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# FUNDAMENTAL RIGHTS IN THE EU'S EXTERNAL TRADE RELATIONS: FROM PROMOTION 'THROUGH' TRADE AGREEMENTS TO PROTECTION 'IN' TRADE AGREEMENTS

Isabella Mancini\*

## INTRODUCTION

At an international level, the linkage of international trade law and human rights law has always been an extremely contested one,<sup>1</sup> and 'one of the central issues confronting international lawyers at the beginning of the twenty-first century.'<sup>2</sup> In the context of a trade regime that has long been accused of being embedded in, not least designed by, neoliberal thought, and whose legitimacy is highly disputed, questions have been raised as to the normative foundations and purpose of such a system today.<sup>3</sup> At present, the two legal frameworks remain largely separate and hardly speak to each other.<sup>4</sup> The main developments have instead occurred in the context of regional and preferential trade agreements.<sup>5</sup> In this case, the linkage with human rights has mainly manifested in the inclusion of provisions on labour standards, which yet have only recently

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\* Isabella Mancini is a PhD candidate at the City Law School (City, University of London) and an Early Stage Researcher within the Marie Skłodowska-Curie Innovative Training Network on EU Trade and Investment Policy (EUTIP). Isabella is working on a thesis on "The Place of Fundamental Rights in the New Generation of EU 'Deep' Trade Agreements with other Developed Economies".

<sup>1</sup> See *inter alia* E. U. Petersmann, 'Human rights and international economic law in the 21st century. The need to clarify their interrelationships' (2001) 4 *Journal of International Economic Law* 3, 3-39; T. Cottier *et al.* (eds.), *Human Rights and International Trade* (New York: Oxford University Press 2005).

<sup>2</sup> P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' 13 *European Journal of International Law* 2002, at 181.

<sup>3</sup> A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (New York: Oxford University Press 2014); Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press 2018); P. O'Connell, 'Brave New World? Human Rights in the Era of Globalisation' in M. A. Baderin and M. Ssenyonjo (eds.), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Abingdon: Routledge 2010); N. Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements' (Queen's University Legal Research Paper No 2018-102, 2018); F. J. Garcia and T. Meyer, 'Restoring Trade's Social Contract' 116 *Michigan Law Review Online* 2017, 78-100; F. Bourguignon *et al.*, *The Globalization of Inequality* (Princeton: Princeton University Press 2015); B. Milanovic, *Worlds Apart: Measuring International and Global Inequality* (Princeton: Princeton University Press 2005).

<sup>4</sup> H. Gott, 'Labour Standards in International Economic Law: An Introduction' in H. Gott (ed.), *Labour Standards in International Economic Law* (Cham: Springer International Publishing 2018), at 4.

<sup>5</sup> H. Gott, *supra* note 4, at 3.

gained wider acceptance as forming part of an international system of human rights.<sup>6</sup>

When it comes to trade and human rights linkages, the European Union (EU) emerges as a leading actor. Depending on the partner at stake, the EU has operationalised the linkage between trade and human rights in different ways: by means of human rights conditionality clauses, by making market access concessions dependent on, e.g., ratification of a number of human rights instruments and/or ILO Conventions, and most recently via provisions binding the Parties to respect certain core labour standards.<sup>7</sup> The aim of this paper is nonetheless not to review the history of the EU's approach to human rights in trade. Rather, it focuses on the latest, so-called 'new generation' of EU free trade agreements (FTAs) with other developed economies, and provides a critique of the EU's understanding and approach to fundamental rights therein.

The focus is on developed, as opposed to developing or least developed countries, for they reflect the main EU's trade partners of the Post-Lisbon era, but most importantly as a way to enable an alternative to the traditional understanding of the linkage of trade and fundamental rights. EU trade agreements have been used as tools to promote human rights in third countries,<sup>8</sup> mainly as part of overarching development objectives for developing or least developed countries.<sup>9</sup> In the past, human rights requirements were a sort of EU political messianism or 'offensive' interest.<sup>10</sup> Conversely, it has been argued that today fundamental rights emerge as a 'defensive' tool for the EU and the rights of its citizens, as a result of deep trade relations with other developed countries.<sup>11</sup> The selection of developed economies as trade partners thus enables fresh thinking about fundamental rights in trade, beyond a development issue or as a problem for the trade partner alone.<sup>12</sup>

<sup>6</sup> See V. Mantovalou, 'Are Labour Rights Human Rights?' 3 *European Labour Law Journal* 2012, 151-172.

<sup>7</sup> See Section 2.1. below for specific variations of this: whether ratification of fundamental ILO Conventions, whether provisions committing the Parties not to lower levels of protection and so on.

<sup>8</sup> See F. Martines, 'Human Rights Clauses in EU agreements' in S. Poli (ed.), *Protecting Human Rights in the European Union's External Relations* (CLEER PAPERS 2016/5) (The Hague: T.M.C. Asser Institute 2015).

<sup>9</sup> L. Bartels, 'The Trade and Development Policy of the European Union' in M. Cremona (ed.), *Developments in EU External Relations Law* (New York: Oxford University Press 2008).

<sup>10</sup> J.H.H. Weiler, 'In the face of crisis: Input legitimacy, output legitimacy and the political Messianism of European integration' 34 *Journal of European Integration* 2012, 825-841.

<sup>11</sup> V. Depaigne, 'Protecting fundamental rights in trade agreements between the EU and third countries' 42 *European Law Review* 2017, at 563.

<sup>12</sup> The paper will speak of 'fundamental rights' as opposed to 'human rights' for two main reasons: the willingness to take an EU law and governance perspective, which in turn should allow going beyond the minimum floor and understanding provided by internationally recognised human rights. By referring to fundamental rights, the aim is to appreciate a broader set of rights which additionally form part of and are recognised under EU law. The paper thus wants to out-distance understandings of human rights according to which protection of rights would be satisfied with the protection of basic rights or would be limited to civil and political rights. There is an important revived debate in the literature on international human rights, particularly on what they encompass and their role within the global economy. The most recent contribution in this respect is Samuel Moyn's controversial book 'Not Enough: Human Rights in an Unequal World.' Samuel

From this perspective, the paper does not embark upon an examination of *all* possible fundamental rights. The focus is on two sets of rights: labour and data privacy rights. The former represents the most common set of rights being incorporated into trade agreements, while the latter have typically not been included in trade agreements and have only recently emerged as an increasingly significant set of rights in the context of digital trade. Regarding labour rights, the paper wants to embrace a broad understanding beyond core labour standards, which is warranted in a context of ever evolving employment conditions in the digital era, even witnessing labour and data privacy issues coming together.<sup>13</sup> Labour rights are understood as forming part of broader frames of social justice, encompassing i.a. matters of health and safety at the workplace, decent work, social protection and promotion of social dialogue. In this respect, together with the EU Social Charter, the ILO Declaration on Social Justice for a Fair Globalization<sup>14</sup> and the objectives of the ILO Decent Work Agenda, represent key frameworks of reference. By employing the terminology of 'data privacy rights' the aim is to avoid discussions that dispute the difference between 'data protection' and 'privacy' rights, and to focus instead on the protection of 'personal' data, as opposed to any other kind of data.<sup>15</sup> The relevance of labour and data privacy rights is provided later. Suffice to say that the contrasting way they are addressed in EU trade agreements is telling of many inconsistencies and deficiencies in the EU's approach towards the linkage of fundamental rights and trade.

The paper proceeds as follows: it starts with a discussion of how the Treaty of Lisbon provides for 'new normative impetus' which outdoes the limited perception of trade agreements promoting human rights as a development issue<sup>16</sup> (Section 1). In the light of this, it gives an overview of the EU's current approach to fundamental rights in the new generation trade agreements (Section 2) and offers reasons why it is problematic from a fundamental rights perspective (Sec-

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Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press 2018). The paper is informed by a broad reading of the sources of fundamental rights under EU law and international human rights agreements, not least the ILO Conventions. From an EU law perspective, fundamental rights are understood as encompassing the rights flowing from the sources specified in Article 6 TEU, as well as from the member states' obligations under international human rights treaties to which they are party. The European Charter of Fundamental Rights (EUCFR) has introduced some socio-economic rights which were not included in the ECHR. The EUCFR constitutes an important yardstick as it incorporates internationally recognised human rights while also developing them further and amplifying their catalogue. As such, it goes beyond both minimum standards and understandings of rights limited to civil and political.

<sup>13</sup> See F. Hendrickx, 'Video surveillance at work: European Human Rights Court approves hidden cameras', *Regulating for Globalization: Trade, Labour and EU law perspectives* (18 October 2019), available at <<http://regulatingforglobalization.com/2019/10/18/video-surveillance-at-work-european-human-rights-court-approves-hidden-cameras/>>.

<sup>14</sup> International Labour Organisation, *ILO Declaration on Social Justice for a Fair Globalization* (2008), available at <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms\\_371208.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf)>.

<sup>15</sup> Recognised under Art.8 of Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

<sup>16</sup> V. Kube, 'The European Union's external human rights commitment: what is the legal value of Article 21 TEU?' *EUI Working Paper LAW 2016/10* (2010).

tion 3). It concludes by suggesting a change in perspective and an exploration of fundamental 'in' trade as opposed to 'through' trade (Section 4).

## 1. THE NEW NORMATIVE IMPETUS OF THE TREATY OF LISBON FOR THE EU'S EXTERNAL RELATIONS

With the Treaty of Lisbon, the EU Common Commercial Policy (CCP) has been brought under the umbrella of the EU's external action, including its principles and objectives. As per Article 207(1) TFEU, the CCP of the Union 'shall be conducted in the context of the principles and objectives of the Union's external action.' Such principles and objectives are to be found in Articles 21 and 3(5) TEU, which include human rights and the Union's values, more broadly. Because of Article 207(1), these principles and objectives can now be read as applying to the EU CCP, leading some to speak of a 'Union's human rights obligation in its external relations.'<sup>17</sup> Such an alleged obligation has been extensively debated in its scope and effect, raising questions of whether it should be understood as giving rise to a duty for the EU to protect the rights of third country citizens.<sup>18</sup> This paper does not embark upon this discussion, its aim being much narrower in scope: it wants to rely on the innovations of the Treaty of Lisbon in this regard to suggest a change in perspective on the relationship between EU external trade and fundamental rights, and address the question of what the combined reading of these articles would imply: is it about respecting, protecting and/or promoting fundamental rights?

The relevance of this question lies in recent arguments maintaining that the Treaty of Lisbon provides a 'new normative impetus' that allows going beyond the typical understanding that sees human rights in trade agreements as a development issue in third countries.<sup>19</sup> The EU has traditionally found in preferential trade agreements, and a series of mechanisms attached to them, useful convectors to promote the respect of human rights *externally*, in the rest of the world.<sup>20</sup> Meunier and Nicolaïdis have coined the concept of governing 'through trade' to refer to how the EU uses its trade policy 'to 'export' its laws, standards, values and norms.'<sup>21</sup> Most of the literature on EU external trade and

<sup>17</sup> I. Vianello, 'Guaranteeing Respect for Human Rights in the EU's External Relations: What Role for administrative Law?' in S. Poli, *supra* note 8, at 35.

