

CLEER, 11th Summer School on the Law of EU External Relations

Green and Digital Transitions: External Dimension

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BIBLIOGRAPHY

Council of the EU, *Conclusions on EU Energy and Climate Diplomacy*, 21 April 2026, 8417/26.

Council of the EU, *Conclusions on Global Gateway*, 15 June 2026, 10349/26.

European Commission, High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, *An International Digital Strategy for the European Union*, 5 June 2025, JOIN(2025) 140 final.

European Commission, High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, Annex to the Joint Communication to the European Parliament and the Council, *An International Digital Strategy for the European Union*, 5 June 2025, JOIN(2025) 140 final.

M. Chamon, T. Verellen, “Empowering the Green Deal: Significant Delegation and Constitutional Limits in CBAM and CRMA”, in M. Eliantonio, K. Kulovesi, M. Peeters, A. Savaresi, *Greening the EU and the Rule of Law*, Edward Elgar, 2026, p. 51-72.

E. Fahey, *The EU as a Global Digital Actor*, Hart Publishing, 2022, p. 24-81.

T. Honkonen, “The Role of Climate and Energy Diplomacy in Promoting Sustainability in EU External Relations Law”, in R. Wessel, J. Bergamaschine Mata Diz, J. Tasende Társia, S. E. Akdogan, *EU External Relations Law and Sustainability*, T.M.C. Asser Press, 2024, p. 305-328.

R. Kamphof, T. Bonenkamp, J. Selleslaghs, M. O. Hosli, “External Competences in Energy and Climate Change”, in R. Leal-Arcas, *Research Handbook on EU Energy Law and Policy*, Edward Elgar, 2024, p. 33-50.

E. Neframi, “The Member States of the European Union, Contracting Parties to the Energy Charter Treaty: Plurilateralism in the Light of EU Law”, *Journal of World Investment & Trade* 26 (2025), p. 867–895.

R. Wessel, G. Kübek, G., “Governing Sustainability Through Trade in EU External Relations: The ‘New Approach’ and its Challenges”, in J. Bergamaschine Mata Diz, A. Rocha, & L. E. Bertoni (Eds.), *Comércio e Desenvolvimento Sustentável: As Relações Exteriores da União Europeia*, Arraes Editores Ltda, 2024, p. 75-93.

R. Wessel, “Digital Diplomacy: The EU as a Global Digital Actor”, 21 *Croatian Y.B. Eur. L. & Pol’y*, 2025, Editorial.

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COPS 220
DEVGEN 66
SUSTDEV 28
CONUN 57
ENER 190
CLIMA 212
ENV 384
ONU 24
CFSP/PESC 552
RELEX 540

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	8054/26 + COR 1
Subject:	Council conclusions on EU energy and climate diplomacy

Delegations will find in the annex the Council Conclusions on EU Energy and Climate Diplomacy as approved by the Council at its meeting held on 21 April 2026.

Council conclusions on EU Energy and Climate Diplomacy***“EU energy and climate diplomacy – strengthening sovereignty and advancing the global clean transition”***

1. In a world marked by geopolitical fragmentation and the rules-based international order under strain, the EU’s sovereignty, competitiveness and economic security are increasingly at risk. The perils of critical dependencies and vulnerable energy, technology and industrial supply chains are compounded by the existential threats of accelerating climate change and environmental degradation.
2. The Council calls for EU foreign and security policy to respond resolutely and with urgency, increase the EU’s resilience and preparedness against climate, environmental and energy security threats, and support efforts to reinforce the EU’s strategic autonomy. The EU needs to secure critical supply chains and infrastructure, adapt defence policies, support the competitiveness of EU economies and increase its ability to anticipate, deter and respond to economic or political coercion.
3. Building on the EU’s experience of decoupling economic growth from greenhouse gas emissions, the EU will continue to advance the energy transition, lead and advocate for global climate action and environmental protection, and promote resource efficient and circular economies.
4. The Council recalls the critical importance of the clean transition towards climate neutrality as a driver of innovation, economic growth and competitiveness, and the key response to the climate and environmental crises. Driven by investments into clean energy that have globally overtaken those into fossil fuels, the clean transition is also the source of strengthened energy and economic sovereignty reinforcing energy security, reducing exposure to energy market shocks and fundamentally reshaping global power relations and partnerships.

