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Regulating through Trade: The Contestation and Recalibration of EU 'Deep and Comprehensive' FTAs

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REGULATING THROUGH TRADE: THE CONTESTATION AND RECALIBRATION OF EU 'DEEP AND COMPREHENSIVE' FTAS

Billy Melo Araujo*

ABSTRACT

Contemporary international trade politics is primarily focused on deep integration – that is, the removal of regulatory barriers to trade. The EU, in particular, has long been one of the main proponents of the use of trade agreements to promote regulatory disciplines on issues such as intellectual property regulation, procurement, services, competition and investment protection. This so-called 'EU regulatory agenda' has rapidly gathered pace over the past decade and culminated, more recently, in attempts to conclude mega-regional trade agreements such as the EU-US Transatlantic Trade and Investment Partnership. Such agreements have, however, proved highly contentious and are being fiercely contested - both because of their potential impact on the regulatory autonomy of the EU and its Member States, and their potential adverse effect on third countries and the multilateral trading system. This Article discusses the evolution of the EU regulatory agenda, the manner in which the agenda has been contested from a constitutional and policy perspective, and the extent to which the EU has (or has not) responded to such contestations.

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I. INTRODUCTION

For over a decade, the European Union (“EU”) has been intensively negotiating and signing so-called “deep and comprehensive free trade agreements,” (“DCFTAs”) which seek to go beyond the removal of traditional barriers to trade and address a variety of regulatory issues.¹ This “deep”² or “regulatory”³ trade agenda is part of a wider global trend wherein international trade law and policy has progressively moved away from its historical focus in removing barriers to trade at the border, such as tariffs and quotas (negative integration); and, is increasingly focused on the adoption of global common regulatory frameworks and pursuit of regulatory harmonization (“deep integration”).⁴ It is a trend that is in part due to the success of the General Agreement on Trade in Tariffs (GATT) and subsequently the World Trade Organisation (“WTO”) in reducing tariffs, which has in turn highlighted the need to address less visible ‘behind-the-border’ obstacles to trade which result from regulatory divergence.⁵ It is also the result of fundamental shifts in the structure of the global trading system, such as the rising importance of trade in services and the globalization of

¹ See *Report from the Commission on the Implementation of Free Trade Agreements*, at 7–16, COM (2017) 654 final (Nov. 11, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0654&from=HU>.

² Alasdair R. Young & John Peterson, *The EU and the New Trade Politics*, 13 J. EUR. PUB. POL’Y 795, 795–814 (2006).

³ Dirk De Bièvre, *The EU Regulatory Trade Agenda and the Quest for WTO Enforcement*, 13 J. EUR. PUB. POL’Y 851, 858–59 (2006).

⁴ Jacques Pelkmans, *Economic Theories of Integration Revisited*, 18 J. COMMON MKT. STUDS. 333, 349 (1980).

⁵ See Chad. P. Bown, *Trade Policy Instruments Over Time*, in OXFORD HANDBOOK OF THE POL. ECON. OF INT’L TRADE 57, 58 (Lisa L. Martin ed., 2015) (discussing the variety of instruments governments use to conduct international trade policy); see generally Céline Carrère & Jamie De Melo, *Non-Tariff Measures: What do we Know, What Might Be Done?*, 26 J. ECON. INTEGRATION 169, 169–96 (2011); Greg Anderson, *Hemispheric Integration in the Post-Seattle Era: The Promise and Problems for the FTAA*, 56 INT’L J. 205, 216 (2001); William A. Dymond & Michael M. Hart, *Post-Modern Trade Policy: Reflections on the Challenges to Multilateral Trade Negotiations After Seattle*, 34 J. WORLD TRADE 21, 21 (2000).

supply chains.⁶ The EU's current approach to DCFTAs is therefore not something that is particularly unique to the EU; the use of FTAs to address regulatory barriers to trade and promote market-liberal regulatory frameworks that protect the assets and interests of firms is a policy that has been pursued by other large trade powers⁷. Aside from these economic drivers, other considerations underpin the EU's contemporary free trade agreements ("FTAs"). Over the years, the EU has been at pains to stress that its trade policy is not exclusively aimed at promoting its economic interests, but also at disseminating its values abroad⁸. Trade agreements have thus been used to export the EU's regulatory approaches to issues such as environmental protection, food, safety, and human and social rights.

The EU's regulatory agenda in trade has encountered a degree of success over the past decade. The EU has been able to sign a number of deep and comprehensive trade agreements ("DCTAs") with developed and developing countries, which include disciplines on a wide variety of regulatory issues from intellectual property protection and technical regulations to competition policy, procurement, and environmental protection.⁹

⁶ See Emily J. Blanchard, *A Shifting Mandate: International Ownership, Global Fragmentation, and a Case for Deeper Integration under the WTO*, 14 WORLD TRADE REV. 87, 92–93 (2015) (discussion of how global fragmentation can lead to behind-the-border policy manipulation); Richard Baldwin, *WTO 2.0: Governance of 21st Century Trade* 9 REV. INT'L ORGAN. 261, 265–66 (2014) (standing for the proposition that internationalization of production creates a new supply-chain trade).

⁷ See, e.g., Alberta Sbragia, *The EU, the US, and Trade Policy: Competitive Interdependence in the Management of Globalization*, 17 J. EUR. PUB. POL'Y 368, 376 (2010); Christopher M. Dent, *Freer Trade, More Regulation? Commercial Regulatory Provisions in Asia-Pacific Free Trade Agreements*, 14 COMPETITION & CHANGE 48, 48–76 (2010).

⁸ EUROPEAN COMM'N, TRADE FOR ALL: TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY 22–26 (Oct. 2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf [hereinafter TRADE FOR ALL]; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Trade, Growth, and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy*, at 15, COM (2010) 612 final (Nov. 9, 2010), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0612:FIN:EN:PDF>.

⁹ For an overview, see Jacques Pelkmans, *Business Dimensions of EU's new FTAs*, 7 J. EUR. INTEGRATION 782 (2017); see also Valerie Demedts, *Which*

More recently, the EU has engaged in negotiations with large trade powers such as Canada, the US, and Japan to conclude so-called mega-regional trade agreements.¹⁰ These countries are significant both in terms of the markets they encompass and the type of regulatory disciplines addressed. However, this agenda is increasingly contested both domestically and internationally.¹¹ Within the EU, politicians and civil society organisations have criticised recent trade agreements, arguing that by addressing regulatory issues, these agreements undermine law-making processes and reduce regulatory autonomy.¹² These concerns were reflected in a European Commission Communication published in 2015, which called for a more transparent and values-based trade agenda.¹³ From a constitutional perspective, there are also misgivings regarding the compatibility of these agreements with EU law and, in particular, the competence of the EU to address certain regulatory issues through such agreements. The use of trade

Future for Competition in the Global Trade System: Competition Chapters in FTAs, 49 J. WORLD TRADE 407, 407–436 (2015); Sangeeta Khorana & Maria Garcia, *Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?* 48 J. WORLD TRADE 481–500 (2014); Sikina Jinnah & Elisa Morgera, *Environmental Provisions in US and EU Trade Agreements: A Comparative Analysis*, REV. EUR. COMMUNITY & INT'L ENVTL. L. 324–39 (2013); Stephen Woolcock, *Policy Diffusion in Public Procurement: The Role of Free Trade Agreements*, 18 INT'L NEGOT. 153–73 (2013).

¹⁰ Stefanie Roskopf, *New Challenges for EU Trade Policy-making: Why is the EU Pursuing a Comprehensive Economic and Trade Agreement with Canada?*, in THE EU AND THE EUROZONE CRISIS: POLICY CHALLENGES AND STRATEGIC CHOICES 177, 216 (Finn Laursen, ed., 2016).

¹¹ Finn Laursen & Christilla Roederer-Rynning, *Introduction: The New EU FTAs as Contentious Market Regulation* 39 J. EUR. INTEGRATION 763–77 (2017); Ferdi De Ville & Gabriel Siles-Brügge, *Why TTIP is a Game-Changer and its Critics Have Point*, 24 J. EUR. PUB. POL'Y 1491, 1491–1505 (2016); see HANDBOOK ON THE EU AND INT'L TRADE (Sangeeta Khorana & María García eds., 2018).

¹² Gabriel Siles-Brügge, *Transatlantic Investor Protection as a Threat to Democracy: The Potency and Limits of an Emotive Frame*, 30 CAMBRIDGE REV. INT'L AFF. 464, 464–88 (2018); Laurie A. Buonanno, *The New Trade Deals and the Mobilisation of Civil Society Organizations: Comparing EU and US Responses*, 39 J. EUR. INTEGRATION 795, 795–809 (2017); Christilla Roederer-Rynning & Morten Kallestrup, *National Parliaments and the New Contentiousness of Trade*, 39 J. EUR. INTEGRATION 811, 811–25 (2017).

¹³ TRADE FOR ALL, *supra* note 8, at 20–26.

agreements to export norms has also been criticised because it challenges perceived notions of what the EU is and how it acts in world politics. In accordance with the EU Treaties, the EU is bound to carry out its trade policy in a manner that reflects foundational values and objectives, such as the consolidation of the rule of law, the promotion of sustainable development, and multilateral cooperation. It is typically portrayed as a foreign policy power which is ontologically predisposed to uphold and promote such values. Yet, the EU's regulatory agenda raises questions about the EU's commitment to such values because of its potential impact on the ability of developing economies to adopt measures in the public interest, and because these trade agreements are increasingly viewed as a threat to the WTO and its centrality in rule-making¹⁴.

This Article seeks to provide a broad overview of the EU regulatory trade agenda in recent years, how the manner in which it has been contested by multiple actors has evolved, and to discuss the internal and external tensions that have consequently been exposed. Section II provides an overview of the rationale of the EU regulatory agenda and how this policy framework has expanded over the last decade, both in terms of the countries with which the EU negotiates and the regulatory issues addressed in such agreements. Section III discusses the points of tension resulting from the EU regulatory agenda; from concerns regarding the effect of the rules included in these agreements on national policy autonomy, to the concerns of countries that are reluctant to carry out the type of regulatory reforms demanded by the EU in its trade agreements. Section IV discusses the internal tensions associated with the regulatory trade agenda in more detail by focusing on the issue of the EU's competence to negotiate regulatory issues in trade agreements and the concerns relating to the lack of democratic accountability regarding regulatory cooperation mechanisms included within these agreements. Section V examines the extent to which the EU's regulatory agenda can be squared with the prevailing narratives surrounding the EU's identity as an international actor and, more generally, the EU's commitment to

¹⁴ See Jane Kelsey, *From GATS to TiSA: Pushing the Trade in Services Regime Beyond the Limits*, in 7 EUR. YEARBOOK OF INT'L ECON. LAW 119, 119–51 (Marc Bungenberg et al., 2016); Laursen & Roederer-Rynning, *supra* note 11, at 763–77; HANDBOOK ON THE EU AND INT'L TRADE, *supra* note 11, at 13.

promote the multilateral trading system and carry out a trade policy that reflexively takes account of external actors.