<sup>18</sup> See L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' 25 *European Journal of International Law* 2014, 1071-1091; E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' 25 *European Journal of International Law* 2014, 1093-1099; C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' 20 *International Community of Law Review* 2018, 374-393.

<sup>19</sup> V. Kube, *supra* note 16.

<sup>20</sup> A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in A. Dashwood and M. Maresceau (eds.) *Law and practice of EU external relations* (New York: Cambridge University Press 2008), p.85 and footnote 44; Piet Eeckhout, *External relations of the European Union* (New York: Oxford University Press 2004), at 473.

<sup>21</sup> S. Meunier and K. Nicolaïdis, 'The European Union as a Conflicted Trade Power' 13 *Journal of European Public Policy* 2006, 906-925; A. Marx *et al.*, 'Protecting labour rights in a globalizing world: an introduction' in A. Marx *et al.* (eds.), *Global Governance of Labour Rights Assess-*

its relationship with human rights has accordingly focused on the effectiveness of EU's instruments in bringing a change or securing compliance with human rights in third countries.<sup>22</sup>

This section wants to provide a different angle: it argues that a combined reading of Articles 207 TFEU and 21(1) and 3(5) TEU allows liberation from the traditional understandings of the EU as a global trade actor that is expected to *promote* fundamental rights globally 'through' its trade agreement, and to prompt an exploration of the protection of fundamental rights 'in' trade; in the sense of making sure that trade agreements do not become, as of themselves, sources or intensifiers of downward pressures on fundamental rights.

The table below is an attempt to unpack what the combined reading of Articles 207(1) TFEU, 21 TEU and 3(5) TEU can imply in terms of: (a) what the EU is expected to pursue (object) in relation to its external relations, and the extent to which these objects encompass fundamental rights; (b) what the EU is expected to do (action) in its external dimension in relation to fundamental rights; and then (c) it explores and questions the meaning of 'EU's external action' and similar phrasings such as 'in its relations with the wider world'; given the abstractness of these phrasings, it tries to highlight specific instances where EU's action is required and/or possible, for instance 'when defining', 'developing', and also 'implementing' areas of the Union's external action.<sup>23</sup> In this respect, EU trade agreements are regarded as specific instances 'developing' and 'implementing' the EU's external relations in trade, and essentially the Union's Common Commercial Policy as an area of the Union's external action.

Table 1: The Union's mandate to respect and promote fundamental rights in its external relations.

Relevant Article	Action	Object	Level/phase
Art.21(1) <sup>24</sup>	[Be guided by]	Principles of: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity..	When acting on the international scene

*ing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham: Edward Elgar Publishing 2015) at 4-5.

<sup>22</sup> See *inter alia* L. Camping *et al.* 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' 155 *International Labour Review* 2016, 357-382; J. Orbie *et al.*, 'The Impact of Labour Rights Commitments in EU Trade Agreements: The Case of Peru' 5 *Labour Standards in a Global Environment* 2017, 6-18; A. Marx *et al.* (eds.) *supra* note 21; S. Poli (ed.) *supra* note 8.

<sup>23</sup> Art.21(3) Consolidated version of the Treaty on European Union [2008] OJ C115/13 (hereafter, TEU).

<sup>24</sup> Art.21(1) TEU: 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Art.21(2)(a) <sup>25</sup>	<i>Safeguard</i>	[Union's] values	When defining and pursuing common policies and actions
Art.21(2)(b) <sup>26</sup>	<i>Consolidate and support</i>	Human rights	<i>Ibid</i>
Art.21(3) <sup>27</sup>	<i>Respect</i>	Principles (set out in paras 1 and 2)	When developing and implementing areas of the Union's external action
	<i>Pursue</i>	Objectives (set out in paras 1 and 2)	<i>Ibid</i>
Art.3(5) <sup>28</sup>	<i>Uphold and promote</i>	Its values	In its relations with the wider world
	<i>Contribute</i>	Protection of human rights	-

The table should help to visualise that principles and objectives of the Union's external action, which include human rights and the Union's values, not only have to be 'pursued' and 'promoted',<sup>29</sup> but also have to be 'respected', 'upheld' and 'safeguarded'<sup>30</sup> – the timing of this being 'in the development and implementation of the different areas of the Union's external action.'<sup>31</sup> This suggests that the EU's external action itself should i.a. 'respect', 'safeguard', 'consolidate and support' principles and values of fundamental rights. To the extent that trade agreements can be considered concrete manifestations of the 'EU's external action', it could be argued that as of themselves they should be consistent with such principles and objectives, and therefore 'respect', 'safeguard' and 'uphold' fundamental rights.

<sup>25</sup> Art.21(2)(a) TEU: 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity;

<sup>26</sup> Art.21(2)(b) TEU: (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

<sup>27</sup> Art.21(3) TEU: The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

<sup>28</sup> Art.3(5) TEU: 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

<sup>29</sup> Art.21(3), Art.3(5) TEU.

<sup>30</sup> Art.21(3), Art.3(5) TEU, Art.21(2)(a) TEU.

<sup>31</sup> Art.21(3) TEU.

Understanding the articles this way enables a different perspective on how fundamental rights are addressed in the context of trade agreements, and how their protection should be pursued in practice. Fundamental rights would not represent *external* objectives alone, but would become *inherent* objectives to EU external trade. Such reading suggests two views: not only that trade *can* and *has to* work as an instrument for the pursuit of fundamental rights objectives *externally*; but that also the Union's external action, and in fact the trade agreements themselves, should be consistent with such principles and objectives, including fundamental rights. This can imply that trade agreements should not undermine the protection of fundamental rights as a minimum ('respect'), and can be understood as having to ensure their protection ('safeguard').

Such a different understanding is also allowed by Article 207(1) TFEU,<sup>32</sup> wherein the second sentence states that the CCP of the Union 'shall be conducted *in the context* of the principles and objectives of the Union's external action.' [emphasis added] This sentence was not present in previous versions of the treaties,<sup>33</sup> and in fact represents a novelty of the Treaty of Lisbon. However, it is not clear, generally speaking, what 'conducting' a policy '*in the context of principles*' could mean. Arguably, a less vague wording could have been used, such as 'shall respect and promote' the principles of the Union's external action. For instance, as regards the EU's foreign and security policy, the EU treaties have typically specified that the Union and its Member States shall 'define and implement' a common foreign and security policy, 'the objectives of which shall be', i.a. to safeguard 'common values.'<sup>34</sup> Yet in this case, the focus on the 'objectives' clearly alludes to an *outward* perspective. The legacy of this provision is now Article 21(1) TEU,<sup>35</sup> which deploys a vague phrasing in its first paragraph, namely 'shall be guided by', similar to Article 207(1) TFEU. Arguably, it is precisely the vagueness of the wording of Article 207(1) TFEU that allows embracing a broader, normative understanding of the relationship between the EU's external action in trade and fundamental rights.

## 2. THE EU'S APPROACH TO FUNDAMENTAL RIGHTS IN POST-LISBON FREE TRADE AGREEMENTS

### 2.1 Labour and Data Privacy Rights in EU FTAs with other Developed Economies

The post-Lisbon EU trade agreements with Canada, Singapore and Japan, as well as what would have been the TTIP, do not include a chapter on fundamen-

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<sup>32</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter, TFEU).

<sup>33</sup> See Art.113 Treaty on European Union [1992] OJ C191/1 (Treaty of Maastricht) (hereafter, EC Treaty), Art.113 Treaty establishing the European Community [1997] OJ C340/1 (Amsterdam consolidated version (hereafter, EEC Treaty) and Art.133 Treaty establishing the European Community [2001] OJ C80/1 (Nice consolidated version).

<sup>34</sup> Art.J.1 EC Treaty and EEC Treaty.

<sup>35</sup> Art.21(1),(2)(a) and (2)(b) TEU.

tal rights, yet can be understood as still providing a series of mechanisms aimed at their protection.<sup>36</sup> Starting with labour rights, relevant provisions are to be found in the so-called Trade and Sustainable Development chapters.<sup>37</sup> With slight variations and different configurations, a taxonomy of the provisions included across trade agreements can be largely classified as displayed in the table below.

Provisions including commitments on certain standards	Provisions envisaging cooperation on labour matters	Provisions on upholding levels of protection
<ul style="list-style-type: none"> <li>● Commitments to respect, promote and implement/realise the principles concerning the fundamental rights at work (ILO Declaration 1998)</li> <li>● Commitments to ratify and/or implement Fundamental ILO Conventions (or implement the ILO Conventions that the Parties have ratified)</li> <li>● Make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions</li> </ul>	<ul style="list-style-type: none"> <li>● Cooperation at the international level</li> <li>● Exchange of information and the sharing of best practices</li> <li>● Cooperation on trade-related aspects of the ILO Decent Work Agenda</li> </ul>	<ul style="list-style-type: none"> <li>● Recognition that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded by their domestic labour law</li> <li>● Recognition that labour standards should not be used for protectionist trade purposes</li> </ul>

In addition to these, CETA is the only trade agreement that includes commitments in relation to labour rights beyond core labour standards, and which refers to the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization, and ‘other international commitments’, which are listed: health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and non-discrimination in respect of working conditions, including for migrant workers.<sup>38</sup>

With respect to data privacy rights, a very small number of provisions can be found, limitedly the chapters on financial services, telecommunications (or electronic communications) and e-commerce. They usually require the Parties to ‘adopt or maintain appropriate safeguards to protect privacy and personal data’;<sup>39</sup> and make data privacy rights part of general exceptions, allowing derogation

<sup>36</sup> See V. Depaigne, *supra* note 11.

<sup>37</sup> The Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, and recently the EU-Singapore FTA, include a specific subsection on Trade and Labour, but in practice the commitments remain the same.

<sup>38</sup> Art.23.3(2) and (3) CETA.

<sup>39</sup> See e.g. Art.8.54 EU-Singapore FTA.

from a more general commitment to liberalise trade in services.<sup>40</sup> Unlike the provisions on labour rights, provisions on data privacy rights do not require the Parties to promote or realise certain standards via their laws, nor to cooperate on the matter. The underlying idea, as it will be explained below, is to avoid including substantive standards related to data privacy rights *in* the trade agreements. Even though not envisaged prior to the negotiations, the EU-Japan trade talks led to parallel negotiations on an adequacy decision on their level of protection of personal data.<sup>41</sup> On this path, the EU has initiated similar negotiations with trade partners with which it had concluded trade agreements, such as South Korea, and is contemplating doing the same with Singapore. At present, the EU maintains the Privacy Shield with the US, a partial adequacy decision with Canada.