5. The Council reaffirms the EU's steadfast commitment to effective multilateralism and the rules-based international order, including in tackling the climate crisis via the Paris Agreement and in responding to global environmental degradation.
6. The EU and its Member States stand ready to deepen and forge mutually beneficial partnerships and issue-based coalitions, prioritising engagement with partners willing to accelerate the clean transition and take action on strengthening global resilience. The EU will remain a predictable and reliable partner and uphold its commitments, while pursuing its strategic interests and advance, manage and respond to the global clean transition as an essential task of EU foreign, security and defence policy.
7. The Council welcomes the Joint Communication on the *EU global climate and energy vision*. The Council invites the High Representative and the Commission to drive its swift implementation and steer EU diplomacy in line with the priorities set out in these Conclusions, strengthening coherence with relevant policies and reinforcing strategic planning and joint action with Member States in a Team Europe approach.
8. The hostilities in Iran and the wider region threaten regional and global security and prosperity. Acknowledging the EU's geopolitical and economic exposure due to a significant reliance on imported fossil fuels, the Council confirms that the energy transition based on clean, abundant and homegrown energy remains the most effective strategy towards achieving Europe's strategic autonomy. Accelerating the deployment and integration of renewable and low-carbon energy sources and energy storage, strengthens resilience, enhances security of supply and contributes to structurally lowering energy prices and reducing dependence on volatile fossil fuel markets. The Council calls on all parties to comply with international humanitarian law and protect civilians and civilian infrastructure and reaffirms the importance of safeguarding the freedom of navigation through maritime routes, as well as the safety and security of supply chains ensuring the stability of global energy markets. The Council welcomes the important work and guidance of the International Energy Agency and supports dialogue among producer and consumer countries aimed to limit excessive price rises in the energy and related economic sectors, recognising the socioeconomic impacts on the most vulnerable developing countries in particular.

Strengthening EU sovereignty

9. The Council supports the continuous operationalisation of the economic security strategy. The EU needs to assess, monitor and mitigate high-risk dependencies and the risks posed by disruptive trade measures and export restrictions, ensure secure and reliable access to strategic technologies and resources, and advance the circularity, diversification and resilience of industrial value chains and the global supply chains of critical raw materials. In this respect, the Council calls for boosting work on strategic projects launched under the Critical Raw Materials Act, the RESourceEU Action Plan, and Global Gateway. The Council highlights the importance of Member States and all relevant stakeholders actively contributing to risk assessments, monitoring, and appropriate response measures.
10. The Council welcomes the effective steps taken to increase energy efficiency, expand homegrown clean energy production, and reduce fossil fuel consumption. These steps have also contributed to the phase-out of EU dependency on Russian fossil energy. The Council calls for further endeavours to reduce existing and avoid new dependencies and build a balanced external energy supply network, based on reliable routes and partners and a full compliance with EU energy market rules. During the period of the clean transition and while avoiding long-term fossil-fuel lock-ins, foreign policy needs to continue to support the security of supply of fossil fuels by diversifying imports, promoting transparent, rules-based and liquid global markets, and ensuring the safety and security of all relevant infrastructure. Geopolitical considerations should be fully integrated in the revision of the EU's energy security legislative architecture. The Council also calls for continued diplomatic support to the ongoing efforts by Member States to diversify nuclear fuel supplies, nuclear fuel cycle services, and spare part supplies, to complement European supply capacities.

