU, Member States in many instances intervened, speaking with one voice. This close cooperation within the EU is based on shared competence which gives the European Commission the right to promote coordination where this is appropriate within.

In relation to third countries, the EU applies strategy of persuasion and information sharing as well as offers a degree of flexibility in its proposal to attract states interested only in appeal option. In addition, it finances a fund allowing developing states to attend meetings in hope that they will align with its approach. Finally, the EU tries to gain support for its cause from other stakeholders, such as the Academic Forum, in order to put public pressure on opponents of a MIC. It is an example of coalition-building in international organisation that can be very complex, involving public and private negotiating parties. But under current circumstance, the EU success depends on its ability to find a significant number of allies.

At the UNCITRAL, the EU applies broad range of regulatory diplomacy's tools in order to shape international investment rules as evidenced in this article. However, previous research on EU external actorness has already provided several worrying conclusions for EU negotiators. First, EU internal cohesion and external unity is important but does not necessarily translate into greater influence.[76] It is the compellingness of the external environment or the international context which is a decisive factor: "[G]reater EU unity, better EU coordination and better negotiating skills may not be able to counter a decline of

[75] UNCITRAL 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS): 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37th session (New York, 1-5 April 2019)' (14 May 2018) A/CN.9/970, para. 84. Compare to para. 85.

[76] RHINARD, Mark, KAEDING, Michael. The International Bargaining Power of the European Union in ‚Mixed' Competence Negotiations: The Case of the 2000 Cartagena Protocol on Biosafety, *Journal of Common Market Studies*, Vol. 44, No. 5 (2006), p. 1043; KISSACK, Robert. 'Man Overboard! 'Was EU influence on the Maritime Labour Convention lost at sea?, *Journal of European Public Policy*, Vol. 22, No. 9 (2015), p. 1307, 1311; PANKE, Diana, The European Union in the United Nations: an effective external actor?, *Journal of European Public Policy*, Vol. 21, No. 7 (2014), p. 1053; ROMANYSHYN, Iulian. Explaining EU Effectiveness in Multilateral Institutions: The Case of the Arms Trade Treaty Negotiations, *Journal of Common Market Studies*, Vol. 53, No. 4 (2015), p. 885-889.

EU power resources relative to other actors."[77] Second, EU external effectiveness is much lower if bargaining parties stick to their negotiating positions, no matter how cohesive it is internally. The situation is even more difficult when the EU holds a 'reformist' position aimed at obtaining policy shifts from its partners. Again, it significantly decreases chances to achieve pursued goals.[78] A multilateral investment court, proposed by the EU, does not have to be the only possible result of the process where the EU is possibly less influential.[79] Moreover, there are questions about the feasibility of establishing a standing court for the resolution of investor-state disputes. Various countries have recently also begun to turn away from ISDS. Other international standing courts currently face different challenges. Hence, it is questionable whether under present circumstances states will have an appetite for another international adjudication body.

We are still at early negotiations and the EU faces a number of challenges in establishing a MIC. Nevertheless, the EU has been already successful in shifting a paradigm in the debate about the reform of the global investment regime and in agenda-setting of an important multilateral international organisation. The paramount question for coming years will be how many countries are actually prepared to join a MIC. It will become crucial to ensure the support of other important partners, in particular, the US, Japan, Russian China or India. The first three states are sceptical since the beginning of the process and lead broader opposition to the systemic reform of ISDS. At least, the next session of the WG III should finally provide space for initial substantial discussion on systemic reform of ISDS. If it will show an engagement and interest from other states, the MIC proposal has a chance to become a viable project. Alternatively, it may follow the fate of other unsuccessful multilateral initiatives in international investment law at the OECD and the WTO. But in broader sense, the UNCITRAL's development is an evidence of an expanding structural role of the EU in global governance as an influential actor in international investment protection regime.

---

[77] JOGENSEN, Knut E., OBEHRTHUR, Sebastian, SHANIN, Jamal. Introduction: Assessing the EU's Performance in International Institutions – Conceptual Framework and Core Findings, *Journal of European Integration*, Vol. 33, No. 6 (2011), p. 615.

[78] DA CONCEICAO-HELDT, Eugénia, MEUNIER, Sophie. Speaking with a single voice: internal cohesiveness and external effectiveness of the EU in global governance, *Journal of European Public Policy*, Vol. 21, No. 7 (2014), p. 974.

[79] NEWMAN, Abraham L., POSNER, Elliot. Putting the EU in its place: policy strategies and the global regulatory context, *Journal of European Policy*, Vol. 22, No. 9 (2015), p. 1330.

GOVERNMENT PROCUREMENTS IN NEW EU FTAS THE ONLY WAY TO OVERCOME THE LACK OF THE WTO GOVERNMENT PROCUREMENT AGREEMENT (GPA) EFFECTIVENESS?

Thomas Destailleur[1]

I. Introduction

Globalization and free trade currently underwent many reservations explained by the lack of confidence from the dominant economic debate promoting a slightly regulated open market economy. Examples of tensions such as customs tariffs or foreign direct investments[2] illustrate a will from countries to reinforce economic controls of their boundaries. Long considered as a space facilitating a free trade unconditionally – and being criticized[3] –, the European Union is committed to harden its position towards third countries as well. Two very different ways have been adopted during the last decades through the common commercial policy (206 TFEU): the adoption of a general legislation based on a the legal instrument established in article 288 TFEU (directive, regulation, decision)[4] and the multiplication of international agreements (like new generation of free trade agreements, but non exclusively)[5]. The first ones are not well known and generally deal with commercial defense legal instruments[6] whereas last ones are subject to a widening gap between the European Union and the civil society (among others) about the European Union's external action[7].