Beyond these provisions specifically on labour and data privacy rights, three additional mechanisms can be considered as providing room for protection. First, clauses on the right to regulate have been included to reaffirm the right of the Parties to pursue their public policy objectives. Overall, these can be found in the chapters on trade and sustainable development and in the chapters regulating services and investment. Safeguards under these formulations have been introduced to address concerns that regulatory cooperation and investment chapters would have restrained the regulatory space or even prevented each Party to adopt new regulatory measures, particularly in the public interest. It has been argued that such provisions could be invoked or relied upon by the Parties to justify the adoption of measures that are necessary to protect and ensure respect of certain rights, while preventing regulatory chill effects.<sup>42</sup> However, they do not imply a proactive stance, representing a rather defensive, and not absolute, guarantee. Similarly, general exceptions are a second means by which the Parties retain their possibility to derogate from the agreement to introduce measures in favour of, e.g., protection of public morals and public order, public

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<sup>40</sup> CETA also specifically provides that, in cases of transfers of financial information that involves personal information, 'such transfers should be in accordance with the legislation governing the protection of personal information of the territory of the Party where the transfer has originated.' (Art.13.15(2) CETA). In practice, any transfer originating from the EU will have to fall within the restrictive EU standards of protection, and that as such, there is no indication that standards for data protection would be lowered. See W. Berka, 'CETA, TTIP, TISA, and Data Protection' in S. Griller *et al.* (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TISA; New Orientations for EU External Economic Relations* (New York: Oxford University Press 2017) 178-179; K. Irion *et al.*, 'Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements' (2016) independent study commissioned by BEUC *et al.*, Amsterdam, Institute for Information Law (IViR), p.43. On the other hand, it has been also argued that the use of the language 'should' does not lead to a binding obligation and that has been weakened if compared to the version preceding the legal scrubbing. See A. Wessels, 'CETA will harm our privacy' (15 April 2016), available at <<https://blog.ffii.org/ceta-will-harm-our-privacy/>>.

<sup>41</sup> See E. Fahey and I. Mancini, 'The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations' *International Trade Law and Regulation* 2020 (forthcoming).

<sup>42</sup> V. Depaigne, *supra* note 11; L. Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA', *University of Cambridge Faculty of Law Research Paper No.13/2017*, 12-16.

life and health, the environment, privacy and national security.<sup>43</sup> Yet again, they do not provide for a positive relationship between trade reform and fundamental rights issues related to it.<sup>44</sup>

Finally, human rights conditionality clauses could also be understood as providing a mechanism for fundamental rights protection. Some have seen in the human rights conditionality clauses an additional venue via which labour rights could be protected.<sup>45</sup> However, these clauses have seldom been invoked by the EU to suspend trade benefits,<sup>46</sup> and their scope is usually one that envisages an outrageous violation of human rights of the magnitude of coups d'état. Furthermore, the EU's practice has recently been to include these clauses in political agreements (called Strategic Partnership Agreements or Framework Agreements) which are negotiated parallel to the trade agreements: they are not binding and their relationship to the trade agreement remains often very vague.

Having briefly outlined what can be found in relation to fundamental rights in the new generation of EU's trade agreements, the next section turns to the arguments that back such an approach, and explains essentially why so little is there. The way fundamental rights are dealt with in EU trade agreements reflects underlying assumptions and open standpoints in relation to their linkage, which are used to justify such an approach. However, as it will be shown, they raise a series of concerns from a fundamental rights perspective.

## 2.2 Arguments Backing the Current Approach to Fundamental Rights in EU FTAs

### a. *Fundamental Rights are 'non-negotiable'*

One of the main arguments is that fundamental rights are 'non-negotiable', and as such, should fall outside trade negotiations and trade agreements altogether. This has been mostly manifested and voiced in relation to data protection, and particularly during the trade negotiations with the US and Japan. In a speech in the US, amid TTIP negotiations, Vice-President of the Commission, Viviane Reding warned 'against bringing data protection to the trade talks', for data protection 'is a fundamental right and as such it is not negotiable.'<sup>47</sup> Similarly, when faced with Japanese demands to discuss data protection-related issues, the Commission said that data protection 'is a fundamental right in the Euro-

<sup>43</sup> S.M. Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia 2009), p.57.

<sup>44</sup> S.M. Walker, *supra* note 43.

<sup>45</sup> L. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' 40 *Legal Issues of Economic Integration* 2013, 297-313.

<sup>46</sup> T. Novitz, 'Labour Standards and Trade: Need We Choose Between 'Human Rights' and 'Sustainable Development'?' in H. Gott, *supra* note 4, p.129.

<sup>47</sup> V. Reding, 'Towards a more dynamic transatlantic area of growth and investment' (29 October 2013), available at <[https://ec.europa.eu/commission/presscorner/detail/de/SPEECH\\_13\\_867](https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_13_867)>.

pean Union and is therefore not up for negotiation.<sup>48</sup> The Commission's open position in respect to trade *and* fundamental rights is clearly that fundamental rights are non-negotiable and should therefore not be dealt with in trade agreements.

It is totally logical and understandable that the EU does not want to compromise the level of protection of fundamental rights by making them objects of trade negotiations. The trade realm is a particularly sensitive setting where this could occur, as the rhetoric is usually one of 'cutting the red tape.'<sup>49</sup> On the other hand, what does it mean that fundamental rights are not negotiable in the context of trade negotiations? What would 'negotiation of fundamental rights' imply *in practice*? Such an approach arguably raises a series of concerns. The first is the implication of excluding altogether any discussion relating to fundamental rights in the context of trade. Even though the Commission's stance aims at ensuring that levels of protection are not compromised, it simultaneously removes any positive action or consideration for ensuring that fundamental rights are not compromised by the trade agreement itself once in place.

Second, one could argue that negotiations on data protection have indeed taken place, in the context of data adequacy negotiations with Japan. Here, the benchmark, or starting point of reference, for the assessment of adequacy was the EU legal framework on data protection (GDPR).<sup>50</sup> Yet the outcome of such negotiations has been criticised for not providing a true equivalent level of protection; while others have also noticed how the alleged convergence of the Japanese and EU legal framework on data protection has been reached in a way that only personal data of EU citizens have been granted additional safeguards, leaving much unchanged for Japanese citizens' personal data. One could argue that, in this case, data protection emerges as a clear defensive interest of the EU when deepening trade relations with third countries. At the same time, the EU-Japan adequacy talks can inform a different understanding of 'negotiations': not as something that only leads to *downwards* pressures on the levels of protection, but one that can aim at achieving *upwards* convergence of standards.

Third, the argument that fundamental rights are not for negotiation raises the question of why trade agreements include provisions on the protection of labour standards: are labour standards not fundamental rights? These provisions only concern 'core' internationally agreed labour standards: they are understood as guaranteeing a 'level playing field', and thus represent a minimum floor of labour rights for which there would be no lower levels, hence in fact nothing to be 'negotiated.' Asking more would certainly prove very controversial and raise much opposition. Yet while trade agreements include provisions on *minimum*

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<sup>48</sup> European Commission, 'Key elements of the EU-Japan Economic Partnership Agreement', Press release (18 April 2018), available at <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_18\\_3326](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3326)>.

<sup>49</sup> V. Reding, *supra* note 47.

<sup>50</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 (hereafter, GDPR).

levels of labour protection, no corresponding provisions exist for data protection, for instance referring to the OECD Privacy Guidelines or the APEC Privacy Framework (the latter having been included, for instance, by Canada and the US in their newly concluded trade agreement with Mexico).<sup>51</sup> Instead, data protection occupies a complex place in trade agreements,<sup>52</sup> and the reference benchmark for (albeit parallel) adequacy decisions is the strictest legal framework in the world, namely the GDPR. Most importantly, an explanation for the minimum labour standards lies in the Union's limited competences in labour matters<sup>53</sup> and the scope of Common Commercial Policy, which result in the impossibility for the EU *alone* to include new substantive obligations in relation to i.a. labour in its trade agreements.<sup>54</sup> Yet there remains an underlying contradiction, or incoherence, in the argument that fundamental rights are non-negotiable. This is reflected in the differential treatment of the two sets of rights: while for labour standards it is generally accepted to have the lowest common denominator, for data protection it is the highest standard that is maintained.

b. *'Trade agreements are for trade'*

Recently, the EU Commission has also been outspoken about the fact that trade agreements are essentially for trade, done to liberalise trade and make it less costly.<sup>55</sup> This position contends that trade agreements cannot become the vehicles for everything and anything. Whilst one should concede that EU trade agreements now go far beyond anything that had ever been included for fundamental rights, this logic remains highly problematic from a fundamental rights perspective, inasmuch as fundamental rights are considered to form part of a broader category of 'non-trade objectives.' There is similar scepticism among EU policy officials, economists and academics about the usefulness of provisions on, for instance, environment and/or labour rights in trade agreements.<sup>56</sup> The argument is either that trade agreements should be primarily for trade,<sup>57</sup> or

<sup>51</sup> Article 19.8 Agreement between the United States of America, the United Mexican States, and Canada.

<sup>52</sup> See Section 2.1.

<sup>53</sup> More precisely, it is a shared competence, see Articles 3 and 4 TFEU.

<sup>54</sup> See Opinion 2/15 (*Singapore FTA*), ECLI:EU:C:2017:376, paras. 164 and 471 (hereafter Opinion 2/15).

<sup>55</sup> See DG Trade Commissioner Cecilia Malmström at Civil Society Dialogue, available at <<https://webcast.ec.europa.eu/civil-society-dialogue-with-cecilia-malmstrom>>.

<sup>56</sup> See i.a. R.J. Flanagan, *Globalization and Labor Conditions* (New York: Oxford University Press 2006).

<sup>57</sup> L. Campling *et al.*, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' 155 *International Labour Law Review* 2016, 357-382; F. C. Ebert, 'Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?' 155 *International Labour Law Review* 2015, 407-433; E. Postnikov and I. Bastiaens, 'Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements' 21 *Journal of European Public Policy* 2014, 923-940; J. M. Siroen, 'Labour provisions in preferential trade agreements: Current practice and outlook' 152 *International Labour Review* 2013, 85-106; L. Van Den Putte and J. Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 263-283; A. Marx and J. Soares, 'Does integrating labour provisions in

that such provisions are not effective in achieving compliance to certain standards by the third country: whereas some would advocate for a change in the approach, others would still be sceptical about their usefulness altogether.<sup>58</sup>

With respect to the first argument, a series of developments clearly show that trade agreements have already for a long time expanded beyond purely trade-related matters. And this is so even if one were to exclude the newly-introduced 'trade and sustainable development' chapters. The new generation of EU FTAs is marked by a high degree of ambition in terms of the liberalisation pursued and matters to be regulated under trade agreements. For instance, CETA and EUJEPA now include chapters on Regulatory Cooperation, which is something that has traditionally been undertaken outside the negotiations of trade agreements, often in much looser forms. In general, the new generation of EU FTAs includes a series of so-called 'WTO-X' issues, such as anti-corruption and transparency, which are not part of the WTO legal framework, and whose link to trade, strictly-speaking, could be questioned. The widening of the scope of FTAs is at once inevitable in the context of an increasingly interconnected and digitalised world, with structural changes having altered the way goods are produced and exchanged. A parallel can be drawn with the gradual expansion of the scope of the EU Common Commercial Policy, which has been interpreted as a reflection and adjustment 'to the constantly evolving international trade environment.'<sup>59</sup> Hence the scope of trade agreements has been enlarged to such an extent that FTAs are not strictly-speaking about trade anymore; or they might be, but because the nature of trade itself has changed, in a way that it has raised the relevance of more matters in relation to it.