II. THE EU REGULATORY AGENDA

A. Promoting Rules through Trade Agreements: The Global Europe Strategy

The EU has been a steadfast supporter of attempts to promote deeper integration in international trade law. It was one of the main proponents of the WTO and, in the years following its establishment, repeatedly called for the negotiation of further WTO rules addressing regulatory barriers to trade.¹⁵ Most notably, the EU proposed the negotiation of multilateral agreements dealing with investment, competition, transparency in government procurement and trade facilitation¹⁶ at the WTO Ministerial Meeting in Singapore in 1996. Two years later, it would also advocate the introduction of labour and environmental protection issues within the fabric of WTO law.¹⁷ However, these proposals were rejected by the WTO membership, in particular (though not exclusively) developing country WTO Members, who were keen to maintain the focus of the negotiations on traditional market access issues of importance to them. They were also reluctant to agree to new disciplines that would create additional compliance costs and were perceived, in some cases, to further circumscribe the ability of WTO Members to adopt national policies intended to promote economic development.¹⁸

Faced with a WTO in a state of paralysis – a paralysis which culminated with the suspension of the Doha Development Round

¹⁵ Alasdair R. Young & John Peterson, *We Care About You, But . . .*: *The Politics of EU Trade Policy and Development*, CAMBRIDGE REV. INT'L AFF. 497, 509 (2013); David Allen & Michael Smith, *Relations with the Rest of the World*, 46 J. COMMON MKT. STUD. 165, 169 (2008).

¹⁶ See Steve Woolcock, *The Singapore Issues in Cancún: A Failed Negotiation Ploy or a Litmus Test for Global Governance?*, 38 INTERCON. 249, 254 (2003).

¹⁷ De Bièvre, *supra* note 3, at 858–59.

¹⁸ Simon J. Evenett, *Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round*, 23 OXFORD REV. ECON. POL'Y 392, 392

negotiations in 2007 – the EU followed other trade powers such as the US in pursuing deep integration through bilateral trade agreements, where their increased negotiating leverage would enable them to impose the type of concessions and regulatory reforms they were unable to push through at the multilateral level. This EU regulatory agenda materialized in the form of the EU Global Europe strategy,¹⁹ a trade policy framework devised by the European Commission in 2007, targeting the negotiation of deep and comprehensive trade agreements with large emerging economies that maintained significant barriers to trade with respect to the EU. The Global Europe Strategy represented a significant departure from the EU's past trade policy. In the years that preceded it, the European Commission had focused all of its efforts on the negotiations at the WTO Doha Development Round in the hopes of concluding multilateral trade agreements. The European Commission had previously eschewed bilateral and regional trade agreements, viewing them as a distraction. Some bilateral trade agreements were concluded by the EU in this period, but these were few and far between and, to a large extent, motivated by political and security purposes. This included, for instance, trade agreements concluded in the context of the European Neighbourhood Policy, which covers the EU and neighbouring countries located in Eastern Europe (e.g., Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine) and the Mediterranean (e.g., Algeria, Occupied Palestinian Territory, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, and Tunisia), and allows for a deeper level of economic integration with the EU by promoting the adoption of the *acquis communautaire*.²⁰ The Global Europe Strategy, by contrast,

(2007); see also Kevin P. Gallagher, *Understanding Developing Country Resistance to the Doha Round*, 15 REV. INT'L POL. ECON. 62, 62 (2007).

¹⁹ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Global Europe Competing in the World – A Contribution to the EU's Growth and Jobs Strategy*, COM (2006) 567 final (Oct. 4, 2006), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:en:PDF>.

²⁰ Marise Cremona & Gabriella Meloni, *The European Neighbourhood Policy: A Framework for Modernisation?* 7 (European Univ. Inst. Working Paper No. 21, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024102; see Roman Petrov et al., *The EU-Ukraine Association Agreement: A New Legal*

heralded a new era of commercially-driven EU trade agreements.²¹ This policy shift was in part justified by the need to play catch-up with the US, which had been pursuing a policy of signing ambitious and comprehensive trade agreements since the early 2000s.²² This meant that there was a growing danger that EU firms would find themselves discriminated against compared to their US counterparts in terms of accessing global markets. It was also an implicit acknowledgment that at that time, the WTO was no longer viewed as a realistic venue for trade negotiations. The new generation of deep and comprehensive EU trade agreements would therefore seek to address many of the issues which the EU had failed to push through at WTO level (public procurement, competition, other regulatory issues and IPR enforcement), something which was explicitly acknowledged in the Global Europe Strategy.²³ These agreements targeted the emerging economies (*e.g.*, India, China, Mercosur, and the Association of Southeast Asian Nations (“ASEAN”)), which had played a key role in opposing the EU’s reform proposals in the WTO.

The initial record of the EU’s regulatory agenda as embodied by the Global Europe Strategy was mixed. On the one hand, the EU did succeed in concluding a number of trade agreements which went significantly beyond what was then provided under WTO law. The DCFTAs concluded with Korea, the CARIFORUM group of states, Colombia, and Peru all include rules on issues which remain largely unregulated at WTO level.²⁴ In certain areas, the EU DCFTAs

Instrument of Integration Without Membership?, KYIV-MOHYLA L. & POL. J. 1, 18 (2015) (reviewing the recently concluded EU-Ukraine Free Trade Agreement).

²¹ Alasdair R. Young, *European Trade Policy in Interesting Times*, 39 J. EUR. INTEGRATION 909, 911 (2017); Stephen Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation Towards Commercial Aims*, 20 EUR. L.J. 718, 718–32 (2014).

²² Charles P. Barfield, *US Trade Policy: The Emergence of Regional and Bilateral Alternatives to Multilateralism*, 42 INTERECON. 236, 237 (2007); Woolcock, *supra* note 21, at 721.

²³ *Infra*, note 19, at 9.

²⁴ ALASDAIR YOUNG & JOHN PETERSON, PAROCHIAL GLOBAL EUROPE: 21ST CENTURY TRADE POLITICS 189 (2014); RAYMOND AHEARN, CONG. RESEARCH SERV., R41143, EUROPE’S PREFERENTIAL TRADE AGREEMENTS: STATUS, CONTENT, AND IMPLICATIONS 13–26 (2011), <https://fas.org/sgp/crs/row/R41143.pdf>; Maria Garcia, *Fears and Strategies: The*

require parties to comply with plurilateral agreements negotiated within the framework of the WTO. This is the case with respect to public procurement²⁵ and telecommunication services,²⁶ where the EU policy is to require trading partners to sign up to the WTO Government Procurement Agreement and the General Agreement on Trade in Services (GATS) Reference Paper on Telecommunications. In other cases, the EU DCFTA requires parties to comply with existing international rules and standards developed outside of the WTO. This includes requirements to reaffirm commitments to comply and ratify international treaties concluded under the auspices of the World Intellectual Property Organisation (WIPO),²⁷ minimum labour and environmental

European Union, China and their Free Trade Agreements in East Asia, 6 J. CONTEMP. EUR. RESEARCH 508 (2010).

²⁵ See, e.g., Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member states, of the other part, 2008 O.J. (L 289/I/3) arts. 165–82 [hereinafter CARIFORUM-EC EPA] (outlining the importance of public procurement in trade agreements between the European Community and various nations); 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 O.J. (L 127) arts. 9.1–9.3 [hereinafter EU-Korea FTA]; Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, 2012 O.J. (L 354) arts. 172–194 [hereinafter EU-Colombia & Peru FTA]; Free Trade Agreement between the European Union and the Republic of Singapore arts. 9.1–9.20, Oct. 15, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [hereinafter EU-Singapore FTA]; Agreement between the European Union and Japan for an Economic Partnership art. 10.1, July 17, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684> [hereinafter EU-Japan EPA].

²⁶ See, e.g., CARIFORUM-EC EPA, *supra* note 25, arts. 94–102 (outlining the importance of telecommunication services in trade agreements between the European Community and various nations); EU-Korea FTA, *supra* note 25, arts. 7.27–7.37; EU-Colombia & Peru FTA, *supra* note 25, arts. 139–50; EU-Singapore FTA, *supra* note 25, arts. 8.24–8.48; 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 O.J. (L 11) art. 14.1 [hereinafter CETA].

²⁷ See, e.g., CARIFORUM-EC EPA, *supra* note 25, art. 143 (outlining the importance of other provisions in trade agreements between the European Community and various nations); EU-Colombia & Peru FTA, *supra* note 25, art. 196; EU-Singapore FTA, *supra* note 25, art. 10.4; CETA, *supra* note 26, art. 20.7; EU-Japan EPA, *supra* note 25, art. 14.3.

protection standards provided for under the International Labour Organisation,²⁸ and a series of multilateral environmental agreements.²⁹ The EU DCFTA also requires the implementation of technical standards in line with existing international standards multilateral agreements (*e.g.*, automotive sector).³⁰ Finally, in some cases the EU used its trade agreements to export its own rules. For example, for want of existing multilateral rules, EU trade agreements have typically replicated the text of EU Directives on intellectual property enforcement as well as that of the EU Treaties on competition matters such as the abuse of dominant position.³¹

Whilst the substance of these trade agreements reflects the aspirations of the EU's regulatory agenda, the EU has failed to conclude any agreement with the largest economies identified in the Global Europe Strategy. Negotiations with India failed because of India's reluctance to bind itself to high standards of intellectual, labour and environmental protection as well as the EU's refusal to offer commitments on Mode 4 access (temporary movement of service providers).³² Similarly, progress in the EU-Mercosur trade negotiations have been painstakingly slow, with parties struggling to reach an agreement on contentious issues such as liberalisation in the agricultural sector.³³ As for ASEAN, the EU struggled to find

²⁸ See, *e.g.*, EU-Korea FTA, *supra* note 25, art. 13.4 (discussing multilateral labour standards and agreements); EU-Colombia & Peru FTA, *supra* note 25, art. 269; EU-Singapore FTA, *supra* note 25, art. 12.3; EU-Japan EPA, *supra* note 25, art. 16.3.

²⁹ See, *e.g.*, EU-Korea FTA, *supra* note 25, art. 13.5 (discussing multilateral environmental agreements); EU-Colombia & Peru FTA, *supra* note 25, art. 270; EU-Singapore FTA, *supra* note 25, art. 12.6.

³⁰ See, *e.g.*, EU-Korea FTA, *supra* note 25, art. 15.3(1)(a) (discussing work groups that are established the auspices of the Trade Committee); EU-Japan EPA, *supra* note 25, at Annex 2-C.

³¹ See Billy A. Melo Araujo, *Intellectual Property and the EU's Deep Trade Agenda*, 16 J. INT'L ECON. L. 439, 439–74 (2013).

³² *India-EU FTA negotiations likely to resume soon*, ECON. TIMES, (Mar. 26, 2018, 6:18 PM), <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-eu-fta-negotiations-likely-to-resume-soon/articleshow/63467513.cms>.

³³ See Patrick Messerlin, *The Mercosur-EU Preferential Trade Agreement: A View from Europe* 1, 4 (Ctr. for European Policy Studies, Working Paper No. 377, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277476; CT Report,

common ground between the countries composing this free trade arrangement because of their disparate levels of economic development, and eventually decided to negotiate agreements on an individual basis.³⁴ In short, the EU found that the stumbling blocks it had encountered at WTO level were also present in the context of bilateral negotiations with large emerging economies. Unsurprisingly, the EU has since only successfully concluded trade agreements with either similarly-minded economies (e.g., South Korea, Canada, or Singapore), or small developing economies where it can use its increased leverage to impose its agenda (e.g., Colombia, Peru, Ecuador and Central American states, Vietnam).