These methods are both raising quit a few disagreements illustrating the complexity to ensure the consistency of EU/Member States legal orders, especially because of differences remaining between the interest of the EU and national interests. That said, they reflect a paradox: one the one hand, international agreements are generally rejected in order to protect the sustainability of specific sectors (such as agriculture), the protection of fundamental rights (such as data protection), and to avoid "the race to the bottom" as a perfect parallel of criticisms raised after the case *Cassis de Dijon* 45 years ago[8] ; one the second hand, the adoption of general legislation aiming to protect the internal market from third countries is complicated because of national interests. As shown by the recent regulation (UE) 2019/452, the decision of each national government representative in the Council depends quite often on whether or not the text will protect first and foremost national interests[9]. There are

[1] Lecturer in public Law, University Polytechnique Hauts-de-France (University of Valenciennes).

[2] There are a lot of examples the five past years between United-States, China, and European Union. On May 6th, Donald Trump announced his will to increase customs tariffs to many goods from China because of its slowness to facilitate investments from American firms.

[3] HEUZÉ (V.), « L'Europe désenchantée », *JCP G.* 2005 doctr. 157.

[4] For a recent example, Regulation (EU) 2019/452 of the European Parliament and the Council of 19 mars 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 on 21 March 2019, pp. 1-14.

[5] For an overview, see: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/

[6] BOUHIER (V.), *La défense commerciale de l'Union européenne*, Bruxelles, Bruylant, 2011; Regulation (EU) 2016/1036 of the Parliament and the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification), OJ L 176 on 30 June 2016, pp. 21-54; CJUE 27 march 2019, *Canadian Solar Emea GmbH agaitsConseil*, C-237/17 P, EU:C:2019:259.

[7] The recent reactions about the MERCOSUR/UE agreement constitutes a perfect illustration.

[8] CRAIG (P.), DE BÚRCA (G.), *EU LAW. Text, Cases, and Materials*, Oxford, Oxford University Press, 2011, 5th ed., pp. 647 et s.

[9] Italy was with France and Germany one of the three countries soliciting on February 2017 the European commission in order to adopt a European framework for the screening of foreign direct investments into the

accordingly obstacles in the European external action implementation obliging to find a delicate balance between several interests.

Among various fields, government procurements fulfill a concrete and particularly important example of protectionist measures in the relationships between European Union, Members States, and Third countries[10]. Far from being unknown in public international law[11], there are however many legal instruments intended to open national government procurements to foreign enterprises by implementing non-discrimination with local enterprises and transparency of procedures. First, *Soft law* – a classical method on the international level – like guidelines adopted by The World Bank[12] and the International Monetary Fund[13], becoming actually *binding law* when these organizations force developing countries to implement them in exchange of loans[14]. Secondly and most importantly, there is the "Tokyo Code" adopted in 1979 which was with the World Trade Organization (hereafter the "WTO") replaced later by the Government Procurement Agreement adopted in 1994 and revised in 2012 after almost 6 years of negotiation[15] (hereinafter "the GPA"). Thirdly, there is in the scope of the EU a European law of public purchasing gradually established by the European institutions since the beginning of the 1990's[16].

There is however a main difference between international law and European Law on government procurements. The public purchasing rules deepening in the last ones have engaged a theoretical study of government procurement as exemplify by the recent case *P.M against Ministerraad*[17]. ECJ had to decide on whether or not lawyers' services are in the scope of the directive 2014/24/UE on public procurements and accordingly on whether or not a contracting authority has to select them after a competition and a procedure based on transparency criteria. The negative answer from the ECJ is justified on the ground that *"such a relationship* intuitu personae *between a lawyer and his or her client, which is characterized by the free choice of representative and the relationship of trust that unites the client with their lawyer, renders it difficult to provide an objective description of the quality expected of the services to be provided"*. This case raises the question on whether or not a government procurement is a real contract or if the solution is isolated as regard to the specificities of services fulfilled by lawyers. On the contrary to the European Law, such concerns don't matter in the scope of the GPA that is only focusing generally speaking on the opening of national government procurements[18]".

In spite of the GPA, the openness between countries is still heterogeneous. As pointed out by the European Commission, government procurements in Member States opened to

Union. However, Italy abstained later to vote the text because of the proximity between the date of the vote and the Xi Jinping visit aiming to include Italy in the new Silk Road project.

[10] On relationships between protectionism and EU Law, see. BARBOU DES PLACES (S.) (ed.), *Protectionnisme et droit de l'Union européenne*, Cahiers européens, Paris, Pedone, 2014.

[11] COHEN-JONATHAN (G.), *Les concessions en droit international public*, Paris, Faculté de droit de Paris, thèse dactyl., 1966.

[12] FOLLIOT LALLIOT (L.), "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", in AUDIT (M.) SCHILL (S.-W.) (ed.), *Transnational Law of Public Contracts*, Droit administratif européen, Bruxelles, Bruylant, 2016, pp. 23-44.