11. Considering repeated and growing threats against the EU's critical infrastructure, the Council calls for a 'preparedness and security by design' approach investing into improved situational awareness, and for the strengthening of the protection and resilience of infrastructure against physical, hybrid, cyber, climate-related and environmental threats, highlighting the importance of resilient ecosystems, landscapes and sustainable forest management. In this context, the Council invites the Commission to propose measures to increase repair capacities and assess the need to review the safety and security rules applicable to all relevant energy infrastructure, both on and offshore. The Council also stresses the need to continue to strengthen energy systems by bridging infrastructure gaps and building additional external interconnections, where appropriate, thus enhancing market integration and regional connectivity with partners in the EU's neighbourhood and beyond. The Council calls on the High Representative and the Commission to assist Member States in engaging third countries on the safety and security of critical energy infrastructure situated on their territory.
12. The Council condemns, in the strongest possible terms, Russia's war of aggression against Ukraine, including attacks on critical civilian and energy infrastructure precipitating a humanitarian crisis. The Council invites the High Representative, the Commission and Member States to support, in cooperation with international partners, the reconstruction and defence of Ukraine's energy sector based, as much as possible, on clean, decentralised and efficient technologies. The Council calls further to reinforce diplomatic action in support of Ukraine's energy resilience through the G7+ coordination group, the Ukraine Energy Support Fund and other mechanisms. The EU and Member States should intensify the provision of equipment and enhance cross-border infrastructure – with Ukraine, while supporting accelerated reforms towards alignment with EU energy market rules and improved transparency. The Council calls with particular urgency for the immediate cessation of all military activities endangering nuclear safety and security in Ukraine and condemns the illegal seizure of the Zaporizhzhia Nuclear Power Plant. The Council welcomes the work assessing compensation for environmental damages arising from the war, highlighting ongoing destruction of ecosystems and pollution risk, particularly in the Black Sea region.

13. The Council also calls on Member States to ensure the full and effective implementation of sanctions, in accordance with relevant legislation, preventing their circumvention via third countries and complex trading practices. The Council welcomes continued efforts countering the threats from the ‘shadow fleet’ in full compliance with international law, including the UN Convention on the Law of the Sea, addressing the security and environmental risks posed by substandard ships and risky navigation practices as set out in relevant International Maritime Organisation resolutions.
14. The Council recognises the strategic role of the Energy Community in strengthening regional energy security, advancing energy and climate cooperation, and driving the clean transition. The Council highlights the continued need to respond to the energy system vulnerability of the Republic of Moldova, including by enhancing cross-border connectivity, and the need to strengthen the resilience of the Western Balkans partners. The Council calls for further support to energy security, energy market reforms, and the adoption of climate and environmental standards in the region, advancing the full integration with the EU energy market in line with EU accession goals and the EU *acquis*.
15. The Council underlines the need for EU foreign policy to support the growth of the European clean tech sector. EU diplomacy needs to leverage the EU’s strengths such as innovation, reliability, local value creation, financial tools, cyber security as well as social and environmental standards. The EU and Member States will support the EU’s global competitiveness through the creation of lead markets and by encouraging global demand for European products and technologies, including through promotion by Delegations and Missions in a Team Europe approach, underlining the EU’s reputation as a trustworthy trading partner. The Council calls for coordinated and shared assessments of market potentials, the promotion of EU technology standards and solutions, and strengthened international research cooperation where appropriate.

16. The Council acknowledges the links between the clean transition and a credible defence policy and invites the High Representative and the Commission to systematically consider the requirements of the defence sector when reviewing relevant legislation, including the revision of rules on liquid fuels security. Recalling the Climate Change and Defence Roadmap of 2020, the Council calls for a full review to be completed by the end of 2026 to align it with current EU climate and energy frameworks and strategic defence priorities.
17. The Council calls, in the context of increased defence spending, for strategic investments that build upon the technological and innovation potential of the clean transition and address its consequences, recognising the role of the defence industry in the development of clean technologies. Such investments can bolster both the EU's clean tech and defence industries, increase defence readiness, and the resilience of the military, improving adaptation to climate change impacts.

Climate diplomacy and advancing the clean transition

18. Recognising the existential threat of climate change to livelihoods, economies, cultural heritage, ecosystems and thus to international peace and security, the Council reconfirms its unwavering commitment to international climate action, with the Paris Agreement temperature goal at its centre, keeping 1.5C within reach. The Council underlines the EU's substantial contribution to global climate action expressed through its Nationally Determined Contribution (NDC) setting an indicative 2035 net greenhouse gas emissions reduction range based on the European Climate Law, which commits the EU to climate neutrality at the latest by 2050, and sets a domestic net emission reduction target of at least 55% by 2030 and a net emission reduction target of 90% by 2040, compared to 1990 levels.
19. The Council reaffirms the importance of effective multilateralism for advancing global climate action based on implementing the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. The EU aims to ensure that the multilateral process reflects the voice of all Parties and stakeholders, including future generations and the most vulnerable, and promotes sound economic, environmental and social policy solutions, while underscoring that the severe costs of inaction far outweigh the costs of action. The EU will advance its cooperation with all Parties, notably COP presidencies, and the UNFCCC secretariat, in scaling up the efficiency and effectiveness of this multilateral process and

ensuring that it remains the key vehicle for climate action, in particular through the full implementation of the Paris Agreement ambition cycle leading towards enhanced objectives.