B. Global Europe Strategy 2.0: Reshaping the Rules of the Game through Mega-Regionals

The EU's policy with respect to negotiating DCFTAs has in recent years significantly exceeded the initial parameters set out in the Global Europe Strategy, both in terms of the scope of the rules included in these agreements and in the identity of the EU's negotiating partners. A first significant development was the entry into force of the Treaty of Lisbon in 2010, which increased the scope of the EU's exclusive competence in external trade matters by providing that the Common Commercial policy would also cover "foreign direct investment."³⁵ The immediate consequence of the expansion of the EU's external competence is that all EU DCFTAs negotiations that were initiated in the aftermath of the Treaty of Lisbon have included comprehensive chapters on investment

Germany wants EU-Mercosur trade agreement this year, CUSTOMS TODAY (June 7, 2017), <http://www.customstoday.com.pk/germany-wants-eu-mercotur-trade-agreement-this-year/>.

³⁴ Locknie Hsu, *EU-ASEAN Trade and Investment Relations with Special Focus on Singapore*, 6 EUR. Y.B. INT'L ECON. L. 233, 233–50 (2015).

³⁵ Markus Krajewski, *The Reform of the Common Commercial Policy*, in EU LAW AFTER THE TREATY OF LISBON 292–311 (Andrea Biondi et al., eds., 2012); Siegfried Fina & Gabriel M. Lentner, *The Scope of the EU's Investment Competence after Lisbon*, 14 SANTA CLARA J. INT'L L. 419, 419–20 (2016); Ramses A. Wessel & Tamara Takács, *Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament* 28 EUR. BUS. L. REV. 103, 110 (2017).

protection regulating both direct and indirect investments and subject to investor-State dispute settlement mechanisms.³⁶ The second significant development concerns the EU's increasing willingness to negotiate trade agreements with other large developed economies. The EU's decision to participate in negotiations on a Trade in Services Agreement is indicative of this.³⁷ The Trade in Services Agreement is a plurilateral trade agreement focused exclusively on services liberalisation, which is currently being negotiated by twenty-three mostly-developed nations.³⁸ The EU has also engaged in important bilateral trade negotiations. First, the EU engaged in negotiations with Canada regarding a comprehensive economic trade agreement—the Comprehensive Economic and Trade Agreement (“CETA”),³⁹ which was subsequently followed by talks of a Transatlantic Trade and Investment Partnership (“TTIP”) with the US as well as a DCFTA with Japan. The last two agreements were motivated both by economic and geopolitical considerations and, in particular, the US's decision to negotiate the Trans-Pacific Partnership (“TPP”)—an agreement which was intended to encompass the entire Asia-Pacific region (including countries such as Australia, Canada, Japan, Malaysia, Mexico, Vietnam, and New Zealand)—and counter China's growing political and economic influence in the region.⁴⁰ For the EU, the TPP represented a challenge to the extent that it would have effectively allowed for the discrimination of EU firms and exporters in terms of accessing rapidly growing and lucrative markets in Asia.

³⁶ Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 EUR. J. INT'L L. 639, 641 (2015).

³⁷ Juan A. Marchetti & Martin Roy, *The TISA Initiative: An Overview of Market Access Issues*, 48 J. WORLD TRADE 683, 684 (2014).

³⁸ *Trade in Services Agreement (TiSA)*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm (last visited June 24, 2019).

³⁹ Teresa Healy, *Canadian and European Unions and the Canada–EU CETA Negotiations*, 11 GLOBALIZATIONS 59, 59 (2014).

⁴⁰ See Reeve T. Bull et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 LAW & CONTEMP. PROBS. 3–5 (2015); Leif Johann Eliasson & Patricia Garcia-Duran, *Why TTIP is an Unprecedented Geopolitical Game-Changer, but not a Polanyian Moment*, 24 J. EUR. PUB. POL'Y 1522–33 (2017).

The TPP was also problematic insofar as it was viewed and presented by its proponents as an opportunity to address the type of regulatory issues which are increasingly disruptive to global trade, but which were unregulated at the WTO level. This would include rules on competition, state owned enterprises, electronic commerce, labour and environmental protection and even, to a lesser extent, currency manipulation.⁴¹ The US, in particular, was keen to stress the importance of the TPP as an opportunity to re-assert the US's hegemony in global economic governance and maintain its central role in writing "the rules of the road."⁴² The EU's decision to kick-start bilateral talks with the US and Japan and, subsequently, with countries such as Australia and New Zealand was therefore informed by the need to both ensure that EU firms would not be left at a competitive disadvantage in Asian markets and that the EU would have a say in shaping the rules of the global trading system.

The negotiation of DCFTAs with large developed nations would have a direct effect on the content of the EU's DCFTAs. Whereas developing and emerging economies have typically been reluctant to engage in regulatory issues, countries such as the US and Canada have historically pursued similar trade agendas to the EU. These negotiations were therefore marked by far higher levels of ambition in their attempts to tackle regulatory barriers compared to those DCFTAs that had previously been concluded in the context of the Global Europe strategy. For example, one way in which the CETA and the TTIP departed from previous practice concerned the inclusion of "regulatory cooperation" chapters, which established institutional mechanisms through which parties could monitor market access restrictions resulting from the application of domestic regulation, and engage in dialogues to avoid or rectify such restrictions.⁴³ These agreements were thus dubbed by the EU as

⁴¹ Gary Hufbauer & Cathleen Cimino-Isaacs, *How will TPP and TTIP Change the WTO System?*, 18 J. INT'L ECON. L. 679–96 (2015).

⁴² OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S TRADE AGENDA 2016, at 2 (2016), <https://ustr.gov/sites/default/files/2016-Trade-Policy-Agenda.pdf>.

⁴³ See EUROPEAN COMM'N, TTIP- EU PROPOSAL FOR CHAPTER: REGULATORY COOPERATION (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf.

“living agreement[s]”⁴⁴ in that they envisaged the removal of regulatory barriers as an ongoing process.

In sum, the broad trade policy framework within which the EU regulatory agenda is being conducted has changed in important ways in recent years. Commercially-driven trade agreements have gone from being seen as interim solutions to address the lack of progress in negotiations at the WTO to occupying a central place in the EU’s trade policy. The EU has ramped up trade negotiations with a wide variety of countries to secure the commercial interests of its firms abroad as well as to reinforce its normative influence in global trade governance geo-political objectives.⁴⁵ This had a knock-on effect on the contents of the trade agreements. As the EU engages in negotiations with like-minded countries keen on pursuing deeper integration, the trade agreements have become more ambitious in terms of the regulatory disciplines included therein.

C. The Contestation of the EU’s DCFTAs

The regulation of areas which, until fairly recently remained the exclusive remit of national parliaments within trade agreements, has further exposed the potential of international trade regulation to undermine national policy space and democratic accountability. These tensions are nothing new—they are at the very root of much of the opposition from developing countries towards attempts to promote deep integration at either bilateral or multilateral levels.⁴⁶ An apt illustration of the problems posed by deep integration can be seen in the area of intellectual property, where requirements on parties participating in trade agreements to maintain minimum

⁴⁴ Karel De Gucht, European Trade Comm’r, Press Release, Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle (Oct. 10, 2013), http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm.

⁴⁵ Sandra Lavenex et al., *EU and US Regulatory Power Under Strain? Emerging Countries and the Limits of External Governance* 22 EUR. FOREIGN AFF. REV. 1, 1–17 (2017); John Peterson, *Choosing Europe or Choosing TTIP?: The European Union and the Transatlantic Trade and Investment Partnership* 21 EUR. FOREIGN AFF. REV. 383–401 (2016).

⁴⁶ See *supra* notes 25 & 26 (listing various multilateral and bilateral agreements).

standards of intellectual property rights have been severely criticised. For developing countries, the obligation to implement minimum standards of intellectual property ("IP") protection within their domestic regulatory systems means that they are no longer able to adopt the type of policies that would allow for the copying of products and technologies patented in developed countries in order to promote the growth of technology-intensive domestic industries.⁴⁷ The imposition of IP rules through trade agreements is also problematic because such agreements tend to be exclusively focused on the protection of the economic interests of IP holders to the detriment of conflicting interests, such as the protection of consumer rights and human rights.⁴⁸ The latter point illustrates a key problem relating to deep integration – that democratic processes that lead to the ratification of trade agreements are ill-suited to address complex regulatory issues. Contrarily, while domestic legislative proposals can be carefully scrutinised by national parliaments and laws are the result a dialogue between the executive and the legislative branches of power, the take-it-or-leave-it dynamic underpinning the ratification process means that parliaments only have the choice to ratify or reject the text of an agreement in full.⁴⁹

The emergence of mega trade agreements such as the CETA and the TTIP and the Comprehensive TransPacific Partnership (CPTPP)⁵⁰ also create tensions at the multilateral level. These large-

⁴⁷ CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 316–20 (2009); Susy Frankel, *Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. LAW 1023–65 (2009).

⁴⁸ See generally J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, 29 INT'L L. 345, 382–88 (1995) (discussing the problems of implementing IP rules through trade agreements).

⁴⁹ See Marise Cremona, *International Regulatory Policy and Democratic Accountability: The EU and the ACTA*, in REFLECTIONS ON THE CONSTITUTIONALISATION OF INTERNATIONAL ECONOMIC LAW 155, 166–67 (Marise Cremona et al. eds., 2014).

⁵⁰ See *Comprehensive and Progressive Agreement for Trans-Pacific Trade Partnership*, GOV'T OF CAN., <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng> (last visited Apr. 16, 2019). The CPTPP (also

scale agreements are challenging the centrality of the WTO as a rule-making venue, in that they allow their main proponents to develop new rules on trade which would otherwise have been rejected or, at the very least, contested in the framework of the WTO's unanimity-based decision-making processes. The sheer scale and importance of the markets covered by mega-regional trade agreements means that the rules included therein are likely to be held as global standards. These rules are replicated in future bilateral agreements with third countries not involved in the negotiations of mega-regionals, thus relegating them to the role of rule-takers. This would occur not only because the rules included in such agreements will be replicated in future trade agreements, but also because the size of the markets covered by these agreements means that any substantive harmonization of product standards achieved through regulatory cooperation would lead to the creation of *de facto* global standards.⁵¹ In this way, mega trade agreements and, in particular, the use of such agreements to develop new rules, will lead to an increasing marginalisation of those countries (mostly developing economies) that are not involved in the negotiation process, and, consequently, in the shaping of international trade law.

These challenges to democratic accountability and the global trade governance system⁵² are especially relevant in relation to the EU. Firstly, the concerns regarding the erosion of democratic accountability and policy autonomy are heightened in the context of the EU's multi-level system of law-making. Since its inception, the EU has had the exclusive competence on external trade policy matters, including the power to negotiate trade agreements on behalf

referred to as the TPP) is an agreement concluded on 24 February 2016 by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The main proponent of the agreement, the United States, decided to withdraw from the CPTPP in January 2017. As of the writing of this article, the CPTPP is currently in the process of being ratified.