This backdrop has two related implications: first, that arguing trade agreements cannot become the hub for everything and anything misses the empirics of the current situation, and can thus hardly hold when used to reply to demands regarding fundamental rights; and second, that as the scope of trade agreements expands and touches upon a wider array of issues, its reach is also more liable to have an impact on fundamental rights, which thereby warrants scrutiny of potential collisions with fundamental rights. It is noticeable how current discussions on the inclusion of a chapter on gender in trade agreements has been put forward as an additional issue to be tackled via trade agreements. And it is even more remarkable how much more emphasis has been placed on explaining how trade negatively affects women more than men: no such discourses have emerged with respect to labour, explaining and recognising how trade agreements might have an impact of labour rights. Hence if one is to counter conten-

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free trade agreements make a difference? An exploratory analysis of freedom of association and collective bargaining rights in 13 EU trade partners' in J. Wouters *et al.* (eds.), *Global Governance through Trade: EU Policies and Approaches* (Cheltenham: Edward Elgar Publishing 2015); K. Banks, 'Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labour Law' 32 *Berkeley Journal of Labor and Employment Law* 2011, 45-142.

<sup>58</sup> A. G. Brown and R. M. Stern, 'What are the issues in using trade agreements to improve international labor standards?' 7 *World Trade Review* 2008, 331-357.

<sup>59</sup> P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2<sup>nd</sup> edition 2015) p.71.

tions that FTAs are about trade and cannot be loaded with too many issues, it is important for any argument in favour of fundamental rights to spell out their relevance and linkage with trade.

With respect to the second argument, namely that provisions on labour rights are not effective in prompting positive change in the third country, it is clear that the assumption is one that sees ensuring fundamental rights protection as an issue to be tackled only by the third country alone. Yet it is argued that this misses the point of having labour provisions in trade agreements, and a more thorough understanding of their relationship with trade. Alternatively, they become an *internal* EU's cause for concern when contemplated from an economic perspective: the concern is that the third country will lower its labour standards, hence altering the relative terms of trade and affecting workers at home – a rationale that, as discussed further below, remains very narrow-sighted from a fundamental rights perspective, as it only contemplates the rights of EU citizens. Related to this, and in addition to the outspoken arguments for the current approach to fundamental rights in trade agreements, it is worth considering an underlying assumption that rows against more compelling contemporary understandings of linkages between trade and fundamental rights.

### c. *Fundamental Rights protection as 'a problem of third countries'*

Specifically with respect to the linkage of trade agreements and fundamental rights, an underlying assumption is that the protection of fundamental rights, yet more often in this case 'human rights', is an 'external problem.' This has been traditionally the case with conditionality clauses<sup>60</sup> and the Generalised System of Preferences.<sup>61</sup> The recent EU Commission's Communication on Trade, Growth and World Affairs of 2010 similarly states that through trade, the EU should aim to encourage *partners* 'to promote the respect of human rights, labour standards, the environment, and good governance.'<sup>62</sup> Again, the target partners in this case are developing countries, while nothing is mentioned about the understanding and role of human rights with more economically advanced countries, which were the main trade partners targeted by the Global Europe Strategy at the basis of the new generation of EU trade agreements.

Yet also in the context of the Post-Lisbon trade agreements with developed economies, potential breaches of fundamental rights seem to remain a problem of third countries: the inclusion of provisions that commit the Parties to core labour standards and fundamental ILO Conventions which all EU Member States have already ratified leads one to wonder about its *added-value*. Conversely, one could see some added value to the EU's partners of the latest trade negotiations: at the time of the negotiations, Canada, the US, Singapore and Japan

<sup>60</sup> Had the trade partner committed an outrageous violation of human rights, the EU could have suspended the trade agreement.

<sup>61</sup> Preferential access can be withdrawn where the trade partner fails to ratify or implement a series of human rights instruments.

<sup>62</sup> European Commission, 'Trade, Growth and World Affairs: Trade Policy as a core component of the EU's 2020 strategy', COM(2010) 612 final (2010).

were all missing ratification of some of the Fundamental ILO Conventions. While the trade negotiations with Canada, for what would have become CETA, have triggered Canada's ratification of the ILO Convention on the right to organise and collective bargaining, discussions on the inclusion of ILO commitments have proven very controversial in the negotiations with the US and Japan, both which are presently missing ratification of some important ILO Conventions. While the EU-US talks for TTIP have failed, it has to be seen whether commitments under EUJEPA will bring about changes on the Japanese side in terms of ILO Conventions ratification. Yet again, this perspective leads to an outward-look on the issue.

Additionally, Labour standards are reportedly included in trade agreements between developed countries to counter claims of protectionism by developing countries. Therefore, it has been suggested that the EU, to counter such accusation, has to include the same provisions in agreements with developed countries. However, what this entire argument reveals is the assumption that fundamental rights are only an issue for concern outside EU borders.<sup>63</sup> Developing countries have traditionally opposed the inclusion of provisions on labour standards and similar terms within the WTO framework, relying on the argument that these clauses are disguised protectionist measures. On a related note, while the EU maintains that its demands in relation to labour do not go beyond core labour standards, and should therefore meet no opposition by developing countries, discussions at the WTO on e-commerce, supported by the EU, are being accused of 'digital colonialism.'<sup>64</sup> In any case, justifying the inclusion of labour provisions in FTAs with developed countries because of possible accusations by developing countries is a window dressing that misses the purpose, and emerges in fact as a very narrow and dry understanding of the relationship between labour protection and trade agreements.

Finally, the discussion on sanctions for breaches of labour rights reveals similar assumptions. The whole debate around labour rights in trade agreements typically ends up being narrowed down to the discussion on having binding mechanisms for their enforcement and the possibility of imposing sanctions on the trade partner. While not irrelevant, it reveals that concerns are about violations of labour rights *abroad*, rather than at home. In this sense, the idea purported is the same that has dominated trade agreements with developing countries: namely using trade agreements as tools, or 'sticks and carrots', to trigger compliance with human rights in third countries. Interestingly enough, in the trade negotiations with Canada, it was the EU that rejected the Canadian proposal to include the possibility of having sanctions in relation to the trade and sustainable development chapter, revealing concerns about *its own* labour protection.<sup>65</sup> Furthermore, the discussion on sanctions reflects an understanding of labour rights which considers them as exogenous and independent from

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<sup>63</sup> Informal interview with policy official from the European Commission.

<sup>64</sup> D. James, 'Big tech seeks to cement digital colonialism through the WTO', ALAI's magazine No 542: Social justice in a digitalized world, 24 June 2019.

<sup>65</sup> B. M. Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality' 67 *International and Comparative Law Quarterly* 2018, at 242.

the trade agreement, i.e. which focuses on the (possibly precarious) situation of labour protection in the third country, regardless of the trade agreement. Such a perspective fails to question inherent challenges and pressures posed by the trade agreement upon the enjoyment of fundamental rights also *within* EU borders.<sup>66</sup>

### 3. WHY PROBLEMATIC FROM A FUNDAMENTAL RIGHTS PERSPECTIVE: OVERLOOKING INTRINSIC LINKAGES BETWEEN TRADE AND FUNDAMENTAL RIGHTS

From a fundamental rights perspective, three main flaws are highlighted here in the EU's current approach to fundamental rights in trade agreements: first, it overlooks the economically developed nature of the trade partner, for which fundamental rights would not be a development issue (3.1); second, it omits contextualisation in an era of globalisation and digitalisation, which increases the relevance of labour and data flows to trade; and which puts additional pressure on potential adverse effects of trade agreements on fundamental rights (3.2); and third, it overlooks new features of the 'new generation' of trade agreements that warrant exploration in their linkage with and impact upon fundamental rights (3.3).

#### 3.1 Fundamental Rights in the context of FTAs with Economically Developed Trade Partners

What has taken the name of 'new generation' of EU trade agreements is the result of the EU Global Strategy. Under the latter, the EU targeted 'economically significant trading partners' and 'industrialised states that [could] offer the greatest potential for economic growth'<sup>67</sup> in North America as much as Asia. Negotiations were then initiated with South Korea, Canada, the US, Singapore and Japan. It is argued here that the way fundamental rights have been dealt

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<sup>66</sup> See Sections 3.2 and 3.3. The (down)side of this latter argument, however, is the risk of embroiling in arguments that would require the establishment of a link to trade before triggering any action, which is extremely difficult to prove. This argument yet goes beyond the scope and main thesis of this paper: the aim is not to identify how enforcement could be triggered, but rather provide a critique of the EU's current approach in understanding the relationship between fundamental rights and trade agreement. Suffice to say that while the link between an instance of lowering, e.g., labour standards and facilitation of trade is indeed usually required for the action to be brought, the relevant provisions of the FTAs dealing with labour rights do not elaborate on the features of this link: there is no description, nor examples are provided, as to how trade agreements could have such a link, for which action could be triggered. This again shows a lack of appreciation, or underestimation, of trade and fundamental rights linkages. As shown below, the idea of the paper is to trigger a change in perspective and advocate for the inclusion of provisions in the trade agreements that would address these linkages, and prevent, or at least minimise, and not intensify, potential adverse effects on fundamental rights in the first place. Issues of dispute settlement remain outside the scope of this paper.

<sup>67</sup> L. McKenzie and K. L. Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: the Case of the EU-Singapore FTA' 55 *Journal of Common Market Studies* 2017, 832-849.

with in the resulting trade agreements<sup>68</sup> (including TTIP had it been successful) ignores the fact that the trade partner is *not* a developing country. Instead, the EU Commission should have taken into consideration that those trade agreements were being negotiated with developed countries, for which fundamental rights concerns arising from a trade agreement would probably differ from those of a developing country.

Developing countries usually argue that they do not have the economic capacity or tools to achieve the degree of fundamental rights protection demanded by developed countries, and essentially look at social clauses as disguised protectionism. It is typically in these cases, where the trade partner is one where breaches of basic human rights are more likely, that the EU has adopted an approach 'through trade', aimed at changing the situation in the third country, by supporting mechanisms which promote human rights compliance. This criticism is not intended to suggest that the current provisions would be redundant in trade agreements with developed countries. This is particularly so since, as mentioned before, third countries might not have ratified some of the fundamental ILO conventions; and even when these were ratified, it might in fact not be enough.<sup>69</sup> Rather, some have suggested that the EU's trade instruments 'to promote and uphold human rights be tailored to the specificities of the countries that are parties to a given agreement', including at the implementation, monitoring and enforcement levels.<sup>70</sup> While EU policy officials recognise that concluding trade agreements with developed countries is a totally different matter from FTAs with developing ones, this is not reflected in the way fundamental rights are dealt with in trade agreements.

From a fundamental rights perspective, one would wish that, particularly with countries such as Canada and the US, the EU recognised the economically developed nature of the trade partner and were more ambitious in thinking about fundamental rights in trade, beyond basic human rights. More creativity and thorough exploration is needed when considering the relationship between fundamental rights and trade agreements in the context of present challenges to labour and data privacy rights. The economically developed nature of the trade partners enables thinking of fundamental rights as a matter of intrinsic relevance to trade agreements in an era of globalisation and increasing inequality. This would permit not condemning trade agreements in their entirety, but finding ways to avoid making them intensifiers of downward pressures on fundamental rights by globalisation and digitalisation.