[13] https://www.imf.org/external/np/procure/eng/index.htm

[14] IMF, *Senegal Fiscal Transparency Evaluation*, january 2019, p. 41.

[15] *Infra*. 2.

[16] DE LA ROSA (S.), *Droit européen de la commande publique*, Droit de l'Union européenne – Manuels, Bruxelles, Bruylant, 2017.

[17] ECJ 6 June 2019, *PM against Ministerrad*, C-264/18, ECLI:EU:C:2019:472.

[18] *Ibid* . pt. 36.

enterprises from third countries represent around 352 billion euros while they are only 178 billion in USA, 27 billion in Japan, and much less in China[19]. Such incredible differences result from economic and social purposes of government procurements in order to stimulate domestic markets and economic growth. More precisely, third countries adopted protectionist measures by promoting directly national firms or by determining conditions to award contracts promoting in fact national companies (typically the *American Buy Act*[20]). Highlighting the lack of effectiveness of the international legal instruments (*Second point developed in below*), the European Union has started to use the common commercial polity in order to encourage the openness from third countries. Although articles 206 and 207 § 1 TFEU don't explicitly refer to government procurements, a teleological interpretation of European union law (quite usual[21]) and terms like "other barriers" from article 206 TFEU[22] and "particularly" from article 207 § 1 TFEU[23] have been used to justify a broad interpretation of the common trade policy[24]. For now, EU has failed to adopt a general legislation subjecting to conditions the access of goods and services from third countries to the single market (*Third point developed in below*). SO, the EU focus on new FTAs (in particular)[25] that tend to be the most suitable – although incomplete – way to reinforce and extend the GPA (*Fourth point developed in below*).

II. The Insufficient Removal of International Discriminatory Practices by the GPA

The "Tokyo Code" adopted in 1979 laid down the foundations of a general international framework on government procurements which took place within a broader context of tax barriers reduction engaged after the WWII[26]. Although the text established the principle that foreign enterprises must be considered in a same matter than local enterprises[27], the scope of the text is limited because it concerned only goods (not services[28]), central governments (and

[19] COM(2016) 34 final, 29 January 2016.

[20] MANUEL (K.-M.) *The Buy American Act-Preferences for "Domestic" Supplies: in brief, Congressional Research Service*, 26 April 2016. According to this text, American firms could award work contracts to national enterprises if the most part of their production was made on the national territory.

[21] PESCATORE (P.), « Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux », in *Mélanges W.J. van der Meersch, Studia ab discipulis amicisque in honorem egregii professons édita*, Tome 2, Bruxelles, Bruylant, 1972, pp. 325-363. Note, however, that this kind of interpretation is nowadays less important than before, especially in the scope of free movements.

[22] "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and **other barriers**".

[23] "The common commercial policy shall be based on uniform principles, **particularly** with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies […]".

[24] HERVÉ (A.), Les accords de libre-échange de l'Union européenne seront-ils les mêmes après l'avis 2/15 ? », *R.T.D. eur.* 2017 p. 617.

[25] Such treaties are into in force between UE-Korean Republic, UE-Canada, UE-Japan. Negotiations are also in progress with Singapore (after opinion 2/15), Indonesia, Philippines, and Viet Nam. Negotiations with USA was unsuccessful.

[26] The text can be found at the following address: https://www.wto.org/french/docs_f/legal_f/tokyo_gpr_f.pdf

[27] Art. 2.1.

[28] Art. 1.1.a.

not sub-central entities), and applied at a certain thresholds[29]. Moreover, the text was adopted in a period marked by the existence of several monopolies – as many examples can be found in the EU – and protectionist measures favored by the Cold War therefore limiting potential benefits for foreign enterprises. However, it constituted the first general framework on government procurements in international public law whose the structure was mainly taken up in 1994 in the Government Procurement Agreement (GPA) adopted within the framework of the WTO.

The GPA adopted in 1994 (including EU since then) is committed to strengthen the previous legal background on government procurements[30]. Reiterating the principle that each part *"shall accord immediately and unconditionally to the goods and services of any other party and to the suppliers of any other Party offering the goods or services of any party, treatment no less favorable than the treatment the Party",* the text is characterized by four changes: it applies both for goods and services, concerns henceforth sub-central entities, fulfilled a short definition government procurement – "*procurement for governmental purposes*[31]" –, and was adopted in a more favorable international context[32]. It was revised in 2012 and is entered in force on 6 April 2014. Except the expend of the scope for services as telecom, the revision is however much less fundamental than in 1994 and intervened on isolated technical points in order to implement some measures in favor of social and medium enterprises (SME)[33], stipulations about environment[34], new publication tools[35].

Legally speaking, the GPA is a text with general provisions (compared to the 178 pages, 142 recitals, 110 articles, and 22 annexes from the directive 2014/24/UE[36]) focusing most of the time on general principles central entities and sub-central entities have to observe conducting a contract. There are 22 various articles dealing for instance with non- discrimination and offset prohibition[37], transitional measures for developing countries[38], different kind of tender process[39], information's published by entities[40], prerequisites to participate[41], tenders (including delays to respond)[42], or national remedies[43]. As defended by

[29] For an historical analyze of government procurements, see SCHWARTZ (J.-I.), "International Protection of Foreign Bidders under GATT/WTO Law: Plurilateral Liberalization of Trade in the Public Procurement Sector and Global Propagation of Best Procurements Practices", AUDIT (M.) SCHILL (S.-W.) (ed.), *Transnational Law of Public Contracts*, op cit., pp. 79-105, especially p. 88 et f.