⁵¹ Dan Ciuriak & Harsha Vardhana Singh, *Mega-regional Trade Agreements: How Excluded Countries Can Meet the Challenge*, in *TPP AND INDIA: IMPLICATIONS OF MEGA-REGIONALS FOR DEVELOPING ECONOMIES* 443, 453 (Harsha Vardhana Singh ed., 2016).

⁵² See Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, 23 *CONSTELLATIONS* 58, 58–70 (2016) (discussing in-depth the challenges posed to democratic decision-making processes by recent developments in international trade law).

of its Member States. However, the scope of such competence is limited. As the issues addressed in trade agreements have expanded dramatically over the course of the past decade, the right of the EU to exclusively negotiate and sign these agreements have been questioned. Secondly, concerns have also been raised about the potential use of EU trade agreements to bypass internal democratic decision-making processes. This can be achieved by using trade agreements to regulate issues that have previously proved problematic to legislate domestically (so-called “policy laundering”).⁵³ It can also occur through the establishment of institutional mechanisms within trade agreements which could undermine democratic processes as well as the autonomy of domestic institutions.

As previously discussed, these tensions between the regulatory trade agenda and regulatory autonomy are not new, but they have increased as a result of the EU’s recently acquired willingness to negotiate trade agreements with other trade powers which also have their own interests and regulatory preferences to protect. The negotiation of DCFTAs with smaller and developing economies proved fairly uncontroversial because the EU could make use of its significant bargaining power to impose its regulatory preferences on others. In such agreements, the EU regulatory trade agenda amounted to a one-way process whereby the EU would require countries to comply to a set of rules chosen by the EU.⁵⁴ Similar agreements with large economies have proved far more controversial because the bargaining power symmetries which characterise these negotiations mean that the EU must also be receptive to regulatory reform demands from its counterparts. In other words, the advent of mega-regional trade agreements such as the TTIP has exposed the EU to the adverse consequences that are typically associated with deep integration, but which were, until fairly recently, mostly felt by developing countries. Thirdly, the EU’s regulatory trade agenda is also problematic because it raises questions about the EU’s identity as an international actor. The EU

⁵³ See Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 786–88 (2010) (explaining policy laundering).

⁵⁴ See Maria Garcia & Annick Masselot, *EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer*, 13 ASIA-EUR. J. 241, 241–51 (2015).

has historically portrayed itself and has been portrayed by others as a distinct foreign policy power which seeks to shape the international community by promoting values such as the rule of law, democracy, human rights and the commitment to multilateral institutions.⁵⁵ The EU is also constitutionally bound to conduct its trade policy in line with foreign policy objectives which reflect these aforementioned values. These aims have been reflected in the EU's own policy statements concerning trade agreements. For instance, a constant refrain from the European Commission is that the EU's DCFTAs must take into account the specific needs of the EU's counterparts (especially those parties that are developing countries) and will not be used to undermine the multilateral system.⁵⁶ But can such conceptualisations of the EU's external action be considered valid in the area of trade, where the EU is actively seeking to sign trade agreements which are deliberately sidestepping the WTO decision making processes in order to promote rules that have proven highly contentious and have been steadfastly opposed at the multilateral level?

III. INTERNAL LEGITIMACY OF THE EU REGULATORY AGENDA

A. *Opinion 2/15 and the Role of National Parliaments in the EU Trade Agreements*

The exclusivity of the EU's competence in the area of external trade is well established. It was confirmed by the European Court of Justice in its Opinion 1/75⁵⁷ as an indispensable tool to achieve a fully integrated internal market. Indeed, Member States

⁵⁵ See Owen Parker & Ben Rosamund, *Normative Power Europe' Meets Economic Liberalism: Complicating Cosmopolitanism Inside/Outside the EU*, 48 COOPERATION & CONFLICT 229, 223 (2013); Ian Manners, *The European Union as a Normative Power: A Response to Thomas Diez*, 35 J. INT'L STUD. 167, 170 (2006); Jan Orbie, *Civilian Power Europe: Review of the Original and Current Debates*, 41 COOPERATION & CONFLICT 123, 123 (2006); Helene Sjursen, *The EU as a 'Normative' Power: How can this Be?*, 13 J. EUR. PUB. POL'Y 235, 236 (2006).

⁵⁶ EU-Korea FTA, *supra* note 25, art. 13.4.

⁵⁷ See Opinion 1/75, Understanding on a Local Cost Standard, 1975 E.C.R. 1356 (noting the holding which established external trading is an integral tool for an international market).

would be able to distort competition within the internal market if they were allowed to conduct their own individual trade policies and, for example, apply different tariff and non-tariff barriers with respect to non-EU imports.⁵⁸ The ability of the EU to speak with one voice in trade matters also made sense from a policy perspective, in that it enabled the EU to make more effective use of its considerable market power in trade negotiations.⁵⁹

The scope of this exclusive competence has long been the subject of much debate and change—in large part because the policy areas that are encompassed by international trade law and politics are constantly evolving and expanding. When the Treaty of Rome was signed back in 1957, the Common Commercial Policy (the term used under the EU Treaties to refer to the EU's external trade policy) was described as aiming “to contribute . . . to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.”⁶⁰ No mention was made as to the type of international economic exchanges covered by the Common Commercial Policy—this would have been irrelevant at the time, because global commerce was largely dominated by trade in goods, and international trade law focused the removal of tariffs. But as international economic exchanges diversified and trade policy progressively shifted its focus towards non-tariff barriers, the EU was also forced to widen, through a succession of Treaty reforms, the remit of its trade policy to cover areas such as services, commercial aspects of intellectual property⁶¹ and, more recently, foreign direct investment.⁶²

The Treaty reforms have nevertheless continued to struggle to keep up with the ever-expanding scope of international trade

⁵⁸ *Id.* at 1364.

⁵⁹ See SOPHIE MEUNIER, *TRADING VOICES: THE EUROPEAN UNION IN INTERNATIONAL COMMERCIAL NEGOTIATIONS* 21–40 (2005) (noting the European Union's market power in trade negotiations).

⁶⁰ Consolidated Treaty on European Union, 2012 O.J. (C 202/01), art. 206.

⁶¹ Christoph W. Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 COMMON MKT. L. REV. 7, 7–29 (2002); Horst Günter Krenzler & Christian Pitschas, *Progress or Stagnation?: The Common Commercial Policy After Nice*, 6 EUR. FOREIGN AFF. REV. 291, 291–92 (2001).

⁶² Messerlin, *supra* note 33, at 1–2.

politics, as reflected in the content of the new generation of EU's DCFTAs. The question of whether the provisions included in the first EU trade agreement concluded in the aftermath of the Treaty of Lisbon—the EU-Singapore DCFTA—fell within the EU's exclusive competence or whether they would fall within the EU's shared competence was thus put to the European Court of Justice.

The answer to that question was of importance in that it would provide clarity to the decision-making process that would underpin the conclusion and ratification of EU's DCFTAs and, specifically, the role to be played by national parliaments of EU Member States in this process. Should the DCFTAs be deemed to fall within the scope of the EU's exclusive competence, such agreements could be concluded by a decision of the Council of Ministers after obtaining the consent of the European Parliament. An agreement that would fall under the shared competence of both the EU and Member States—that is, a “mixed” agreement—would likely have to be signed and ratified by each one of the EU's 28 Member States as well as subnational entities which retain foreign policy power in accordance with national constitutions.⁶³

To the extent that modern trade negotiations are already very complex and time-consuming affairs, giving a right of veto to national parliaments could discredit the EU as a credible and reliable trade negotiator. For a while, this issue remained one of limited practical relevance. For example, all trade agreements concluded by the EU, since the entry into force of the Treaty of Lisbon in 2010, have been negotiated as mixed agreements.⁶⁴ The vast majority of these agreements were concluded and ratified without significant hiccups. However, the problem was thrown into sharp relief in the context of the CETA, which was signed as a mixed agreement, allowing the Walloon government—a Belgian federal region—to

⁶³ See generally David Kleimann & Gesa Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, 45 *LEGAL ISSUES OF ECON. INTEGRATION* 13, 13–45 (2018) (discussing the attempt of Wallonian regional government to block the signature of the Comprehensive Economic and Trade Agreement).

⁶⁴ Guillaume Van der Loo, *Less is More? The Role of National Parliaments in the Conclusion of Mixed (Trade) Agreements*, *CTR. FOR THE L. OF EU EXTERNAL REL.* 4, 32 (2018), https://www.asser.nl/media/4164/cleer018-01_proof-01.pdf.

block the approval of the agreement unless the agreement was amended to reflect its multiple concerns.⁶⁵ Although the Walloon stand-off was eventually resolved and the agreement was signed, it served to illustrate how difficult it would be for the EU to conclude comprehensive deep trade agreements if these were considered to cover both issues of exclusive and shared competence. If the EU is, practically speaking, incapable of negotiating such agreements, then it would be left on the outside looking in to major future trade agreements and would no longer be able to play a part in shaping the rules of international trade.

The other side of this debate is that the EU's exclusive competence in trade matters arguably reduces the democratic legitimacy of EU's DCFTAs as it excludes national parliaments from the decision-making process. This point was potently made in the 2006 'Namur Declaration,' a document signed by a variety of politicians and scholars which called for, amongst other things, an enhancement of democratic parliamentary control procedures surrounding the negotiation of EU's DCFTAs.⁶⁶ The proposals include the establishment of mechanisms through which the potential effects of DCFTAs can be analysed and contested, prior to the setting of a negotiating mandate and the systematic release of interim results of negotiations allowing for parliamentary debate prior to the closing of negotiations.⁶⁷

⁶⁵ David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, (Ariz. Legal Stud. Discussion Paper No. 17-10 (2017)); Guillaume Van Der Loo & Jacques Pelkmans, Commentary, *Does Wallonia's Veto of CETA Spell the Beginning of the End of EU Trade Policy?*, CTR. FOR EUR. POL'Y STUD. (Oct. 20, 2016), http://aei.pitt.edu/80526/1/GVdL_and_JP_Wallonia_and_CETA.pdf.

⁶⁶ Trading Together for Strong and Democratically Legitimized EU International Agreements, (Jan. 25, 2017), https://docs.wixstatic.com/ugd/035467_d81f8a7835434c438cff38b5f20dd036.pdf (declaration) [hereinafter Trading Together]; Signatories and Bios, Trading Together Declaration for Strong and Democratically Legitimized EU International Agreement, (Jan. 25, 2017), https://docs.wixstatic.com/ugd/035467_7710d68e543e4b1d90124e1cdb08c529.pdf (listing signatories of the declaration).

⁶⁷ Trading Together, *supra* note 66.

In its Opinion 2/15,⁶⁸ the Court finally delivered its findings on the scope of the EU's exclusive competence to conclude the EU-Singapore DCFTA. Whilst the Court confirmed that the vast majority of fields covered in the EU-Singapore DCFTA fell within the EU's exclusive competence, it also ruled that two key components of the contemporary EU's DCFTAs—foreign indirect investment and the investor-state-dispute settlement mechanism—was considered to be a shared competence between the EU and its member States.⁶⁹

At first sight this would appear to be a positive result for those arguing meaningful democratic scrutiny and control over EU's DCFTAs. Indeed, the Opinion means that, in their current incarnation, EU's DCFTAs would still have to be ratified by national parliaments of EU Member States. However, by confirming that the vast majority of provisions included in these agreements fell under the exclusive competence of the EU, the Court opened the possibility for the EU to consider moving away from its practice of concluding EU's DCFTAs as mixed agreements and instead signing them as EU-only trade agreements.⁷⁰ This approach, which has been endorsed by the Council,⁷¹ would entail negotiating portfolio investment and investor state dispute settlement ("ISDS") in agreements that are distinct from EU's DCFTAs. The former would be subject to Member State ratification whilst the others could be concluded under the article 218 Treaty on European Union ("TEU") procedure.