For instance, this could imply that safeguards are either embedded 'in' trade agreements to prevent or cushion such adverse effects; or in mechanisms parallel to trade agreements, and having similar purpose, but whose implementation would become an obligation *in* the trade agreement, in light of their operation and implications for fundamental rights. A second way of conceiving of fundamental and trade agreements between developed countries could in fact

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<sup>68</sup> See Section 2.1

<sup>69</sup> World Bank, *World Development Report 2013 on Jobs* (World Bank 2012), pp.32-33.

<sup>70</sup> S. Velluti, 'The promotion and integration of human rights in EU external trade relations' 32 *Utrecht Journal of International and European Law* 2016, pp.41-68.

turn to the rights of 'distant others', namely citizens in fourth countries: not so much as a matter of worldwide mission for human rights promotion, as it seems the case in the current discussions between the EU and Canada;<sup>71</sup> but rather, as a matter of European and trade partner's companies' conduct abroad, in a context of global value chains.<sup>72</sup> While trade agreements include a few provisions on corporate social responsibility, these are usually hortatory, besides being very vague, as much as overlooking controversies and ambiguities surrounding the concept of CSR itself. Arguably, there needs to be more consideration of the present context of globalisation and digitalisation, and how trade agreements might become companions for further downward pressures on the enjoyment of fundamental rights.

### 3.2 A Context of Globalisation and Digitalisation Putting Pressures on Fundamental Rights

The EU's current approach to fundamental rights in trade agreements omits contextualisation in an era of globalisation and digitalisation, which increase the relevance of labour and data flows to trade, making them inevitable issues to be tackled. For practical reasons, it is not possible to assess or appreciate the relevance of *all* fundamental rights to trade, and the potential impact of trade agreements to *all* fundamental rights. As mentioned, priority is given to labour and data privacy rights. However, it is posited that in fact research would be needed to conduct such assessment for a broader range of rights.<sup>73</sup> The need to tackle labour and data privacy rights stems above all from the appreciation of the fact that international trade economically depends on, and intertwines with, labour and data flows. In a context of global value chains and the data-driven economy, labour and data underlie dynamics of international trade. Global trade has experienced significant structural changes – from unbundling of production and the emergence of global value chains; to the intensification of trade in services and foreign direct investment, alongside with technological developments – which make the economic relevance of labour and data flows to trade today both undeniable and pivotal.

<sup>71</sup> European Commission, Meeting of Committee on Trade And Sustainable Development (13 November 2019), available at <[https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc\\_158424.11.19%20\(for%20publication\).pdf](https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc_158424.11.19%20(for%20publication).pdf)>.

<sup>72</sup> E. Lee and M. Jansen, *Trade and Employment Challenges for Policy Research* (Joint Study by the Secretariat of the ILO and the Secretariat of the WTO, 2007) (hereafter, Joint ILO-WTO study), available at <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_091038.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_091038.pdf)>, p.29.

<sup>73</sup> The sustainability impact assessments are such example but a very criticised tool: it is not clear always what definitions of human rights are taken into consideration, and are often criticised for obscure methodologies. See e.g. discussion in J. Harrison and A. Goller, 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?' 8 *Human Rights Law Review* 2008, 587-615; and C. Kirkpatrick and C. George, 'Methodological issues in the impact assessment of trade policy: experience from the European Commission's Sustainability Impact Assessment (SIA) programme' 46 *Impact Assessment and Project Appraisal* 2006, 325-334.

*Labour and labour rights*

Unlike data flows, labour has always underlay the dynamics of international trade. The way labour has an impact on trade is not only because, perhaps obviously, services and products come to life as a result of some kind of human activity, which inevitably becomes a factor of production in the trade of these goods and services; but particularly because such activity takes place within a legal system setting parameters to it; this will have a bearing upon the costs of labour, in turn affecting the competitive advantage of the country providing those goods and services.<sup>74</sup> Differences in labour standards have been found to explain differences in international trade patterns, fostering concerns about 'races-to-the-bottom'.<sup>75</sup> The intrinsic economic relevance of labour to trade has traditionally justified the inclusion of international labour standards in trade agreements: since the 1970s, developed countries voiced concerns about cheaper labour in developing countries, and called for provisions on core labour standards to be included in the framework of the WTO.<sup>76</sup> 'Social dumping' arguments are also usually advanced, also to refer to cases where labour standards are intentionally lowered for the purpose of altering the terms of trade and enhancing one country's competitive advantage.<sup>77</sup>

The EU has also embraced similar considerations in the context of its trade agreements. The motivation behind the inclusion of labour provisions seems to be only partially driven by *normative* considerations: while it might reflect concerns about the negative consequences of social dumping on workers *at home*, it seems to overlook potential negative consequences on third or fourth countries' citizens' labour rights. Such interpretation is in line with recent arguments by the Commission that 'labour protection between States can have direct and immediate effects on international trade and investment' and that 'lower standards of protection in one of the Parties can enhance trade and investment in its territory'.<sup>78</sup> The justification for the inclusion of those clauses reflects the 1970s discourses and at once reveals defensive interests of the EU. Yet, arguably, the EU could understand its defensive interests as going beyond concerns over lower labour standards in developing countries. Particularly in the context of trade agreements with other developed economies, the EU could think of ensuring that its trade partner's and its own companies do not violate labour rights of workers abroad. This should be even more so in the context of increased economic interconnectedness and unbundling of production. In an era where

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<sup>74</sup> A. Marx *et al.*, 'Protecting labour rights in a globalizing world: an introduction' in A. Marx *et al.* (eds.), *Global Governance of Labour Rights Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham: Edward Elgar Publishing 2015).

<sup>75</sup> M. Artuso and C. McLarney, 'A Race to the Top: Should Labour Standards be Included in Trade Agreements?' 40 *VIKALPA The Journal for Decision Makers* 2015, 1-14.

<sup>76</sup> A. Verma and G. Elman, 'Labour Standards for a Fair Globalization for Workers of the World' 16 *The Good Society* 2007, 57-64.

<sup>77</sup> See e.g. in the context of future EU-UK relations, European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)).

<sup>78</sup> Opinion 2/15 para. 470.

trade liberalisation is increasingly being blamed for,<sup>79</sup> or at least recognised to have a bearing upon,<sup>80</sup> increasing job insecurity and economic inequality,<sup>81</sup> the aim here is to provide an overview of ways in which trade agreements are liable to put downward pressures on labour protection.<sup>82</sup> The focus is on the potential downward pressure on the workers *at home*, on the one hand, and on the workers *abroad*, on the other.

### *Pressures on workers abroad*

Liberalisation of trade has meant that trade in intermediate goods has grown in prominence.<sup>83</sup> Trade liberalisation opens up market space for firms to contract with foreign suppliers,<sup>84</sup> which allows production to be organised along global value chains whereby products are manufactured by supplier companies abroad.<sup>85</sup> For instance, in the apparel industry, it has been argued that ‘trade

<sup>79</sup> See *i.a.* G. Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ *Illinois Law Review* 2019 (forthcoming) at 18; Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press 2018); N. Lamp, ‘How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements’, *Queen’s University Legal Research Paper* No. 2018-102 (2018); F. Bourguignon, *The Globalization of Inequality* (Princeton: Princeton University Press 2015); B. Milanović, *Worlds Apart: Measuring International and Global Inequality* (Princeton: Princeton University Press 2005).

<sup>80</sup> International Monetary Fund, World Bank and World Trade Organisation, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment* (2017), available at <[https://www.wto.org/english/news\\_e/news17\\_e/wto\\_imf\\_report\\_07042017.pdf](https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf)>.

<sup>81</sup> B. Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge: Harvard University Press 2016).

<sup>82</sup> For reasons of space, the paper cannot go into depth about the economic theories explaining the relationship between trade liberalisation and labour rights: the empirical picture varies greatly across countries (see *i.a.* Joint ILO-WTO study, *supra* note 73, at 2), which complicates taking a hard line on whether trade agreements have a positive or negative impact on labour rights, which would additionally require addressing a number of empirical economic research and findings. Furthermore, it should be borne in mind that while trade liberalisation in the long run is expected to produce positive effects on the ‘quantity’ of jobs, employment and the wages earned, economic studies still lack the appropriate data to assess broader standards of labour rights, such as the ‘quality’ or ‘conditions’ of employment, *i.a.* health and safety in the workplace, or job stability (see Joint ILO-WTO study, *supra* note 72, at 20). Similarly, Milberg and Winkler (2011), who find global production networks to lead to ‘social upgrading’, by using ‘employment growth’ as the relevant standard, concede that their approach would not be sufficient to fully capture that relationship, if one were to broaden the meaning of ‘social upgrading’ to ‘decent work’, hence beyond employment and wages (W. Milberg and D. Winkler, ‘Economic and social upgrading in global production networks: Problems of theory and measurement’ 150 *International Labour Review* 2011, 341-365).

<sup>83</sup> See *e.g.* P. Antràs and R.W. Staiger, ‘Offshoring and the Role of Trade Agreements’ 102 *American Economic Review* 2012, at 3140.

<sup>84</sup> A. Smith *et al.*, ‘Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry’ 94 *Economic Geography* 2018, 550-574.

<sup>85</sup> A. Salmivaara, ‘New governance of labour rights: the perspective of Cambodian garment workers’ struggles’ 15 *Globalizations* 2018, 329-346; F. Mayer and G. Gereffi, ‘Regulation and economic globalization: Prospects and limits of private governance’ 12 *Business and Politics* 2010, 1-25; K. W. Abbott and D. Snidal, ‘Strengthening international regulation through transnational new governance’ 42 *Vanderbilt Journal of Transnational Law* 2009, 501-578; R. M. Locke,

liberalization', and particularly the WTO-mandated phasing out of the Multi-Fiber Arrangement controlling trade in textile products, has enabled 'buyers to play suppliers in more countries off against each other without concern for quotas or other barriers that had earlier restricted their sourcing options.'<sup>86</sup> In addition, it has been observed that because of the falling costs of communication and transport, lead companies would be able to exercise a great amount of control on the production process, including on the 'throughput time, costing structures, delivery systems, workplace organization and labour', even when not directly hiring workers abroad, and not directly owning the supplier.<sup>87</sup> What this implies for workers *abroad* has been studied extensively in the literature, and can be divided into studies that have found either positive outcomes in terms of higher employment and higher wages,<sup>88</sup> or deepening of exploiting conditions,<sup>89</sup> i.e. 'social downgrading.'<sup>90</sup> While the facts might lie in between, it is striking that German firms operating in China have recently planned to leave (or relocate) their production, the main reason being rising labour costs.<sup>91</sup> Two main aspects are worthy of attention here.

First, regardless of better or worsening conditions, the fact remains that fragmented production makes it extremely difficult to identify employment relationships, were one to think about how to improve them and support workers' rights effectively.<sup>92</sup> On this, the inclusion of core labour standards in trade agreements is largely regarded as lagging behind, whereas empowering local institutions to monitor what happens on the ground would be a means to address potential

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*The promise and limits of private power: Promoting labor standards in a global economy* (New York: Cambridge University Press 2013).

<sup>86</sup> M. Anner *et al.*, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' 35 *Comparative Labour Law & Policy Journal* 2013, at 8.