[30] ARROWSMITH (S.), ANDERSON (R.D.), *The WTO Regime on Governement Procurement: Challenge and Reform*, Cambridge, Cambridge University Press, 2011.

[31] Art. II.2.

[32] For instance, Cold War end, the realization of the internal market in EU engaged by the Commission since 1985.

[33] Art. XXII.8. only provides the Committed of Public Market will conduct studies in order to facilitate the access of SME to government procurements. In EU law, directives on public markets lays down the choice to conduct a contract with separated lots. In this way, SME – often unable to propose a bid on the entire scope of the contract – can more easily participate.

[34] Art. XX.6. lays down the possibility to introduce environmental technical specifications (without any precisions).

[35] Art. 2.1. and 2.3. lay down government procurement can be conducted both in paper or by electronic means.

[36] Directive 2014/24/EU of the Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94 on 28 March 2014, pp. 65-242.

[37] Art. IV.

[38] Art. V.

[39] Art. XIII.

[40] Art. VI.

[41] Art. VII, as the right to exclude every candidate which have been convicted.

[42] Art. X, XI, XVI.

[43] Art. XVIII.

SCHWARTZ, the general provisions of the GPA may explain by its purpose, *i.e.* being an attractive legal instrument encompassing more and more countries[44].

Actually, the openness driven by the GPA has to be evaluated through its annexes. Indeed, the definition on “government procurement” it established is generic – *procurement for governmental purposes* – and underlines how a legal category is used as a political instrument and as a way to reach a general consensus between countries. Each part of the agreement had accordingly to determine the scope of “government” and “procurement” in 7 annexes[45]. Although the freedom of each part is not complete[46], they highlight the government procurements legal background is far from presenting the unity that the previous elements might indicate. For instance, USA is part of the GPA but Federated States like North and South Dakota are not included in the agreement[47] whereas its application to Republic of Korea’s enterprises is submitted to thresholds higher than to the other parts[48]. In the same vein, Republic of Korean excludes Norway and Switzerland from government procurements on railway services[49]. Other parts like Republic of Moldova or Canada lay down expressively some government procurements will be excluded of the agreement until a comparable and effective access in the other country[50]. Most importantly, the EU list several limitations to many countries in very various fields justified by a lack of reciprocity: New Zeeland enterprises for government procurements in production/transport/distribution of drinking water, Japan in electricity, or Canada in railways[51]. Thus, an analyze of the annexes highlights that there are – without ever analyzing the practices – a lot of discriminations incorporated directly in the GPA by every party showing a considerable diversity between parties. In addition, many countries like China – except Hong Kong for historical and legal explanations[52] – or Brasilia and are not part of the agreement. Together, it constitutes the first main limit of the agreement.

A second limit of using such generic notion is about the articulation between the material scope of the GPA and national/European legal order. In English, GPA uses the expression of “government procurement” which is not used by European Law that prefers other notions like “public procurement” or “concession”. However, the translation of theses expression in

[44] SCHWARTZ (J.-I.), “International Protection of Foreign Bidders under GATT/WTO Law: Plurilateral Liberalization of Trade in the Public Procurement Sector and Global Propagation of Best Procurements Practices”, art. cit.

[45] Annex 1 on central entities, Annex 2 on sub-central entities, Annex 3 on other entities, Annex 4 on goods, Annex 5 on services, annex 6 on construction services, Annex 7 on general notes (including for instance transitional measures for developing countries).

[46] First, each county candidate to the GPA has to submit a list of what will be covered by the notions of “government” and “procurement”. If the members of the WTO are not satisfied, the candidate will be rejected as it happened several times to China; after being part of the GPA secondly, a country can decide to modify the scope it was previously engaged for. However, art. XIX lays down a procedure to control part of the GPA won’t try to reduce substantially the scope and its commitments.

[47] USA Annex 2, including 37 from 50 Federated States.

[48] USA Annex 7 point 5, 15 000 000 Special Drawing right instead of 5 000 000 for procurement of construction services conducted by sub-central entities. Special Drawing right is a unity establishing thresholds which is converted into national/international currencies.

[49] Republic of Korean Annex 7.

[50] Republic of Moldova Annex 7 point 3; Canada Annex 7 point 6.

[51] To make a parallel with a recent new, the prohibition by the European Commission of the merge between Alstom and Siemens was considered as an error by politics and civil society as regards to Chinese companies. In the EU, note however the annex 7 lay down Chinese’s railway enterprises couldn’t propose a tender to SNCF or sub-central entities after the accession of China to the GPA, EU Annex 3 footnote 6.h.

[52] Hong-Kong was a part of UK after the Nankin treaty in 1842 (end of the first opium war). It decided to be a part of the GPA before it was return to China in 1997.