At this stage, it remains unclear whether the EU intends to systematically carve out portfolio investment and ISDS from its DCFTAs to ensure these fall under its exclusive competence. But if this approach was to be followed, it would inevitably lead to the further distancing of national parliaments from the EU's trade

⁶⁸ Opinion C-2/15, 2017, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>.

⁶⁹ *Id.*

⁷⁰ JOHANN ROBERT BASEDOW, THE EU IN THE GLOBAL INVESTMENT REGIME: COMMISSION ENTREPRENEURSHIP, INCREMENTAL INSTITUTIONAL CHANGE AND BUSINESS LETHARGY 238–39 (2017).

⁷¹ Draft Council Conclusions on the Negotiation and Conclusions of EU Trade Agreements May 8, 2018, <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>.

policy. Parliamentary oversight would still be ensured via the European Parliament, which retains the right to veto trade agreements—and has done so in the past—and has a significant role to play in scrutinising trade negotiations. However, a move away from mixed agreements and the resulting removal of national parliaments in the process of ratifying trade agreements may prove problematic in an environment where EU's DCFTAs have become increasingly politicised and controversial at the national level.⁷²

In the “Brussels Declaration”⁷³—a document authored by the chairman of the European Parliament's Committee on International Trade and co-signed by a number of academics—such concerns were acknowledged. The document proposed the additional engagement of EU Member States and their national and regional parliaments on trade negotiations and an increase in the levels of transparency in trade negotiations. This would be achieved by adopting a policy of automatically transmitting negotiating directives for trade agreements and publishing such recommendations to allow national parliaments and other domestic stakeholders to put forward their observations to their governments.⁷⁴

Such increase in transparency during trade negotiations would enable national parliaments to carry out some degree of scrutiny. The scrutiny would, however, remain limited. Firstly, the negotiating drafts published by the EU tend to be the EU's draft proposals and, typically, do not incorporate the counterparty's counter-proposals unless the counterparty in negotiations agrees to their release. The more contentious aspects of negotiations can, of course, be made available to national parliaments by national governments.

Indeed, a number of Member States have put in place procedures which enable national governments to inform and consult with national parliaments on the progress of EU trade

⁷² See Jan Wouters & Kolja Raube, *Rebels with a Cause? Parliaments and EU Trade Policy After the Treaty of Lisbon* 10–11, 14 (Leuven Ctr. for Glob. Governance Studies & the Inst. for Int'l Law, Working Paper No. 194, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271718.

⁷³ See Trading Together, *supra* note 66.

⁷⁴ *Id.* at 1–3.

negotiations on a regular basis.⁷⁵ However, relying on Member States to consult with national parliament is far from optimal in terms of ensuring democratic legitimacy of EU's DCFTAs. It means that the level of parliamentary scrutiny over agreements will vary from one Member State to another depending on whether a Member state allows for such consultation, and on the level of information national executives opt to share with parliament. To rectify this, it could be worth considering standardising the consultation mechanisms at the EU level. For example, one could envisage the establishment of a system of inter-parliamentary cooperation that would require the European Parliament to meet national parliament representatives on a regular basis. This would ensure that all national parliaments have access to the same level of information and would give them an opportunity to submit their observations and concerns to the European Parliament.

B. Regulatory Cooperation in Trade Agreements

An important addition to the EU's most recent DCFTAs is the inclusion of regulatory cooperation chapters that establish administrative governance systems which allow for information exchange between regulatory authorities and promote regulatory dialogue in order to address the trade disruptive effects of domestic regulation.⁷⁶ These systems reflect a wider trend in global economic governance, whereby the need to address complex regulatory issues means that traditional forms of international cooperation based on state-led negotiations and judicial dispute settlement mechanisms are being complemented by less formal, process-based methods of international cooperation.⁷⁷ Efforts to develop disciplines on market

⁷⁵ Van der Loo, *supra* note 64, at 16.

⁷⁶ See generally Debra P. Steger, *Institutions for Regulatory Cooperation in 'New Generation' Economic and Trade Agreements*, 39 *LEGAL ISSUES OF ECON. INTEGRATION* 109, 109–26 (2012) (providing an overview of regulatory cooperation mechanism included in PTAs); Tracey Epps, *Regulatory Cooperation and Free Trade Agreements*, in *TRADE AGREEMENTS AT THE CROSSROADS* 141, 141–166 (Susy Frankel & Meredith Kolsky Lewis eds., 2014).

⁷⁷ KERN ALEXANDER ET AL., *GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK* 135 (2005); see also Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *N.Y.U. J. INT'L L. & POL.* 663, 674 (2005); Kal Raustiala,

regulation at the international level are increasingly being carried out in the context of “transnational systems of . . . regulatory cooperation have been . . . established through international treaties and more informal intragovernmental networks of cooperation[.]”⁷⁸ This includes specialized bodies and committees established by international organizations in order to administer and implement international agreements, transnational networks of national regulatory authorities, international standard-setting bodies and hybrid public-private organizations.⁷⁹ The CETA was the first in the new generation of commercially-driven deep FTAs concluded by the EU to include a horizontal regulatory cooperation chapter. This chapter creates a Regulatory Cooperation Forum entrusted with the task of monitoring a series of voluntary regulatory cooperation activities, from discussing “regulatory policy issues of mutual interest”⁸⁰ to reviewing regulatory initiatives that are deemed to “provide potential for cooperation.”⁸¹ The EU has also proposed the negotiation of a horizontal regulatory cooperation chapter in the TTIP, which would go significantly further than the CETA.⁸² It includes obligations relating to the adoption of good regulatory practices (*e.g.*, publication of regulatory agendas and sharing of ex ante and ex post analyses) and the establishment of bodies through which the exchange of information on regulatory activity can occur. These bodies would also be entrusted with the task of assessing areas where mutual recognition, or regulatory compatibility could be achieved.⁸³ This regulatory chapter also provides for the

The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 VA. J. INT'L L. 1, 53-55 (2002); Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPP. 159, 162 (2004).

⁷⁸ Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

⁷⁹ *Id.*

⁸⁰ CETA, *supra* note 26, art. 21.6(2)(a).

⁸¹ *Id.* art. 21.6(2)(c).

⁸² Peter Chase & Jacques Pelkmans, *This Time it's Different: Turbo-Charging Regulatory Cooperation in TTIP* (Ctr. for European Policy Studies, Special Report No. 110, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614348.

⁸³ For in-depth analyses of the TTIP regulatory cooperation chapter see Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic*

establishment of a Regulatory Cooperation Body (“RCB”) in the TTIP, which would have the task of monitoring all regulatory cooperation carried out within the framework of the agreement. The RCB would, for example, monitor implementation of the provisions of the regulatory cooperation chapter, discuss and propose new initiatives for regulatory cooperation, prepare joint initiatives for international regulatory instruments, and ensure transparency of regulatory cooperation between parties.⁸⁴ The RCB would be composed of trade officials and representatives of regulatory authorities from both parties, who would work alongside ad hoc working groups, focusing on sector-specific regulatory issues in areas such as chemicals, cosmetics, engineering, medical devices, car safety standards and services.⁸⁵

The purpose of the regulatory cooperation mechanism proposed for the TTIP is to create a “living agreement” through which the parties can tackle regulatory trade barriers on a continual basis.⁸⁶ The hope is that in time, the institutional and cooperation frameworks established by the agreement will foster the type of mutual trust and long-term regulatory dialogue that is a prerequisite of regulatory convergence.⁸⁷ The introduction of strong regulatory cooperation mechanisms within EU trade agreements have been described by some as representing a paradigm shift away from classic free trade agreements and towards “transformative trade agreements”⁸⁸ which view deep market integration as an ongoing and open-ended process. That regulatory cooperation should be pursued in these agreements is logical since the EU, the US, and

Consequences, 18 J. INT’L ECON. L. 625, 640 (2015); see also Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory*, 78 LAW & CONTEMP. PROBS. 103, 134 (2015).

⁸⁴ See EUROPEAN COMM’N, *supra* note 43.

⁸⁵ EUROPEAN COMM’N, TTIP AND REGULATION: AN OVERVIEW (Feb. 10, 2015), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf.

⁸⁶ De Gucht, *supra* note 44.

⁸⁷ Ioannis Lianos & Johannes Le Blanc, *The ‘Trust’ Theory of Integration*, in 15 REGULATING TRADE IN SERVICES IN THE EU AND THE WTO, 17, 46–52 (Ioannis Lianos & Okeoghene Odudu eds., 2012).

⁸⁸ Hanns Ullrich, *The Transatlantic Trade and Investment Partnership (TTIP): Extending Trade Policy to Domestic Markets*, 30 REVENUE INTERNATIONALE DE DROIT ÉCONOMIQUE [INT’L J. ECON. LAW] 421, 451 (2016).

Canada have historically pursued similar trade agendas and have broadly similar regulatory preferences. This is consistent with the idea that regulatory cooperation between advanced economies is beneficial, not just because countries stand to gain more from the removal of regulatory barriers, but because increased interaction between sophisticated regulatory systems can have a positive effect on regulatory outcomes. The argument is that, when faced with better regulatory processes, countries will be induced to “improve [their] own regulations in order to face the challenges raised by the partner’s better regulations[.]”⁸⁹ In this sense, it has been contended that the regulatory cooperation mechanisms envisaged in the TTIP could serve as a “transatlantic policy laboratory,”⁹⁰ enabling parties to learn from each other’s regulatory divergences and experiences and to develop better regulatory approaches.

A number of concerns have been voiced in relation to the potential impact of these mechanisms on the regulatory autonomy and democratic processes of the parties involved. In some respects, these concerns have been overplayed. First, because there is no legal obligation in these agreements for the parties to actively pursue regulatory cooperation,⁹¹ the parties retain the right to decide whether or not to make use of these mechanisms. Second, from a constitutional perspective, the European Court of Justice (ECJ) has previously ruled that the European Commission’s right of initiative with respect to legislative proposals would not be undermined by the existence of similar international regulatory cooperation mechanisms.⁹² It is worth noting that past attempts at EU-US regulatory cooperation (promoting mutual recognition arrangements for product standards) have had very limited success, because the voluntary nature of the mechanisms meant that parties often opted against pursuing regulatory cooperation.⁹³ The same applies to the

⁸⁹ Patrick A. Messerlin, *The Much Needed EU Pivoting to East Asia*, 10 ASIA-PACIFIC EU STUD. 1, 6 (2012).

⁹⁰ Wiener & Alemanno, *supra* note 83, at 134.