<sup>87</sup> S. Barrientos *et al.*, 'Decent work in global production networks: Framing the policy debate' 150 *International Labour Review* 2011, p.302.

<sup>88</sup> See i.a. N. M. Coe *et al.*, 'Global production networks: realizing the potential' 8 *Journal of Economic Geography* 2008, 271-295; Cumbers *et al.*, 'The entangled geographies of global justice networks' 32 *Progress in Human Geography* 2008, 183-201; N. Coe and M. Hess, 'Global production networks, labour and development' 44 *Geoforum* 2013, 4-9; A. Rossi, 'Does economic upgrading lead to social upgrading in global production networks? Evidence from Morocco' 46 *World Development* 2013, 223-33; N. Coe, 'Labour and global production networks' in K. Newsome *et al.* (eds.), *Putting labour in its place* (London: Palgrave 2015).

<sup>89</sup> G. Starosta, 'Revisiting the new international division of labour thesis' in G. Charnock and G. Starosta (eds.), *The new international division of labour* (London: Palgrave Macmillan 2016); A. Smith, 'Economic (in)security and global value chains' 8 *Cambridge Journal of Regions Economy and Society* 2015, 439-58; K. Newsome, *et al.* (eds.), *Putting labour in its place* (London: Palgrave 2015); E. Baglioni, 'Labour control and the labour question in global production networks' 18 *Journal of Economic Geography* 2018, 111-137.

<sup>90</sup> I.e. the worsening of 'conditions and remuneration of employment and respect for workers' rights, as embodied in the concept of decent work.' See S. Barrientos *et al.*, *supra* note 87, at 301.

<sup>91</sup> See 'Quarter of German firms in China plan to leave', *Asia Times*, 12 November 2019, available at <<https://www.asiatimes.com/2019/11/article/quarter-of-german-firms-in-china-plan-to-leave/>>.

<sup>92</sup> See Gereffi (1999) in S. Barrientos *et al.*, *supra* note 87, at 301. See also J. Kenner, 'The Enterprise, Labour and the Court of Justice' in A. Perulli and T. Treu (eds.), *Enterprise and Social Rights* (The Netherlands: Kluwer Law International 2017).

labour rights violations.<sup>93</sup> Second, the outsourcing of production creates a 'trans-national' dimension that gives rise to 'governance gaps' or 'deficits' in global labour protection,<sup>94</sup> making national standards falling short of being the only means for addressing labour.<sup>95</sup> For instance, while some companies might have bilateral arrangements with local governments that would commit them to fair practices in relation to labour protection,<sup>96</sup> some labour unions warn that when this is not the case, workers might be left without an interlocutor that could provide support; for instance, in situations where companies do not pay the wages or decide to lower them without prior consultations. Similarly, many observe how 'it is now widely recognised that business operations affect the public interest and can impact on a range of human rights.'<sup>97</sup>

### *Pressures on workers at home*

Turning to the *domestic* workers perspective, and in the light of what has been discussed in terms of trade agreements facilitating GNPs, liberalisation of trade has the potential to increase the price elasticity of labour demand, as substituting domestic workers with foreign workers becomes easier.<sup>98</sup> It has been found that, as employers become subject to stiffer price competition, they are 'more likely to threaten to lay off workers when they demand higher wages.'<sup>99</sup> Rules of origin in this respect become important as they determine the amount of domestic labour that a product needs to 'contain' for it to qualify for a preferential tariff: more lenient rules of origin, in the sense of less domestic content required for it to fall under the preferential tariff, means that it will be easier for companies to source inputs from 'lower cost countries.'<sup>100</sup> Similarly, Foreign Direct Investment also plays a role in raising labour demand elasticities, as it allows 'globalising' production, via direct foreign affiliates or by means of inter-

<sup>93</sup> A. Smith *et al.*, 'Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry' 94 *Economic Geography* 2018, 550-574.

<sup>94</sup> G. Gereffi and F. W. Mayer, 'Globalization and the Demand for Governance' in G. Gereffi (ed.), *The New Offshoring of Jobs and Global Development* (ILO 2006) p.39; K. Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation' 16 *Michigan Journal of International Law* 1995, 987-1028.

<sup>95</sup> E. de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade/World Trade Organization' 17 *Human Rights Quarterly* 1995, 443-462.

<sup>96</sup> F. Hendrikx *et al.*, 'The architecture of global labour governance' 155 *International Labour Review* 2015, 339-355.

<sup>97</sup> See i.a. J. Wouters and N. Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' 3 *Human Rights & International Legal Discourse* 2009, at 316; S. Velluti, *supra* note 70, at 42; T. Novitz, *supra* note 46, at 124.

<sup>98</sup> Joint ILO-WTO study, *supra* note 72, at 42.

<sup>99</sup> This could happen not only in the context of trade between developed and developing countries, but also in trade between developed countries. See Joint ILO-WTO study, *supra* note 72, at 4.

<sup>100</sup> A. Santos, 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements', *IILJ Working Paper 2018/3 MegaReg Series* (2018).

mediate inputs.<sup>101</sup> It has been found that even the mere possibility of threat of turning to source inputs from another country, or to delocalise, can affect the price elasticity of demand, and thus for instance weaken the possibility for workers to resist wage reductions.<sup>102</sup> One of the consequences of higher price elasticity of labour demand is that workers may have to accept lower wages.<sup>103</sup> This also links to another impact that has been pointed out, namely the reduction of governments' ability to carry out redistributive policies, including the manipulation of wages.<sup>104</sup> Finally, higher price elasticity of labour demand may lead to a reduction of domestic workers' power to bargain, as it becomes easier for employers to replace them with foreign workers.<sup>105</sup>

A final element considered here relates to practices of offshoring tasks, which has become far easier today because of technology that facilitates 'tradability of services'.<sup>106</sup> Expectedly, tasks that can be performed at a distance will be also more likely the ones to be offshored. And this is a case where not only "low-skilled" jobs are likely to be affected, but also more "high-skilled" jobs that can be high IT intensive or transmittable, as in the case of security analysts.<sup>107</sup> Baldwin has also recently coined the term 'globotics' to refer to a mix of 'globalisation' and 'robotics' that will make it easier to outsource services jobs.<sup>108</sup> While his suggestion for worried workers is to move to jobs that cannot be done by 'globots', it has been found that policy-makers will find it extremely difficult to predict next directions and new forms of employment in the digital era.<sup>109</sup> As trade in services has recently witnessed a dynamic growth,<sup>110</sup> trade agreements should take into consideration potential effects on labour and changes in the nature of employment, which might be facilitated not only by digitalisation, but also by further liberalisation of trade in services.<sup>111</sup>

<sup>101</sup> Joint ILO-WTO study, *supra* note 72, at 43, on the basis of Scheve and Slaughter (2004).

<sup>102</sup> *Ibid*, at 4.

<sup>103</sup> In a context of higher elasticity for labour demand, it will be harder for workers to have the employers bearing the costs of benefits and standards, and might find themselves to accept lower wages to maintain these standards/benefits. Joint ILO-WTO study, *supra* note 72, at 44.

<sup>104</sup> *Ibid*, at 45.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*, at 29.

<sup>107</sup> *Ibid*, at 30.

<sup>108</sup> J. Crabtree, 'The Globotics Upheaval by Richard Baldwin — white-collar disruption', *Financial Times*, 23 January 2019.

<sup>109</sup> Joint ILO-WTO study, *supra* note 73, at 30.

<sup>110</sup> Eurostat, International trade in services - an overview, available at <[https://ec.europa.eu/eurostat/statistics-explained/index.php/International\\_trade\\_in\\_services\\_-\\_an\\_overview](https://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_services_-_an_overview)>.

<sup>111</sup> Rules on cross-border provision of services have already been found to have competitive and divisive effects within the EU, see K. Debeuf, 'The labour market is not ready for the future', *EUobserver*, 20 November 2019, available at <[https://euobserver.com/who-is-who/146470?utm\\_source=euobs&utm\\_medium=email](https://euobserver.com/who-is-who/146470?utm_source=euobs&utm_medium=email)>.

### *Data flows and data privacy rights*

Unlike labour, free flow and mobility of data have only lately become the backbone of trade, and particularly of what is now called 'digital trade.'<sup>112</sup> Different from e-commerce, digital trade goes beyond online purchases or sales, and covers more broadly those trade activities that make use of digital technologies for business purposes.<sup>113</sup> The emergence of new technologies has meant that now 'data' increasingly underlie global flows of goods, services, capital as well as people crossing borders. It must be noted, however, that not every transfer of data will necessarily occur in the context of trade, and can instead be simply transferred or collected via a number of mechanisms unrelated to it. Cross-border data flows become a prominent component of digital trade for instance when data flows are used as a tradeable commodity on its own, or when it is attached to goods and services crossing borders, as in the case of e-commerce or financial services. Businesses increasingly demand the regulation of cross-border data flows in trade agreements via provisions that would forbid measures restricting their free flow.<sup>114</sup> The discussions in the context of Brexit, and the demands for an adequacy decision, as opposed to more costly arrangements such as standard contractual clauses and non-binding codes of practices, further confirm the economic relevance of data to trade.<sup>115</sup>

However, concerns have arisen as to when data contains 'personal' data, prompting a debate between those advocating free flow of data and those concerned with the protection of personal data. Trade has moved towards a digital and information space, which increases the amount of data crossing borders, making the protection of personal data ever more crucial. Data transfers in the context of cross-border services, such as financial, e-commerce and telecommunications, increasingly challenge the protection of personal data.<sup>116</sup> Globally, countries have understood that international trade necessitates coming to terms with data, yet divergent approaches mean that data protection will not always be the priority: this raises concerns as to the protection of personal data in an emerging global economic order where data flows are an important component. Whilst trade agreements have now become important vehicles to govern trans-border data flows,<sup>117</sup> the regulation of data flows in the context of trade agreements still seems to be a compelling challenge for the years to come.

<sup>112</sup> W. Berka, 'CETA, TTIP, TiSA, and Data Protection' in S. Griller *et al.* (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (New York: Oxford University Press 2017).

<sup>113</sup> UN Economic and Social Commission for Asia and the Pacific (ESCAP), *Asia-Pacific Trade and Investment Report 2016: Recent Trends and Developments* (2016), see Chapter 7 on 'Digital Trade.'

<sup>114</sup> McKinsey Global Institute, *Global Flows in a Digital Age: How Trade, Finance, People, and Data Connect the World Economy* (Brussels: McKinsey and Company 2014).

<sup>115</sup> O. Patel and N. Lea, 'EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray?' *UCL European Institute Brexit Insights paper* (2019), available at <<https://www.ucl.ac.uk/european-institute/news/2019/aug/eu-uk-data-flows-brexit-and-no-deal-adequacy-or-disarray>>.

<sup>116</sup> K. Irion *et al.*, *supra* note 40.

<sup>117</sup> UNCTAD, *Data protection regulations and international data flows: Implications for trade and development* (United Nations 2016) p.36.