French is "Marché public" both for the GPA and European Union law. Article II.2 GPA refers to government procurement as the purchase of goods and services for "governmental purposes". However, this notion of governmental purposes is actually used in EU law in order to make a difference between public procurement and concessions. The first ones are about contracting authority's needs (included thus in the scope of the GPA) whereas the last ones concern directly users' needs (among other things), arising the question on whether their inclusion in the scope of the GPA[53] because it's not quite sure the government procurement notion in the GPA was built in order to make a difference with specific notions like concession. In spite that the GPA refers to the purchase of goods and services for governmental purposes, the EU decided to include work concession in the scope of the GPA and seems for now exclude services concessions[54], contributing to reinforce the limits of the generic notion of government procurement[55]. Finally, several contracts in the EU and other countries are concluded as concessions (without having the same legal vocabulary), what highlighting that the scope of the GPA do not encompass in principle the various form of contracts conducting by contracting authorities.

On another subject than the scope, there is a third important limit related to the effectiveness of the GPA. On the one hand, there is no international remedy for foreign enterprises to challenge the non-compliance of the agreement by one of its members. Without being surprising in public international law, such limitations restrict somehow the effectiveness of its purpose. Rules of procedures always play an important part of the protection of an established right as illustrated among many examples[56] by the direct effect in European law; On the second hand, there were almost no consultations or dispute of settlements engaged between parts of the agreement before the Committee of Public Procurement (hereafter the Committee)[57] – which is quite surprising from the EU that it claims the lack of reciprocity from members of the GPA –. Some procedures were abandoned after the national measure was forbidden by a national judge[58] and some others were closed during the consultation procedure after reaching a mutual agreement[59]. The only cases where the Committee has to pronounce on the non-compliance of the GPA underscore limits of the agreement (which apply besides for many international agreements)[60]. The first one is about the *Buy American Act* above-mentioned and relating to the purchase of a sonar mapping

[53] WEIß (W.), "WTO Procurement Rules in particular the Government Procurement Agreement and services of General Interest", in KRAJEWSKI (M.) (ed.), *Services of General Interest Beyond the Single Market. External and International Law Dimensions*, La Haye, Springer, 2015, pp. 49-76, especially pp. 70-73.

[54] EU Annex 6 point 2. If EU only uses the notion of work concession without referring to EU Law, note it is not used by each country in the framework of article 6.

[55] *Infra*., point 4.

[56] For an historical example, the Case *Casanova* in French administrative law (Conseil d'État, 29 mars 1901, *Casanova*, Rec. 333) by which a local citizen could henceforth challenge a deliberation from the council of the local authority thanks to his contributor quality. More recently and related to public procurement, CE, 4 avril 2014, *Département Tarn-et-Garonne*, req. n°358994, about the right for a third party to challenge the validity of a public procurement process.

[57] The GPA (art. XX) lays down two different procedures before the Committee if any part raises a non-compliance of the agreement: consultations, and dispute of settlement if no solution has been reached.

[58] It happened in 1997 to a law from Massachusetts forbidding every foreign enterprise having business with Burma to participate to a tender process.

[59] In 1997, the former European Communities engaged consultations before the Committee about the purchase of a navigation satellite by Japan because the technical specifications of the procurement referred directly to an American system. Thus, Europeans enterprises couldn't submit a tender. Consultations were successful after Japan engaging to publish neutral specifications in the future.

[60] It exists in addition a case about procurements of airport construction in Republic of Korea, but the Committee decided them outside of the scope of the GPA.

system. The second was about a collecting tolls system to the town of Trondheim (Norway)[61] challenging by USA because of the exclusive negotiations engaged by Norway with a national enterprise without any tender process. Although noticing the non-compliance of the Tokyo code, the Committee only recommended to Norway to respect tis obligations. In the absence of remedies with binding consequences to resolve the dispute, the parties of the GPA are not encouraged to request the Committee.

Failing to reduce non-discriminatory practices, other countries try to find another way to reinforce the GPA, especially the European Union by trying to adopt a general legislation.

III. The Impossible European General Legislation Due to a Dichotomy Between National and European Interests

The common commercial policy evolves historically in a complex political context because of divergences between several Members States. For instance, Germany always promoted a free trade with few barriers unlike France[62]. Reaching a consensus in order to adopt a general legislation or even a free trade agreement is accordingly quite difficult. Trying to make up for the GPA effectiveness, European commission published on 21 March 2012 a proposal of regulation on the access of third-country goods and services to the Union's internal market on public procurement[63]. This proposition is interesting that the European Commission explicitly indicated its purpose was to exert pressure on third countries having not a sufficient government procurement openness. Above all, it highlights a tighter position of the Commission vis-à-vis third countries which is besides harder than many Member States (Germany, Netherlands, and Italy).

First of all, however, the proposition has a major weakness: it excludes parties to GPA while EU underscore the lack of openness from some of them (for instance, USA)[64]. The proposition could only be directed to countries which have not yet adopted the GPA (that includes countries having the statute of observer[65]). This limit apart, the proposal of the Commission was ambitious and was built around a centralized and a decentralized pillar. According to the centralized pillar, the Commission could decide to open an investigation vis- à-vis alleged discriminatory practices from third countries to European companies and engage consultations in order to remove them. If the negotiations failed, Commission could decide to exclude compagnies from this country to the public procurement in the EU or applied compensatory measures on price (increased value of tender from companies concerned by the decision)[66]. The decentralized pillar is about every public procurement representing at least 5 million euros. Contracting authorities (as central government, local authorities and everybody governed by public law[67]) could decide under the supervision of the Commission to forbid a tender from a company having at least 50% of its production/services in a third country where the non-discriminatory access to government procurement is not guaranteed[68]. The proposal –

[61] The case is related to the "Tokyo Code".