⁹¹ CETA, *supra* note 26, art 21.2(2); see EUROPEAN COMM’N, TTIP – INITIAL PROVISIONS FOR CHAPTER [] - REGULATORY COOPERATION (2015), http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf

⁹² Case C-233/02, French Republic v. Comm’n of the European Cmtys., 2004 E.C.R. I-2759.

⁹³ John Peterson & Alasdair R. Young, *Trade and Transatlantic Relations: Old Dogs and New Tricks*, in 8 MAKING HISTORY: EUROPEAN

voluntary cooperation frameworks envisaged in the CETA and the TTIP.⁹⁴ That such mechanisms may, in practice, influence the Commission's decision to introduce or even affect the content of proposals was not viewed as a restriction of the right of initiative, but rather as an exercise of this right.⁹⁵ In any event, it is difficult to imagine how deliberation between officials in the RCB could lead to substantive changes in the domestic laws of the parties. Any proposed changes to the law would still have to go through the applicable decision-making processes and be subject to parliamentary scrutiny.⁹⁶

These considerations should not, however, distract from the fact that these mechanisms ultimately seek to affect the content of and the decision-making processes underpinning domestic market regulation of the parties involved. This is in part due to the fact that these mechanisms have been devised in the wider framework of trade agreements and are therefore primarily geared towards addressing domestic rules from a trade liberalizing perspective—that is, that the overriding objective of the cooperation is to remove trade distorting effects of domestic regulation. This presents the danger that domestic regulators participating in regulatory cooperation will be incentivized to place trade and investment considerations above non-economic considerations.⁹⁷ For example,

INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY 283, 291 (Sophie Meunier & Kathleen McNamara eds., 2007); Bernard Hoekman, *Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization* 18 J. INT'L ECON. L. 609, 612 (2015); Stephen Woolcock et al., *The Transatlantic Trade and Investment Partnership: Challenges and Opportunities for Consumer Protection* (Ctr. for European Policy Studies, Special Report No. 112, 2015), http://aei.pitt.edu/66136/1/SR_No_115_Woolcock_et_al_TTIP_Consumer_Protection.pdf.

⁹⁴ Van der Loo & Pelkmans, *supra* note 65.

⁹⁵ See Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 LAW & CONTEMP. PROBS. 153, 167 (2015) (noting the Commission enjoys the exclusive right of initiative in the legislative context at the EU level).

⁹⁶ CHRISTIANE GERSTETTER, REGULATORY COOPERATION UNDER TTIP – A RISK FOR DEMOCRACY AND NATIONAL REGULATION? 5 (Sept. 2014), https://www.boell.de/sites/default/files/ttip_study_regulatory_cooperation_under_ttip_1.pdf.

⁹⁷ Ferdi De Ville & Gabriel Siles-Brugge, *Why TTIP is a Game Changer and its Critics have a Point*, J. EUR. PUB. POL'Y 1490, 1500 (2016).

it has been argued that the proposed requirement to conduct impact assessments for planned regulation focuses exclusively on the potential impact of the regulation on international trade and investment. Moreover, the requirement on regulatory authorities to communicate proposed legislation to each other places them in a position where they will be drafting legislation with an external audience in mind.⁹⁸ Concerns have also been raised that past regulatory cooperation mechanisms focused on standard-setting tended to be ripe for regulatory capture⁹⁹ and favoured business and industry interests over those of civil society stakeholders with fewer resources.¹⁰⁰ In short, there are a number of features of regulatory cooperation which could potentially create a pro-liberalizing and de-regulatory dynamic in domestic law-making processes.

The regulatory cooperation components of the EU's recent trade agreements present the EU with a very particular challenge. With the increasing focus on regulatory barriers, it was inevitable that deep integration efforts would seek to develop soft law mechanisms allowing for continual regulatory dialogue and oversight, especially between like-minded countries sharing similarities in their approach to market regulation. There are concerns that regulatory cooperation will "undercut public deliberation and remove regulatory governance further from democratic oversight,"¹⁰¹ which are overblown. Regulatory cooperation of the type pursued in the CETA and (possibly) in the TTIP is not solely about removing regulatory divergences, it is also

⁹⁸ See Fabian Bohnenberger & Christian Joerges, *From Trade Liberalisation to Transnational Governance and TTIP: How Dani Rodrik, Karl Polanyi and the Varieties of Capitalism Studies May Help Us to the Present State of Globalization*, 44 TRANSNAT'L INST. 1, 16 (2016) (discussing the fundamental tensions between economic globalization and democratic politics in the field of international trade governance).

⁹⁹ See generally Richard W. Parker, *Four Challenges for TTIP Regulatory Cooperation*, 22 COLUM. J. EUR. L. 1 (2015) (discussing the challenges of the trade agreement TTIP between the EU and the US).

¹⁰⁰ See Marija Bartl, *Regulatory Convergence Through the Backdoor: TTIP's Regulatory Cooperation and the Future of Precaution in Europe*, 18 GERMAN L.J. 970 (2017) (discussing the EU's obligation to uphold and promote its value and interest in its external policies); Thomas. J. Bollyky & Petros. C. Mavroidis, *Trade, Social Preferences and Regulatory Cooperation: The New WTO-Think*, 20 J. INT'L ECON. L. 1, 18 (2016).

¹⁰¹ Bollyky & Mavroidis, *supra* note 100, at 6.

about creating fora which foster regulatory trust between countries by encouraging information exchange and allowing authorities to explain the rationale for certain trade disruptive regulations.¹⁰² Even where there is scope for regulatory convergence or equivalence, these cannot be pursued without going through the applicable domestic decision making processes. Finally, past experience suggests that, even between like-minded countries, regulatory cooperation mechanisms included in DCFTAs tend achieve very little¹⁰³—a striking example of this being the relatively modest outcomes realized by previously established regulatory cooperation frameworks between the EU and the US.¹⁰⁴

Still, there are legitimate concerns that must be addressed in order to ensure that regulatory cooperation mechanisms do not influence regulatory processes in a manner which exclusively favours trade liberalization goals over other equally legitimate non-trade goals. In this respect, further clarity is required on two points. It is important that regulatory cooperation in trade agreements is not dominated by trade negotiators, but that it also includes regulators that understand and are able to take into account non-trade regulatory preferences. By the same token, whilst the regulatory cooperation bodies included in EU trade agreements allow for the consultation of stakeholders, more thought must be given to creating safeguards to ensure that all interests are given an equal voice and representation, so that no single group is able to capture the process.¹⁰⁵

IV. EXTERNAL LEGITIMACY OF THE EU REGULATORY AGENDA

A. Regulatory Agenda as an Expression of the EU's Foreign Policy Power

The manner in which the EU has pursued its regulatory agenda has raised questions about the EU's role as a trade power

¹⁰² *Id.* at 27.

¹⁰³ Steger, *supra* note 76, at 124–25.

¹⁰⁴ See RAYMOND J. AHEARN, CONG. RESEARCH SERV., RL34717, TRANSATLANTIC REGULATORY COOPERATION: BACKGROUND AND ANALYSIS 15 (2009), <http://www.fas.org/sgp/crs/row/RL34717.pdf>.

¹⁰⁵ See Steger, *supra* note 76, at 124–25; see generally Evenett, *supra* note 18.

and, in particular, the impact that the EU's current emphasis on the negotiation of DCFTAs has on external actors and the multilateral trading system more generally.¹⁰⁶ These questions are relevant because they strike at the heart of the debate concerning EU's identity as an international actor and, specifically, the notion of the EU as a distinct actor which seeks to influence the international community through the diffusion of norms rather than through coercive means. This is best embodied by the notion of the EU as a Normative Power, developed by Ian Manners to capture the EU's supposedly qualitatively distinct international identity in international relations.¹⁰⁷ The conceptual basis of Normative Power Europe is that the EU is predisposed to act in a normative way in international politics because it is itself a normative construct.¹⁰⁸ It is in effect a narrative of self-projection where the EU seeks to shape the international community in its image by projecting constitutional norms such as principles of democracy, rule of law, social justice and respect for human rights.¹⁰⁹ A second major component of Normative Power Europe relates to the process employed by the EU to promote its norms. According to Ian Manners, a normative power must not only promote norms but also act in a normative manner when doing so.¹¹⁰ This entails an obligation to ensure consistency and coherence between the EU's internal and external norms, and to promote norms through cooperation and dialogue rather than through coercive means and to reflexively take into account the

¹⁰⁶ See generally Gabriel Siles-Brügge, *EU Trade and Development Policy Beyond the ACP: Subordinating Developmental to Commercial Imperatives in the Reform of GSP*, 20 CONTEMP. POL. 49 (2014) (discussing the centrepiece of the European Union's (EU's) trade and development strategy as the reform of the Generalised System of Preferences); Jan Orbie & Sangeeta Khorana, *Normative Versus Market Power Europe? The EU-India Trade Agreement*, 13 ASIA-EUR. J. 253, 253–64 (2015); John Peterson, *Choosing Europe or Choosing TTIP?: The European Union and the Transatlantic Trade and Investment Partnership*, 21 EUR. FOREIGN AFF. REV. 383, 401 (2016).

¹⁰⁷ Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUD. 235, 235–58 (2002).

¹⁰⁸ *Infra* note 252.

¹⁰⁹ Michelle Pace, *The Construction of EU Normative Power*, 45 J. COMMON MKT. STUD. 1041, 1054 (2007).

¹¹⁰ See Ian Manners, *The Normative Ethics of the European Union*, 84 INT'L AFF. 45–60 (2008) (discussing the ethics of the EU's normative power).

effect of the promotion of norms on third countries.¹¹¹ A normative foreign policy, therefore, entails the pursuit of normative goals through normative means—that is, one that is “justifie[d] . . . by making reference to its milieu goals that aim to strengthen international law and institutions and promote the rights and duties enshrined and specified in international [law].”¹¹²

The salience of Normative Power Europe as a conceptualisation of the EU’s identity in international relations is such that it was eventually integrated into the constitutional fabric of the EU, as the EU Treaties themselves establish a constitutional obligation on the EU to ensure that its external action is guided by a series of principles, values, and objectives.¹¹³ Article 2 of the TEU states that the EU’s external action must uphold values such as the “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” The provision is then complemented by article 21 TEU which requires the EU to develop policies and cooperate to, inter alia, “safeguard its values . . . consolidate and support democracy, the rule of law, human rights . . . improve the quality of the environment and the sustainable management of global natural resources and promote an international system based on stronger multilateral cooperation and good global governance.” Article 207 of the Treaty on the Functioning of the European Union (TEFU) confirms that the EU’s external trade policy must be conducted in the context of the principles and objectives of the EU’s external action—something which was confirmed in Opinion 2/15, where the Court ruled that foreign policy objectives such as sustainable development form “an integral part of the common commercial policy.”¹¹⁴ The limited case law on these foreign policy values and objectives means that their normative value is still a subject of academic debate. Some

¹¹¹ See generally *supra* notes 98–100.

¹¹² Nathalie Tocci, *Profiling Normative Foreign Policy: The European Union and its Global Partners*, in WHO IS A NORMATIVE FOREIGN POLICY ACTOR? 1, 12 (Nathalie Tocci ed., 2008).

¹¹³ See JORUS LARIK, FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL LAW 1-5 (2016) (discussing EU treaties that establish constitutional obligations of the EU).