On the one hand, attempts to restrict cross-border data have been qualified as protectionist measures, a red tape or non-tariff barriers to trade.<sup>118</sup> Those who see restrictions of cross-border data as new non-tariff barriers to trade denounce measures that require data to be retained onshore (such as data localisation and local storage) and those that require businesses to have their physical presence on territory. Typical arguments against such measures are that they do not serve data security, while constituting an impediment to companies' competitive advantage. On the other hand, data protection is a fundamental right that should be guaranteed in the context of trade in data. Some have pointed at the risk of 'data havens', whereby data processing operations could end up being made in countries with less strict requirements for privacy.<sup>119</sup> The challenge is thus to allow data to flow across countries and reap the benefits this would bring, while ensuring that personal data is protected.

There is a need to define clear benchmarks drawing a line between, on the one hand, measures that amount to digital protectionism and unnecessary regulation impeding such flows of data; and on the other hand, measures that are addressed at the protection of personal data and privacy, and would therefore be legitimate. Whilst trade agreements might not necessarily be the place that most would advocate for including provisions on the protection of personal data, it is important to acknowledge that data today underpins global trade. Once it is recognised how data privacy rights are salient to data flows, and data flows to trade, trade agreements would need to ensure mechanisms to address these linkages. Inasmuch as trade agreements become more complex and far-reaching, giving rise to new possible linkages with fundamental rights, the next section maps some of the new features of the latest EU trade negotiations that should be examined in relation to their impact and potential for fundamental rights protection.

### 3.3 New Linkages Emerging From New Features of the Post-Lisbon EU Trade Agreements

Moving increasingly towards deeper legal and institutional integration, the new generation EU trade agreements have stretched the stakes and implications for rights over a wider segment of people.<sup>120</sup> Their complexity and ambition, not only in liberalising trade, but also in going beyond tariffs and seeking mechanisms for regulatory convergence and institutional arrangements, are at the basis for warranting exploration of new emerging linkages with fundamental rights: places and dimensions where fundamental rights could become subject to downward pressures, but where their protection could be arguably enhanced. What follows

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<sup>118</sup> See e.g. J. Eger, 'Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers?' 10 *Law and Policy in International Business* 1978, 1055-1104.

<sup>119</sup> See L. A. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (The Netherlands: Kluwer Law International 2002); S. Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' 30 *Journal of Information Technology* 2015, 75-89.

<sup>120</sup> E. Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' 23 *Constellations* 2016, 58-70.

aims to provide an exploratory agenda of the following dimensions in their intersection with fundamental rights: wider scope, new actors, regulatory cooperation and institution-building.

a. *Wider Scope*

The new generation of EU trade agreements has widened the scope far beyond strictly-related trade issues. The impact on fundamental rights of new objects of trade agreements, such as new actors, regulatory cooperation and institutions, are discussed further below. However, if one is to consider how the scope of trade agreements has widened in relation to fundamental rights, what emerges is that the new generation EU trade agreements for the first time include the trade and sustainable development (TSD) chapters, where provisions on labour rights can be found. By contrast, data privacy rights remain mostly outside, under formulations which yet include them as part of exceptions or by means of provisions requiring the Parties to ‘maintain safeguards.’

Regarding labour rights, while most scholars point at the hortatory nature of these commitments and the fact that they are not truly binding nor enforceable, another perspective is warranted scrutiny here, which took into consideration the context of downward pressures on social protection and increasing inequalities. It has been observed that labour provisions mandating respect of core labour standards are very limited in addressing possible adverse impacts of trade on labour protection,<sup>121</sup> and do not go to the core of problems related to job insecurity, social dumping and income inequality.<sup>122</sup> Their inclusion in the TSD chapters has additionally the effect of ‘compartmentalising’ their relevance to those chapters, and thus of separating their protection as a self-standing issue. Instead, it is necessary to understand their relevance across issue areas within the trade agreement.<sup>123</sup> Increasingly, other disciplines and provisions in trade agreements are coming under the target of labour rights advocates, such as rules of origin, investment, currency manipulation and public procurement.<sup>124</sup>

<sup>125</sup> Labour rights thus necessitate innovations and integrated approaches to not

<sup>121</sup> D. Rodrik, ‘What Do Trade Agreements Really Do?’ 32 *Journal of Economic Perspectives* 2018, 73-90; G. Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ *Illinois Law Review* 2019 (forthcoming); A. Santos, ‘The Lessons of TPP and the Future of Labor Chapters in Trade Agreements’, *IIJ Working Paper 2018/3 MegaReg Series* (2018).

<sup>122</sup> A. Santos, *supra* note 121.

<sup>123</sup> See T. Novitz *supra* note 46, at 125.

<sup>124</sup> G. Shaffer, *supra* note 121; A. Santos, *supra* note 121.

<sup>125</sup> Furthermore, the Sustainability Impact Assessments of the new generation of EU trade agreements, whilst pointing at harming effects of some specific categories of jobs, do not provide tailored solutions to the problem, nor are follow-ups present in the trade agreements themselves. For instance, the SIA for CETA finds that ‘While high degrees of liberalisation would produce the greatest overall economic gains, it could negatively impact dairy in Canada and beef/pork in the EU. Workers in these sectors would, subsequently, be expected to be negatively impacted with a number of workers likely forced to shift into alternative sectors over the long-term. Maintaining sensitivities on these sectors would likely limit any negative social impact on these workers. It is unclear how expansion in agricultural employment would impact quality and decency of work. (...) Further, as agriculture and food processing tend to have some of the highest rates of work

marginalise them, but to acknowledge their interaction with all aspects of a trade agreement, whose features have now become more complex and far-reaching.<sup>126</sup>

Regarding data privacy rights, the approach is one that avoids references to specific standards and makes them grounds for exceptions, limiting a more proactive stance towards their protection. As Yakovleva has argued, it only reflects 'the economic nature of personal data and not its dignitary nature protected as a fundamental right', with normative concerns not being truly elevated to the level of economic interests.<sup>127</sup> The lack of an international standard on the matter complicates what can and/or should be included in trade agreements about data privacy: data privacy frameworks provided by the OECD and APEC clearly rely on an economic, as opposed to a more normative, approach, and their inclusion might provide suboptimal standards for data privacy rights.<sup>128</sup> The EU's approach in this respect in fact allows concluding parallel adequacy decisions where the main benchmark is the GDPR. However, when adequacy is not granted, data can still flow under other specific, and usually administratively more costly, arrangements; but particularly in the light of the EU-US saga on the Umbrella Agreement, some may wonder as to whether requiring the trade partner to 'maintain or adopt safeguards' would be enough to ensure that data privacy rights are not breached. The recent EU Commission's proposal for horizontal provisions on data flows seems to perpetuate such an approach, as it provides that 'each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy.'<sup>129</sup> On the other hand, their horizontal nature can be contrasted with the approach to labour rights, and be understood as acknowledging the relevance of data to different aspects of trade, from telecommunications to e-commerce, financial services and so on.

Arguably, the complexity of the linkage of trade respectively with labour and data privacy rights implies that the latter could be protected not necessarily via stricter commitments on a wider range of standards. Rather, it is argued here that more research and exploration is needed on more indirect (and possibly less controversial) means, as could be the incorporation of provisions on side-issues that would indirectly bolster their protection in relation to other trade

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related injuries and fatalities, expansion of employment in Canada and the EU's agriculture and food processing sectors could expose a greater number of workers to working conditions that are more unsafe than average. This could, in turn, produce negative consequences for the level of work-related stress of employees in both Canada and the EU.' C. Kirkpatrick *et al.*, *EU-Canada SIA Final Report* (2011), available at <[https://trade.ec.europa.eu/doclib/docs/2011/september/tradoc\\_148201.pdf](https://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf)>, at 49. For a critique, see F.C. Ebert, 'The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?' 33 *International Journal of Comparative Labour Law and Industrial Relations* 2017, 295-329.

<sup>126</sup> T. Novitz, *supra* note 46.

<sup>127</sup> S. Yakovleva, 'Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'?' 17 *World Trade Review* 2018, 477-508.

<sup>128</sup> *Ibid.*

<sup>129</sup> European Commission, Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements), available at <[https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156884.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf)>.

disciplines and in the context of global production networks and further liberalisation of services in the context of digitalisation.

b. *Non-Traditional Actors*

Actors that have not traditionally engaged or been interested in EU external trade law and policy, have mobilised in the context of the new generation of EU trade agreements at an unprecedented degree. Crucially, not only have they mobilised, but they have been enabled to do so, as the Commission and the Council have introduced initiatives and changed their practices to allow for a wider engagement by non-traditional actors of EU external trade. A series of consultations, civil society dialogues and transparency initiatives, including publication of documents, reflect clear attempts to trump traditional criticisms of ‘behind closed doors’ trade negotiations. While the latter have been criticised until recently for excluding representation of broader constituencies with an interest in, not least liable to be affected by, the outcome,<sup>130</sup> the latest EU trade negotiations have been praised for changing this trend, with the EU Commission’s ‘Trade for All’ strategy now being the most manifest example.<sup>131</sup>

However, while it is easy to call for, or exhibit, more inclusiveness broadly speaking, it is more difficult to grasp *who* the actors that are given a say are, how different inputs are weighed, and the extent to which they embrace fundamental rights issues; or put differently, the extent to which such actors understand the relevance of fundamental rights to trade. Research, as much as policy makers, should pay special attention to *whom* is entitled; to provide *what kind of input*; and at *what stage* of the life cycle of the FTA (from the negotiation stage, to the implementation and new regulatory mechanisms beyond the state). Importantly, actors demanding a say in trade negotiations become important voices underlying how trade agreements come about and what they are about. From a fundamental rights perspective, an exploration of linkages between non-traditional actors of the new generation of EU trade agreements thus could look at the extent to which these newly empowered actors have embraced actors advocating for the protection of fundamental rights.

Where this was the case, the next question would be whether they are given meaningful venues to express their views and influence the law-making process. A second issue to be addressed indeed relates to cases where these actors could meaningfully influence the outcome of the law *or not*. From a fundamental rights perspective, actors speaking in favour of rights should be able to shape the trade agreement accordingly, and in this sense, contribute to more thorough understandings of the relationship between trade and fundamental rights. A vast amount of literature has for instance pointed at civil society actors as among the key candidates for achieving democratisation of global governance, and

<sup>130</sup> Bull *et al.*, ‘New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements’ 78 *Law and Contemporary Problems* 2015, pp.13-14.

<sup>131</sup> EU Commission, ‘Trade for All: a More Responsible Trade and Investment Policy’ (2015), available at <[https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)>.

explored ways in which they could fill legitimacy deficits of law-making beyond the state.<sup>132</sup> Yet others have also addressed their limitations.<sup>133</sup> Hence, this would mean conceiving of mechanisms that understood and addressed typical shortcomings of participation of civil society. These mechanisms should be designed with the objective of representativeness and prioritisation of fundamental rights in mind. They should additionally create legal venues for 'normative' actors to provide meaningful input at different stages of trade law-making and ensure that their input is taken into consideration.