[62] DENIAU (J.-F.), *L'Europe interdite*, Paris, Seuil, 1977, pp. 48-63.

[63] COM(2012) 124 final, 21 March 2012 ; see. BOUHIER (V.), « Les contrats de concession dans l'Union européenne : vers un accès conditionné des offres des pays tiers », in DE LA ROSA (S.) (ed.), *L'encadrement des concessions par le droit européen de la commande publique*, Trans Europe Expert, Paris, Société de législation comparée, vol. 10, pp. 73-86.

[64] As a part of the GPA, EU can't adopt a legal act incompatible with it.

[65] It is a preaccession statute of the GPA (Andorra for instance).

[66] COM(2012) 124 final, *above-mentioned*, art. 6.

[67] The notion covers some very specific authority like some public enterprises.

[68] COM(2012) 124 final, *above-mentioned*, art. 5.

especially the centralized pillar – was deeply rejected both by the European Parliament (first reading[69]) and the Council (informally) for at least two reasons: some Member States feared retaliatory measures from third countries, especially from countries like Germany having a particularly positive commercial balance. Then, Member States feared the increasing workload especially as well (especially to local authorities)[70].

The Commission therefore published a new proposal of regulation much less ambitious than the first one[71]. The decentralized pillar was completely removed whereas the centralized pillar was deeply minimized because the Commission could only apply compensatory measures after noticing discriminatory practices from third countries[72]. However, the text is still not adopted (seven years after the publication of the first proposal)[73].

Despite the incapacity of the Council to reach a consensus, some Member States still committed to develop protectionist mechanisms in favor of European Union enterprises as the proposition of a *European Buy Act*[74] by the French President E. MACRON during the presidential campaign. Inspired from the *American Buy Act*, he proposed that European public procurements could have been awarded preferably to European enterprises having at least half of their production within the internal market. However, we can assume such proposition was not very serious. It would imply a revision of public procurement directives because articles 24 and 43 from directives 2014/24/UE and 2014/25/UE lay down the obligation for Member States to consider economic operator from parties to the GPA in a same matter than economic operator from EU[75]. In addition, such revision would be far from easy because of the same opposition from some Member States than the above-mentioned proposition of the Commission. Finally and most importantly, the proposition is not compatible with international commitments like the GPA (article III)[76], explaining why the former Vice- President of the Commission J. KATAINEN rejected the *European Buy Act* proposition shortly after the election of the E. Macron. The Commission is indeed more in favor of the adoption of its pending proposal.

The failure of the proposal about the access to public procurements by enterprises from third countries invites to make several observations about the relationships between Commission, Member States and third countries. Differences persist between national interest and the interest of the EU: the adoption of such general legislation is in favor of the EU and so member states considered as a whole (so potentially in disfavor of some Member States). In addition, the Council, the European Parliament and Members States are refractory to let the Commission playing a role in the negotiations on discriminatory practices decided by third countries without any control from the other institutions[77] (unlike international agreement).

[69] P7_TA(2014)0027, 15 January 2014.

[70] This argue is not quite convincing because the contracting authority would have decided whether or not it planned to forbid a tender from a company.

[71] COM(2016) 34 final, above-mentioned, art. 7.

[72] Note the compensatory measures would have been apply only during the tender process. If the company from the third country would award the contract, the measure would have been released. The purpose of such measures is to make a balance between candidates during the process and not to burden additional charges to contracting authorities.

[73] The last discussions in the Council took place on 13 May 2016.

[74] SABINE (A.), « Le projet européen du Président Macron au regard de la politique commerciale extérieure de l'Union européenne », *R.U.E.* 2019 pp. 72 et s.

[75] Directive 2014/24/EU, *above-mentioned*; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC, OJ L 94 on 28 March 2014, pp. 243-374.

[76] By analogy with the decision of the Committee about the *American Buy Act*.

[77] Laid down by its first proposal in 2012, but in a lesser extent after the version proposed in 2016.

Together, it explains the more reasonable propositions made in other fields the Commission since then[78]. In any case, the failure of a general legislation has encouraged European institutions and Member States to use international agreements and especially FTAs in order to remove discriminatory practices on government procurements from third countries. Bilateralism is indeed more reassuring for Member States in order to avoid retaliatory measures and keep influencing negotiations.

IV. The Use of New EU FTAs to Reinforce and Extend the WTO GPA

Government procurements are not unknown from international agreements concluded by EU and its Member States with third countries. In the framework of the new generation of FTAs, government procurements don't prompt reactions from civil society and politics as much as matters like agriculture, investments, remedies, or protection of environment and security. These agreements are subject to a lot of criticisms that they deal with matters affecting directly the internal market and accordingly citizens and enterprises in the European Union. On the contrary, the inclusion of government procurements in the international agreements aim to encourage the openness of such contracts in third countries. The sensitivity is thus quite different and explain why government procurements are in fact apart from the public debate of international agreements.

Several European agreements (not only new generation of FTAs) contain stipulations about government procurements. However, and we follow Pr. FOLLIOT LALLIOT, they usually do not include binding provisions but only statement of general intent[79]. The framework agreement with Australia (part of the GPA since 2019) on the one hand, and the partnership agreement with New Zealand (part of the GPA since 2015) on the second hand, are quite illustrating. Its article 17 and 19 respectively lays down "*the Parties reaffirm their commitment to open and transparent public procurement framework* […][80]", a statement somehow found in article 23 from the framework agreement with Mongolia as well[81].