¹¹⁴ Opinion C-2/15, *supra* note 68, ¶ 147.

have argued that these are justiciable norms with scope for enforceability,¹¹⁵ whilst others view them primarily as Treaty interpretation tools.¹¹⁶ Nevertheless, the very existence of these constitutionally-recognised objectives reinforces the idea of the EU as an international actor that is predisposed to project its values and norms abroad.

There are, however, other conceptualisations of the EU as an international actor, which contest the assumptions underpinning “Normative Power Europe.” Chad Damro’s idea of a “Market Power Europe,” which posits that the basis for the EU’s power lies in the size of the internal market, is one that has gained significant traction in the field of external trade policy.¹¹⁷ Instead of being a normative construct that is predisposed to act normatively, the EU is an internal market predisposed to externalise its market norms. The inclusion of standards in EU trade agreements is pinpointed by Damro as the archetypal example of market power:

The externalization of internal regulatory measures can take place if, for example, the EU attempts to include standards in bilateral and multilateral trade agreements (i.e., positive conditionality). Even if the EU employs the tools of positive conditionality with the intent of persuading changes in behaviour, the third parties in question may feel they have been coerced into changing their behaviour because they have no alternative: they must agree to undesirable terms in trade agreements because they need access to the large European single market; and they must abide by the EU’s relevant internal regulatory measures or they will be subject to sanctioning under the associated implementing legislation.¹¹⁸

¹¹⁵ See Piet Eeckhout, *A Normative Basis for EU External Relations? Protecting Internal Values Beyond the Single Market*, in SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET: EXTERNAL AND INTERNATIONAL LAW DIMENSIONS 219, 231 (Markus Krajewski ed., 2015) (discussing the EU’s obligation to uphold and promote its values and interests in its external policies).

¹¹⁶ Joris Larik, *Trade and Sustainable Development: Opinion 2/15 and the EU’s Foreign Policy Objectives*, EUR. & THE WORLD L. REV. BLOG (June 1, 2017), <https://blogs.ucl.ac.uk/europe-and-the-world-journal/2017/opinion215-trade-sustainable-development>.

¹¹⁷ Chad Damro, *Market Power Europe*, 19 J. EUR. PUB. POL’Y 682, 686 (2012).

¹¹⁸ *Id.* at 695.

“Market Power Europe” presents the EU as an international trade actor that uses the promise of market access or the threat of the removal of such access as a coercive tool to influence the behaviour of external actors, as opposed to “Normative Power Europe” where influence is exerted through normative, non-coercive, means.

The EU’s current approach to negotiating DCFTAs, however, does not fit neatly into either one of these conceptualisations. On the one hand, a number of features typically associated with Normative Power Europe can be found in the EU’s regulatory agenda. First, the EU has consistently used its DCFTAs to promote fundamental values such as respect of human rights and the promotion of sustainable development objectives¹¹⁹. Second, as previously discussed, the EU tends to shy away from using its DCFTAs to export EU-specific rules and has opted instead to promote international rules and standards. These agreements can therefore be viewed as part of a wider attempt to promote and consolidate existing international norms and institutions.¹²⁰ Third, whilst the EU’s trade agreements generally follow a pre-established template, the EU has not been averse to differentiating between trading partners depending on their particular circumstances and, especially, their levels of economic development.¹²¹ Rather than pursuing a one-size-fits-all policy, the EU has tended to adopt a differentiated approach by imposing less onerous regulatory disciplines and liberalisation requirements on some developing country third parties.¹²² On the other hand, the EU’s regulatory agenda also departs from “Normative Power Europe” in some respects. Whilst the EU has a preference towards the dissemination of international norms, it should be noted that these international norms are fully incorporated into the EU acquis, and that the EU does export EU-specific rules when this is considered to be in its

¹¹⁹ Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, 40 *LEGAL ISSUES ECON. INTEGRATION* 297, 297–313 (2013); Samantha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 *UTRECHT J. INT’L & EUR. L.* 41, 41–68 (2016).

¹²⁰ See *supra* note 25.

¹²¹ Stephen Woolcock, *Differentiation Within Reciprocity: The European Union Approach to Preferential Trade Agreements*, 20 *CONTEMP. POL.* 36, 36–48 (2014).

¹²² *Id.*

interests.¹²³ At a fundamental level, the Global Europe strategy and the decision to focus on the negotiation of bilateral trade deals has shown that the EU is ready to use the increased leverage it has in the context of bilateral relations to push through the types of commitments and reforms it could not secure at the multilateral level. Even accounting for the EU's willingness to differentiate between trade partners, it cannot be ignored that many of the EU's developing country interlocutors rejected the EU's demands for higher standards of intellectual property protection, investment protection or rules on competition within the framework of the WTO. This is further reinforced by the EU's recent foray into the world of mega-regionals and its stated intent to use such agreements to set international rules and standards. By using trade agreements to circumvent opposition at the multilateral level, the EU positions itself as a trade power that will readily make use of its economic might to impose its agendas, irrespective of their potential impact on others.¹²⁴ There is thus an ongoing internal conflict which has characterised the EU's regulatory agenda, between the projection of norms that reflect the EU's regulatory preferences—in essence market liberal norms which have been rejected at the multilateral level—and the EU's commitment to uphold certain values, including to reflexively take into account the interest of third countries and promote multilateral cooperation.

B. The International Investment Court—Rebirth of Normative Power Europe?

This tension is aptly illustrated by the EU's recent experience in designing investment protection and investment arbitration rules. International investment law, as it currently exists, is a fragmented legal system populated mostly by bilateral investment treaties ("BITs"), which regulate investment liberalisation and protection and subject disputes to ISDS

¹²³ See EU-Korea FTA, *supra* note 25, art. 15.3(1)(a) (discussing work groups that are established the auspices of the Trade Committee); Section II.A, *infra* (discussing the EU regulatory agenda).

¹²⁴ Vinod K. Aggarwal & Simon J. Evenett, *A Fragmenting Global Economy: A Weakened WTO, Mega FTAs, and Murky Protectionism*, 19 SWISS POL. SCI. REV. 550, 553 (2013).

mechanisms. It is a field of law which has been increasingly contested by developing countries because the rules included in BITs are seen as highly skewed in favour of the protection of foreign investments (typically originating from developed, capital exporting countries) to the detriment of the rights of host states (typically developing, capital importing countries) to regulate. For example, the obligation to ensure fair and equitable treatment (FET), the most important substantive standard included in BITs, requires host states to refrain from adopting measures that would affect the legitimate expectations that were taken into account by investors when the decision to invest was made. Arbitral tribunals have identified various benchmarks to determine the legitimate expectations of foreign investors; from the status of the host state's legal order at the time when the investment was made, contractual arrangements between the foreign investor and the host state or unilateral representations made by the host State to the foreign investor.¹²⁵ The expectations based on the regulatory environment of the host State have proved to be problematic in that they have, on occasion, been interpreted by arbitral tribunals as creating an obligation not to modify the regulatory environment in a manner that would frustrate such expectations.¹²⁶ This has led to accusations that BITs result in "regulatory chill"—that is, that they act as a disincentive for host states to regulate for fear of falling foul of the agreements.¹²⁷ The ISDS system has also come in for severe criticism. There are concerns regarding the perceived partiality of arbitrators who are accused to have consistently promoted neo-liberalist and pro-investor interpretations of BITs,¹²⁸ the lack of transparency of

¹²⁵ MUTHUCUMARAS WAMY SORNARJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 354 (3d ed. 2010).

¹²⁶ Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. FOREIGN INVESTMENT L.J. 88, 88–122 (2013).

¹²⁷ Stuart Gross, *Inordinate Chill: Bits, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 899 (2012); Lorenzo Cotula, *Do Investment Treaties Unduly Constrain Regulatory Space?*, 9 QUESTIONS INT'L L. 19, 19–31 (2014); Kyla Tienhaara, *What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries*, 6 GLOBAL ENVTL. POLS. 73, 73–100 (2006).

¹²⁸ SORNARJAH, *supra* note 125, at 36.

investment arbitration procedures as well as the inconsistent body of case law which inevitably results from the multiplicity of ad hoc arbitral tribunals.¹²⁹

These concerns have led a number of countries to reconsider their approach to international investment law. Large developed economies like the US and Canada have re-drafted their Model BITs with the aim to strike a more appropriate balance between the rights of foreign investors and the rights of host states to regulate.¹³⁰ Developing countries have also increasingly taken a leading role in this recalibration of international investment law—one recent example being India's new Model BIT, which is so skewed in favour of safeguarding the regulatory autonomy of host states, that it has been described as an attempt by India to “immunize itself from future BIT claims.”¹³¹ Some countries, such as Ecuador, have gone further by contemplating exiting the sphere of international investment law completely and terminating all of their BITs.¹³²

The EU has tried to follow this general trend towards the recalibration of international investment law by designing investment protection chapters in its trade agreements which present a number of distinctive features. Firstly, the EU has opted not to adopt a Model BIT, but rather to adopt a flexible and differentiated approach to negotiation of investment protection rules.¹³³ The European Commission explained this approach arguing that a “one-

¹²⁹ Andreas R. Ziegler, *Is It Necessary to Avoid Substantive and Procedural Overlaps With Other Agreements in IIAs?*, in *IMPROVING INTERNATIONAL INVESTMENT Agreements* 158, 203–04 (Armand De Mestral & Céline Lévesque eds., 2013).

¹³⁰ SORNARJAH, *supra* note 125, at 343; Robin Broad, *Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador*, 36 U. PA. J. INT'L L. 851 (2015).

¹³¹ Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1, 52 (2017).

¹³² Cecilia Olivet, *Why Did Ecuador Terminate All its Bilateral Investment Treaties?*, TRANSNAT'L INST. (May 25, 2017), <https://www.tni.org/en>.

¹³³ *Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy*, at 6, COM (2010) 343 final (July 7, 2010), <https://www.italaw.com/documents/CommissionPolicyCommunication.pdf>.

size-fits-all model for investment agreements . . . would necessarily be neither feasible nor desirable” and that “. . . the level of development of [the EU’s] partners should guide inter alia the standards the Union sets in a specific investment negotiation.”¹³⁴ The European Commission also specified that investment protection rules “should also be guided by the principles and objectives of the Union’s external action more generally, including the promotion of the rule of law, human rights and sustainable development.”¹³⁵ Furthermore, in a nod to the potential effect of international investment law on the EU’s own regulatory autonomy, the European Commission added that its approach to investment protection rules had

to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.¹³⁶

In short, from the outset, the EU signaled its intent to design flexible investment protection rules and ISDS systems which balanced investor protection interest against those of the host state to regulate in pursuit of public interest objectives.

Initially, the reality fell some way short of these grand designs. Whilst there were instances of innovation - notably attempts to limit the scope of problematic investment protection standards (*e.g.*, FET, full security and protection and expropriation) and the inclusion of additional procedural safeguards in the ISDS mechanisms, the first EU trade agreements comprising investment protection chapters (CETA and the EU-Singapore DCFTA) were largely based on the texts of the US and Canadian Model BITs.¹³⁷ The EU was, however, forced to reconsider its approach when it was faced with a barrage of criticisms after initiating the negotiations of

¹³⁴ *Id.*

¹³⁵ *Id.* at 9.