### c. *Regulatory Cooperation*

Another typical new feature of the latest EU trade negotiations is 'regulatory cooperation.' Whilst regulatory cooperation is a concept that comprises a panoply of mechanisms, it can be defined as encompassing those institutional and procedural mechanisms whereby actors at sub- and trans- national levels of law-making cooperate to bridge their regulatory divergences. It is typically understood as a means to create a level regulatory field against a context of regulatory divergence. In trade, divergent regulatory requirements are 'non-tariff' barriers and essentially a source of costs. As trade is increasingly more about non-tariff barriers, regulatory cooperation provides a space for addressing them. In the new generation of EU FTAs, regulatory cooperation clauses provide a range of possibilities and activities that the Parties can undertake, leaving much room for both low and high ambition in terms of the degree of alignment to be sought. As some have observed, institutionalised forms of regulatory cooperation can become veritable 'vehicles for regulatory rapprochement', as the Parties commit to 'regulatory reform and changes to the regulatory culture.'<sup>134</sup> Regulatory cooperation can channel deeper forms of legal and institutional integration.

Regulatory cooperation started receiving public attention, and in fact great opposition, in the context of the trade negotiations with the US: the way it was envisaged would have made the TTIP a 'living agreement' whereby changes to the agreed texts could have taken place via the activity of regulators with the power to advance legally binding commitments in identified areas of convergence.<sup>135</sup> Academic research has also voiced concerns as to potential demo-

<sup>132</sup> J. Tallberg and A. Uhlir, 'Civil Society and Global Democracy: an assessment', in D. Archibugi *et al.* (eds.), *Global Democracy: Normative and Empirical Perspectives* (New York: Cambridge University Press 2011); F. Bignami, 'Theories of civil society and global Administrative Law: the case of the World Bank and international development' in S. Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar 2016).

<sup>133</sup> M. Bexell *et al.*, 'Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors' 16 *Global Governance* 2010, 81-101; S. Kalm *et al.*, 'Civil Society Democratising Global Governance? Potentials and Limitations of 'Counter-Democracy'' *Global Society* 2019, 499-519.

<sup>134</sup> S. S. Krstic, 'Regulatory Cooperation to Remove Non-tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement' 39 *Legal Issues of Economic Integration* 2012, at 10.

<sup>135</sup> A. Alemanno, 'The democratic implications of the Transatlantic Trade and Investment Partnership', *FEPS policy brief* (July 2016), at 3, available at <<https://www.feps-europe.eu/attach>

cratic deficits of regulatory cooperation activities.<sup>136</sup> Some have warned that regulatory cooperation mechanisms would fall outside the scrutiny of domestic institutions, hence undermining 'traditional checks and balances characteristic of vibrant democracies.'<sup>137</sup> From a fundamental rights perspective, regulatory cooperation becomes problematic for there are no provisions reflecting concerns inherently related to the protection of fundamental rights: this is so, even though the subject matter falling under the scope of regulatory cooperation chapters is either very broad;<sup>138</sup> or specifically includes labour or e-commerce,<sup>139</sup> for which labour and data privacy would become a relevant issue.<sup>140</sup> Furthermore, regulatory cooperation is usually understood as a tool to facilitate trade and 'cut the red tape', less often in terms of 'enhanced protection.' This is reflected in the objectives of the relevant chapters, which is argued here to have an impact on how regulators will understand their role. Adding to this the potential legitimacy deficits that have been voiced, regulatory cooperation emerges as a new feature that warrants investigation on its impact on fundamental rights.

In fact, regulatory cooperation could be understood as having potential to contribute to the protection of fundamental rights, by providing a platform for mutual learning and cooperation, where challenges to fundamental rights could be discussed and jointly-addressed. This would require, for instance, making sure that the objectives of regulatory cooperation chapters are not confined to aims of trade and investment liberalisation, which is pivotal for the bodies involved to embrace fundamental rights considerations with a view to enhance their protection. For a research agenda, it would be important to focus on substantive and procedural safeguards that would enable protection of fundamental rights: be it via a mandate including human rights impact assessments of regulatory initiatives; mandatory participatory mechanisms, and the possibility for the European Parliament to scrutinise the activities, as already explored by some scholars.<sup>141</sup>

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ments/publications/alemanno-finalpdf.pdf>; M. Cremona, 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (Guest Editorial) 52 *Common Market Law Review* 2015, pp.352-353.

<sup>136</sup> A. Alemanno, *supra* note 135; W. Weiß, 'Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament' 14 *European Constitutional Law Review* 2018, 532-566; F. De Ville and G. Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Cambridge: Polity Press 2016).

<sup>137</sup> E. Benvenisti, *supra* note 120.

<sup>138</sup> See Art.18.3(1) EU-Japan Economic Partnership Agreement; Art.x3.(1) TTIP - EU proposal for Chapter: Regulatory Cooperation.

<sup>139</sup> See Art.21.1 CETA.

<sup>140</sup> See I. Mancini, 'Deepening Trade and Fundamental Rights? Harnessing Data Protection Rights in the Regulatory Cooperation Chapters of EU Trade Agreements', in W. Weiß and C. Furculita (eds.), *Global Politics and EU Trade Policy: Facing the challenges to a Multilateral Approach* (European Yearbook of International Economic Law, Springer 2020).

<sup>141</sup> W. Weiß, 'The implementation of CETA within the EU: Challenges for democracy and institutional balance', presentation at CETA Implications Conference (Dalhousie University, Halifax, 27-28 September 2019).

d. *New Institutions Beyond the State*

A common feature of the new generation of EU FTAs is the presence of clauses that create a plethora of new entities forming a capacious institutional architecture for the operation of the trade agreement: from joint committees, to specialised (sub)committees, working groups, advisory groups and fora. For instance, the treaty bodies created via CETA encompass a Joint Committee, a Regulatory Cooperation Forum, a Civil Society Forum and a series of specialised committees, among which a Committee on Trade and Sustainable Development. To varying degrees, also the FTAs with Singapore and Japan and the envisaged TTIP all contain institutional provisions for the creation of bodies with different powers and mandates. The proliferation of treaty bodies in trade agreements, and the powers that these bodies are granted, warrant exploration in their relation to rights.

In studying these new institutional arrangements, some have warned against democracy and legitimacy problems that such bodies could entail.<sup>142</sup> Similarly, others have discussed global checks and balances, transparency, parliamentary control and accountability in the operation of the institutional structures that the latest trade initiatives create.<sup>143</sup> It has been observed that not only would these bodies operate for the monitoring and implementation of the trade agreements; in some cases they would also be vested with significant decision-making powers and to create new bodies in turn.<sup>144</sup> In these instances, they would emerge as autonomous institutions operating beyond the State, with uncertainty as to whether they would be subject to any control and by whom. On the other hand, many of these new mechanisms envisage exchanges with, or even encompass, civil society actors. Yet inasmuch as the involvement of civil society is envisaged under different configurations and overlapping mechanisms, some have argued that in the resulting framework, 'the purpose of civil society engagement is lost and genuine participation and voice is likely to fade.'<sup>145</sup>

Against this backdrop, it could be explored how fundamental rights are guaranteed or could be undermined under these new institutional sets-up in the context of trade agreements. Similarly to the emerging structures in the operation of regulatory cooperation chapters, consideration of fundamental rights should be given in the different elements of these new institutions, from the mandate to oversight and participatory mechanisms allowing and enabling discourses of protection of fundamental rights. Regarding the newly-established committees, some suggest a more prominent role being given to the European Parliament, which should be given the possibility to participate in the work of these committees and scrutinise relevant documents.<sup>146</sup> Regarding institutional arrangements for civil society participation, similar considerations as to the involvement of non-traditional actors could apply. A further argument that could

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<sup>142</sup> W. Weiß, *supra* note 136.

<sup>143</sup> E. Benvenisti, *supra* note 120.

<sup>144</sup> W. Weiß, *supra* note 136.

<sup>145</sup> T. Novitz, *supra* note 46, at 128.

<sup>146</sup> W. Weiß, *supra* note 141.

be made is that instead of creating new institutions beyond the state, trade agreements could envisage the creation of institutions *domestically*, as they would be closer to local concerns regarding potential impacts upon the enjoyment of i.a. labour rights.<sup>147</sup> Relationships and interactions between new institutions and local institutions could also be spelled out, with a view to enable exchanges that would benefit the protection of fundamental rights.

#### 4. CONCLUSION: FROM FUNDAMENTAL RIGHTS 'THROUGH TRADE' TO FUNDAMENTAL RIGHTS 'IN TRADE'

In the context of trade, the EU emerges as a singular global actor from a fundamental rights perspective: unlike other international actors, the EU's external action is to be guided by interests as much as values. The Treaty of Lisbon does not erase the tension between market goals and respect of fundamental rights, it opens up the possibility for the EU to pursue fundamental rights both *in* and *through* trade. Yet for a very long time, the EU has been a global actor *through* trade: it has taken for granted an understanding of human rights in trade that sees them as a development issue for third countries. No more sophisticated conceptualisations have been explored, making the EU's current approach heavily reliant on this legacy.

The way fundamental rights are provided protection in the Post-Lisbon new generation EU trade agreements emerges as outdated and not fit for purpose: not fit for trade relations with developed economies where fundamental rights concerns may differ from core labour standards, and where the economic capacity would be present to be more ambitious; not apt in a context of globalisation and new pressures for enjoyment of fundamental rights; and very narrow-sighted insofar as new features of such ambitious trade agreements that account for deeper integration would require a more thorough appreciation of potential linkages with fundamental rights. On this, a parallel can be drawn with the development of the EU Single Market and the emergence of a fundamental rights dimension: not only does the EU now have a Charter of Fundamental Rights that is part of primary law, but some scholars have also started addressing questions as to whether the EU could be considered a 'human rights organisation'.<sup>148</sup> The history of what started as a purely (albeit ambitious) economic project shows how further economic integration is liable to collide with fundamental rights<sup>149</sup> and evolve into *something more*. While fundamental rights have pervaded the EU internally, a lot still needs to be done externally.

The aim of this paper is to urge new conceptualisations of the relationship between trade agreements and fundamental rights. There is a compelling need to understand underlying linkages, and how trade agreements could intensify

<sup>147</sup> G. Shaffer, *supra* note 121. See also M. Barenberg, 'Sustaining Workers' Bargaining Power in an age of Globalization: Institutions for the meaningful enforcement of international labor rights', *EPI Briefing Paper* (9 October 2009).

<sup>148</sup> A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' 37 *Common Market Law Review* 2000, 1307-1338.

<sup>149</sup> See T. Novitz, *supra* note 46.

negative effects upon fundamental rights in the context of new technologies and business practices that underlie the dynamics of production and trade in goods and services. The implication of thinking of trade agreements in relation to their potential for fundamental rights would not necessarily imply an expansion of the range of fundamental rights to be dealt with in a trade agreement – which would additionally ‘load the boat.’ Rather, it is necessary to engage in a systematic research and open discussion about how to ensure that more complex and far-reaching trade agreements do not provide additional fuel to downward pressures on fundamental rights protection. Furthermore, when new features and mechanisms are envisaged (eg. further liberalisation, inclusion of non-state actors, regulatory cooperation, institution-building), the fundamental rights component to them should be appreciated, potential harming effects be taken into consideration, and mechanisms provided to counter them. If not for the sake of social justice,<sup>150</sup> protecting fundamental rights ‘in’ trade agreements becomes vital for their legitimacy and social acceptance, not least their ultimate success.

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<sup>150</sup> G. Shaffer, *supra* note 121.