Apart from such statements of general intent, other agreements contain some very relevant provisions about government procurements by incorporating directly the WTO government procurement agreement (GPA)[82], as Korean/UE, Canada/UE or Singapore/EU FTAs (which is not surprising because they are all parties to the GPA). However, if every new generation of FTAs contain articles dealing with government procurements, this is not a complete specificity of such agreements as illustrates by the partnership and cooperation agreement with Iraq[83]. Finally, and most importantly, we can notice a *spill-over effect* of the GPA. Iraq (partnership and cooperation agreement), Vietnam (new FTA) and countries from the

[78] Typically, the regulation (UE) 2019/452 above mentioned. The text implements a screening to foreign direct investments. An analyze of the text underlines however Members States are still the only level where the decision to forbid such investment will be made.

[79] FOLLIOT LALLIOT (L.), "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", art. cit.

[80] Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part, OJ L 237 on 15 September 2017, pp. 7-35; Partnership Agreement on relations and Cooperation between the European Union and its Member States of the one part, and New Zealand, of the other part, OJ L 321 on 29 November 2011, pp. 3-30.

[81] Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part, OJ L 326 on 9 December 2017, pp. 7-35.

[82] Treaty UE/Republic of Korean, art. 9.1; Treaty UE/Japan, art. 10.1; CETA, art. 19.2.

[83] Partnership and Cooperation Agreement between European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, OJ L 204 31 July 2012, pp. 20-130, chapter 2.

MERCOSUR are not part of the GPA. So, its incorporation directly into the international agreements concluded with the EU constitutes an interesting way to extend the scope of the text: such countries have to respect the GPA provisions in favor of enterprises from EU without being a part of it, which contributing to establish the GPA as a standard international mechanism of government procurement[84]. By the way, such commitments could be used later in order to convince WTO they are ready to be a part of the GPA.

The materials conditions of the new FTAs (in particular) emphasize EU wants to increase the significance of the GPA by encouraging third countries to further open their governments procurements[85]. Each agreement – agreement with Republic of Korean[86] –, or incorporate verbatim the WTO GPA – CETA, Singapore, Iraq –, or in substance – Japan and Vietnam[87] –, contain the exact same structure, words, and expressions dealing with definitions, scope, non-discrimination and offset prohibition, different kind of tender process, information's published by entities, prerequisites to participate, tenders, or national remedies, than the GPA. It raises the question of the differences between the GPA and its incorporation in the new FTAs. The organic and materiel scope of the CETA agreement has been expended by incorporating respectively new entitites[88] and publics services in Canada that the country decided to exclude for now from the GPA[89] –. In the same vein, Singapore agreed to extend to scope in favor of EU enterprises[90]. The scope covered in FTAs could be even broader by including concessions of services as illustrate by the treaty with Singapore[91]. FTAs are therefore a perfect illustration how bilateralism agreements deepen the scope of the GPA.

The doctrine expressed some worries about the multiplication of provisions on government procurements in FTAs[92]. The development of bilateralism risks indeed to increase obligations to Member States and contracting authorities and therefore create a diversity based on the nationality of the enterprises. From an organic (contracting authorities) and material point of view (goods and services), such a diversity already exists as regard in the GPA (as shown before). So, it's not specific from the FTAs. Besides, international agreements concluded by

[84] This conclusion was already assumed by a part of the doctrine, FOLLIOT LALLIOT (L.), "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", art. cit.

[85] In the proposal of FTA with Singapore: the European commission points the FTA should open new possibilities to European companies to award government procurements, COM(2018) 196 final, 18 April 2018, *Proposal for a Council decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore*, p. 8 ; Article 1.1 d) from the EU-Republic of Korea FTA.

[86] The agreement simply refers to the GPA in order to determine obligations on government procurements between EU and Republic of Korean.

[87] That means the succession of provisions in the agreement is not exactly the same than the GPA (word, expressions). However, a comparison between the two of them highlights that the same obligations have been determined. This methodology can be explained for two reasons: the Vietnam is not for now a part of the GPA. So, it had just been used as a guide; Japan is a part of the GPA. However, if agreement contain references to specific vocabulary of government procurement in Japan, some differences with the GPA are artificial (art. 10- 11 for instance: the control of abnormally low tender by a contracting authority can take into account subsidies from Japan or EU. Art. XV GPA does not refer to subsidies. However, among other criteria, it is implicit in order to evaluate such tender).

[88] Canada Annex 1 of the GPA refers to 78 entities. Annex 19-1 of the CETA is quite longer (98 entities).

[89] Canada Annex 5 footnote 3.

[90] Singapour Annex 3 of the GPA refers to other authorities than central and sub-central entities covered by the agreement (23 entities). Annex 9-C of EU/Singapore FTA proposal is quite longer (57 entities).

[91] *Supra*. Point 2 about the exclusion of services concessions in the GPA. According to annexes 9-E et 9-I of the FTA with Singapore, services concessions are not yet included in the scope of the treaty. EU could propose later to widen the scope (annex 9-E point 6).

[92] FOLLIOT LALLIOT (L.), "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", art. cit.