¹³⁶ *Id.*

¹³⁷ August Reinisch, *Putting the Pieces Together . . . an EU Model BIT?* 15 J. WORLD INV. & TRADE 679, 690 (2014); Ursula Kriebaum, *FET and Expropriation in the Invisible EU Model BIT?*, 15 J. WORLD INV. & TRADE 454, 465 (2014).

the EU-US TTIP, particularly relating to its plans to include an investment chapter in the agreement.¹³⁸ These criticisms eventually led the European Commission to launch an online public consultation exercise where it asked stakeholders to voice their views on the EU's proposed text for a TTIP investment protection chapter (based on the text of the CETA).¹³⁹ The response was overwhelmingly negative with many contending that the text did not go far enough in terms of securing the EU's right to regulate and that ISDS should be excluded from the TTIP altogether.¹⁴⁰ The EU responded, in turn, by publishing a "Concept Paper" proposing further changes to its investment protection chapter in the TTIP that would address the concerns domestically.¹⁴¹ With respect to substantive standards, the changes proposed remained quite modest. It was suggested that future trade agreements should include: (i) an operational provision confirming the right of the parties to take measures to achieve public interest objectives; and (ii) a provision clarifying that the agreement would not affect the right of the parties to discontinue or request the reimbursement of subsidies should such subsidies be considered illegal.¹⁴² However, the Concept Paper ushered a real departure from current international investment law practice by putting forward a significant revamp of the ISDS mechanism in its trade agreements by including innovative features that were specifically intended to address the many flaws typically

¹³⁸ Reinhardt Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, 49 J. WORLD TRADE 199, 200 (2015).

¹³⁹ See *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, EUROPEAN COMM'N, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last visited July 31, 2019).

¹⁴⁰ EUROPEAN COMMISSION, REPORT ON ONLINE PUBLIC CONSULTATION ON INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

¹⁴¹ EUROPEAN COMM'N, 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 11 (May 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

¹⁴² *Id.* at 6.

associated with ISDS and, more generally, international investment law.¹⁴³ This would include, for example, stringent rules on the appointment of arbitrators, the possibility for the arbitral tribunals to accept *amicus curiae* briefs and the establishment of appellate mechanisms.¹⁴⁴ Some of these proposals have since been incorporated in EU trade agreements (CETA and EU-Vietnam DCFTA) and are currently being discussed in the context of ongoing negotiations (*e.g.*, TTIP¹⁴⁵). But by far the most transformative suggestion made by the EU in the Concept Paper relates to the possibility of creating a Multilateral Investment Court (“MIC”), which would replicate many of the innovative features found in EU trade agreements.¹⁴⁶ The most important aspect of the proposal concerns the idea of creating two levels of judicial controls whereby rulings delivered in the first instance by an arbitral tribunal could be subsequently reviewed by an appellate body. Such an appellate mechanism would promote consistency in case law and improve the predictability of investment arbitration rulings. The Concept Paper also includes rules that would seek to ensure the independence and impartiality of judges. Members of the tribunal or appellate body are appointed for fixed terms, paid a fixed monthly retainer fee and subject to strong ethical requirements that address potential conflicts of interest.¹⁴⁷ Additionally, the Paper includes rules intended to enhance transparency (publication of documents and participation rights for third parties¹⁴⁸), to reduce procedural costs in order to promote the use of the system by smaller economies and small and medium sized enterprises,¹⁴⁹ and to avoid abuses of procedure (*e.g.*, parallel or manifestly unfounded claims¹⁵⁰).

¹⁴³ *Id.* at 9–11.

¹⁴⁴ *Id.* at 9–12.

¹⁴⁵ EUROPEAN COMM’N, CHAPTER II – INVESTMENT, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: TRADE IN SERVICES, INVESTMENT AND E-COMMERCE (2016), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹⁴⁶ *Id.* at 12–13.

¹⁴⁷ *Id.* at 17–18.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Id.* at 17.

¹⁵⁰ EUROPEAN COMM’N, GOV’T OF CAN., DISCUSSION PAPER: ESTABLISHMENT OF A MULTILATERAL INVESTMENT DISPUTE SETTLEMENT SYSTEM (Dec. 13–14, 2016),

The extent to which the EU's proposals truly represent a paradigm shift is the subject of some debate. Some commentators have argued that the proposals merely recycle existing rules and mechanisms and point to difficulties in ensuring a transition from a BIT-dominated system to a permanent multilateral system.¹⁵¹ Others have taken a far more positive outlook by describing the EU's proposal as a "brave initiative and an innovative reform blueprint for ISDS,"¹⁵² and commended the EU's multilateral approach as a "superior forum to investor-state arbitration."¹⁵³ Irrespective of the potential benefits or deficiencies of the EU's proposal for an MIC, it remains a significant attempt by the EU to take a leadership role in the reform of international investment law in a manner that is consistent with the idea of a Normative Power Europe. From the outset, the EU has sought to design rules that take into account its values, principles, objectives, and, in particular, rules that would reflect the right of states to regulate in the public interests.¹⁵⁴ Further, the EU has been mindful of both its' interest and concerns and those of external actors. The EU's proposal thus addresses dissatisfaction with ISDS voiced not just domestically, but also internationally. In this regard, it is significant that not only do the EU's proposals for a MIC address many of the broad complaints aimed at ISDS, but they also put forward ideas that relate specifically to developing country concerns, such as cost reduction initiatives and special assistance for developing countries. It is also significant that the EU has sought to develop its' proposals in an

http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf.

¹⁵¹ Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, in SECOND THOUGHTS: INVESTOR STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 59, 88 (Armand de Mestral ed., 2017).

¹⁵² Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 1 TRADITIONAL DISPUTE MGMT. (2017).

¹⁵³ Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework* i, 7 (Inst. for Int'l Law & Justice, Working Paper No. 2017/1 (MegReg Series), 2017), <https://perma.cc/KK5G-RT2L>.

¹⁵⁴ See *supra* note 133.

inclusive manner¹⁵⁵ To do this, the EU has used trade agreements to incrementally promote and garner support for the MIC model. Thus, the CETA and the EU-Vietnam DCFTA both replicate the dual judiciary control system envisaged by the MIC and include a commitment from the parties to enter into negotiations for the establishment of the MIC. In the meantime, the investment court proposal has been tabled by the EU in the context of the ongoing TTIP and EU-China Investment Agreement negotiations.¹⁵⁶ But besides trade agreements, the EU (alongside Canada) has also actively endeavoured to engage the wider international community to in the project. The EU and Canada have co-sponsored inter-governmental meetings in Nairobi and Geneva, whether within the framework of the United Nations Conference on Trade and Development (UNCTAD),¹⁵⁷ the Organisation for Economic Co-operation and Development (“OECD”),¹⁵⁸ and the World Economic Forum (WEF)¹⁵⁹ were even within margins of these organisations¹⁶⁰ to gauge the appetite for the establishment of the MIC and to give third countries an opportunity to shape and take ownership of the proposals. This, again, bears the hallmarks of Normative Power Europe. Not only is the EU seeking to project itself in a manner

¹⁵⁵ See *supra* note 150.

¹⁵⁶ EUROPEAN COMM’N, NOTE TO THE FILE: EU-CHINA INVESTMENT AGREEMENT: REPORT OF THE 12TH ROUND OF NEGOTIATIONS, BRUSSELS 26-30 SEPTEMBER 2016 (2016), http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155061.pdf.

¹⁵⁷ EUROPEAN COMM’N, GOV’T OF CAN., NON-PAPER: REFORMING INVESTMENT DISPUTE SETTLEMENT: CONSIDERATIONS ON THE WAY TOWARDS A MULTILATERAL INVESTMENT DISPUTE SETTLEMENT MECHANISM (July 17–21, 2016), [http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20\(rev2\)\(clean\).pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20(rev2)(clean).pdf) (last visited Mar. 23, 2019) (discussing eleven considerations on the way towards a multilateral investments dispute settlement mechanism).

¹⁵⁸ EUROPEAN COMM’N, GOV’T OF CAN., NON-PAPER: REFORMING INVESTMENT DISPUTE SETTLEMENT: CONSIDERATIONS ON THE WAY TOWARDS A MULTILATERAL INVESTMENT DISPUTE SETTLEMENT MECHANISM (Oct. 17, 2016), http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf.

¹⁵⁹ Cecilia Malmstrom, *In Davos, Discussing Investment Disputes*, EUROPEAN COMM’N BLOG (Jan. 19, 2017), https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/davos-discussing-investment-disputes_en.

¹⁶⁰ See generally EUROPEAN COMM’N, *supra* note 150.

which seeks to take into account the considerations beyond its self-interest—to do “least harm”¹⁶¹—it is doing so by both engaging with external actors and by promoting dialogue and participation in cooperative frameworks within existing international institutions.

V. CONCLUSION

Recent events have put the spotlight back on international trade politics. The United Kingdom’s decision to leave the EU and the results of the presidential elections in the US have been presented in some quarters as a rejection of the liberal trade policies of economic globalisation and, more generally, as part of a gnawing sense on the part of certain segments of the electorate that globalisation and the international legal structures that underpin it have eroded national autonomy and democratic accountability. These are the same concerns that have been fuelling the growing contestation of the EU regulatory agenda.

As discussed in this Article, the EU regulatory agenda pursues perfectly legitimate goals. The regulatory dimension of EU DCFTAs is intended to address very real market access restrictions which EU firms and exporters encounter when doing business abroad.¹⁶² Promoting rules and standards abroad that reflect EU regulatory preferences facilitates market access for EU firms abroad and expands its normative sphere of influence. This proved fairly uncontroversial while the EU negotiated DCFTAs that were vehicles for the exportation of EU and international standards to smaller economies. But the negotiation of more ambitious EU DCFTAs with large trade powers has brought home questions concerning the legitimacy of the regulatory agenda. Some of these questions will find answers within the realm of EU law. The recently delivered Opinion 2/15 confirmed that most of the provisions included in the EU’s DCFTAs do fall within the scope of the EU’s exclusive competence. In the future, we can also expect challenges regarding other aspects of these DCFTAs, such as the compatibility of ISDS mechanisms with EU law.

Other questions, however, will require some introspection on the part of the EU and a careful examination of the type of

¹⁶¹ Manners, *supra* note 110, at 59.

¹⁶² See *supra* note 6.

measures that can be taken to recalibrate its regulatory agenda in a manner that enhances its legitimacy domestically and abroad. In this respect, the EU's recent experience in designing the investment protection chapters of its DCFTAs can be held up as a shining example of the positives that can be derived from exposing the regulatory components of its DCFTAs to a more broad-based democratic debate. The EU's decision to conduct an online public consultation and its response to the criticisms levelled at its investment protection chapters has led to the development of genuinely innovative reform proposals which tackle many of the flaws associated with international investment law system. A similar approach should be followed in relation to the regulatory cooperation chapters of these DCFTAs which, as things stand, lend themselves to capture by special interest groups. More generally, there is also a discussion to be had as to how best to achieve a balance between the need to conduct an effective EU trade policy and the need to garner broad democratic support for those DCFTAs which delve into delicate regulatory issues. Here, despite the exclusive nature of the EU's trade competence, it may be worth considering a constitutional reconfiguration in this field which would enhance the role of national parliaments in the negotiation process.