EU and its Member States simply refer to the general provisions of the GPA, which maintaining the unity procedure rules of European public purchasing. That also means FTAs are for now not used to spread European rules on public procurements outside from the EU. For instance, article 69 from directive 2014/24 about abnormally low tender[93] is more developed than article XVI.6 GPA related on the same matter and found in the different FTAs.

Beyond this technical analyze, government procurements provisions invite to make general remarks on European Law. Firstly, the use of FTAs to introduce reciprocity on government procurements firstly arises – as many other subjects covered by FTAs – the question of division of competencies. Unlike investments, it didn't raise controversial debates. In its opinion on the Singapore Treaty, ECJ pointed out government procurements are already covered in a large extent (legal harmonization[94]) by several directives on public procurement – without referring to directive 2014/23 on concessions[95] – adopted in 2014 and covered general services and network services such as water, energy, transports, postal services. Hence, ECJ decided the European Union has on this matter an exclusive external competence both based on article 3 § 1 TFUE (services and goods but transports) and article 3 § 2 TFUE (related to the particular case of transports[96]). Finally, the direct effect – which focusing a lot of scholars – does not raise controversial debates as well because of the inclusion of the GPA directly to articles 24 and 43 from directives 2014/24/UE and 2014/25/UE and the references of its general provision in FTAs. So, the question is less about the direct effect of the new FTAs provisions than the direct effect of the European directives on public procurements. ECJ refers to its classical jurisprudence on direct effect as illustrated in the recent the *Marina del Mediterràneo* case (right to challenge a decision from a contracting authority)[97], which encompasses both European and third countries enterprises.

Secondly, a more controversial question deals with the articulation between FTAs and the obligation of EU in the framework of the GPA. For instance, article 29 CETA about dispute of settlements lays down among others provisions each party can engaged a procedure both before the WTO (non-specific to the CETA) or the special group of arbitration (specific to the CETA)[98]. A party could adopt temporary suspension measures in case of non-compliance of the treaty by the other party, meaning EU could decide to restrain the access to its government procurements if the access to Canada by EU enterprises is not sufficient[99]. Article 29.3.4 CETA provides also that a party couldn't refer to a WTO agreement in order to force the other part to sustain temporary measures (in particular). Such rule is however not established by the GPA which only lays down its own dispute of settlement procedure.

[93] An abnormally low tender is a tender with a price much lower than the other tenders implying eventually dumping practices from the enterprise or its financing by subsidies.

[94] DER ELST (R.), « Les notions de coordination, d'harmonisation, de rapprochement et d'unification du droit dans le cadre juridique de la Communauté économique européenne », in WAELBROECK (ed.), *Les instruments de rapprochement des législations dans la Communauté économiques européenne*, Bruxelles, Éditions de l'Université Libre de Bruxelles, 1976, pp. 1-14.

[95] For an explanation, see footnote 91.

[96] ECJ (Full Court), 16 May 2017, *opinion 2/15*, ECLI:EU:C:2017:376, pts. 75-77 and 219-224. It may be recalled article 207 § 5 TFUE excludes from the common commercial polity the negotiation dealing with transport matters. The exclusive competency of the EU is based on the *AETR* doctrine, explaining why ECJ proceeded to a separate analyze with other services.

[97] ECJ 5 April 2017, *Marina del Mediterràneo*, C-391/15, ECLI:EU:C/2017:268.

[98] Treaty UE-Republic of Korea, art. 14.11; Treaty UE-Japan, art. 21.22.2; COM(2018) 196 final, *above mentioned*, art. 14.12.2.

[99] Art. 29.14 CETA.

V. Conclusion

Observing the lack of openness despite of the GPA, the EU has tried for nearly 10 years to find new ways in order to increase the access on government procurements in third countries in a same matter than in the Member States. The complexity to articulate national interests and interest of EU explains why a general legislation is for now impossible, letting international agreements as the only way to achieve its purpose. In spite of quite a few agreements (especially new generation of FTAs) concluded by EU and its Member States dealing with procurement governments, EU could finally find a way both to reinforce the significance and the dissemination (*spill-over effect*) of the GPA. The multiplication of new EU FTAs could be therefore an efficient way to remove discriminatory practices from third countries. However, and to conclude, the main characteristic of FTA – bilateralism – is also its most important limit in the dissemination of the GPA. The absence of negotiations with most important countries like USA and China is still a main weakness that only a general legislation could be resolved (but for now impossible). Thus, there is still an important fragmentation of discriminatory practices on government procurements that new FTAs could only partially reduced.

Jean Monnet Network LAwTTIP

Based on a consortium among the **International Research Centre on European Law of the University of Bologna**, the **Centre of European Law of the King's College London** and the **Institut de l'Ouest Droit et Europe of the University of Rennes 1**, the Jean Monnet Network **LAwTTIP – Legal Ambiguities withstanding TTIP** intends to promote a large-scale legal reflection of both the existing EU Free Trade Agreements of new generation and the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

http://www.lawttip.eu
info@lawttip.eu
https://twitter.com/JMN_LAwTTIP

LAwTTIP Working Papers Series

http://www.lawttip.eu/lawttip-working-papers/

ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA
DIPARTIMENTO DI SCIENZE GIURIDICHE
CENTRO INTERNAZIONALE DI RICERCHE SUL DIRITTO EUROPEO

Co-funded by the Erasmus+ Programme of the European Union