20. The Council urges parties that have not done so to submit their NDC under the Paris Agreement as soon as possible. Highlighting the existing implementation gap between pledges and policies, the EU urges all parties to fully implement their NDCs and will continue to work with partners to support the implementation of their plans in steady alignment of their ambition with agreed mid-century climate neutrality strategies. The Council recalls, in this context, the International Court of Justice’s advisory opinion on the ‘Obligations of states in respect of climate change’. The EU will engage all countries, in particular major emitters, to realise the potential for common actions and socio-economic benefits, while highlighting their evolving responsibilities commensurate with their economic role and capacity to act.
21. The EU is committed to the delivery of the agreed ambition expressed in the first global stocktake (GST) outcome. The EU will particularly promote the implementation of the goal to halt and reverse deforestation and forest degradation by 2030, and in line with Paragraph 28 of the GST outcome, the goals to triple renewable energy and double energy efficiency improvements by 2030, to accelerate zero and- low-emission technologies, and to ‘transition away from fossil fuels in a just, orderly and equitable manner, accelerating efforts in this critical decade.’ In this context, the Council welcomes and supports the Brazilian COP30 Presidency in developing, by COP 31, credible and inclusive roadmaps on forests and the transition away from fossil fuel, mobilising stakeholders and advancing planning on a transition consistent with climate neutrality commitments, while taking into account diverse national circumstances. Building on the outcome of the first global stocktake and geopolitical circumstances, the Council will continue to reflect on its longer-term approach towards the second global stocktake in 2028.
22. The Council underlines that scientific integrity, transparency, and reliable data and information are essential for informing credible and effective climate action and preparedness and rejects the politicisation of climate science. The Council calls on all partners with urgency to ensure that all contributions to the 7th Assessment Report of the Intergovernmental Panel on Climate Change are delivered in time to inform the second global stocktake and supports joint diplomatic action by the EU and Member States facilitating that goal.

23. The Council supports international agreements and initiatives that advance the uptake and deployment of renewable and low carbon energy, improved grid connectivity and flexibility, energy storage, the energy efficiency first principle, the clean electrification of end-use sectors, effective carbon pricing, and the role of hydrogen in the decarbonisation of hard-to-abate sectors. The Council supports further initiatives advancing circular economies, sustainability in supply chains and policies combatting threats to ecosystems, land degradation and biodiversity loss, highlighting the crucial role of nature-based solutions. In the context of some countries opting for nuclear energy, the EU will continue to promote and support full transparency on nuclear projects and the highest nuclear safety and environmental standards, in the immediate vicinity of the EU, regionally and globally.
24. The EU recognises the growing importance of the Global Climate Action Agenda as an integral part of the UNFCCC process and will continue to support valuable plurilateral initiatives that broaden engagement with state and non-state actors in advancing the clean transition. In this context, the Council highlights, among others the Global Energy Transitions Forum, Just Energy Transition Partnerships, the support of ‘No New Coal’ commitments towards the phase out of unabated coal in cooperation with the Powering Past Coal Alliance, the acceleration of industrial decarbonisation through the Climate Club, the Declaration on Information Integrity on Climate Change, the Open Coalition on Compliance Carbon Markets, and the efforts to phase-out fossil fuel subsidies that do not address energy poverty or just transition as soon as possible. The EU will continue to support methane abatement initiatives, co-lead the Global Methane Pledge, and enhance engagement on the implementation of the EU Methane Regulation, while preserving secure energy supplies to the EU.

25. The Council underlines the importance of forging mutually beneficial partnerships that advance the clean transition. This includes sustainable investment facilitation agreements, raw materials partnerships, Green Alliances and Partnerships, trade agreements and Clean Trade and Investment Partnerships, the promotion of domestic carbon pricing instruments, as well as cooperation with partners on high quality international credits under Article 6 of Paris Agreement in line with the European Climate Law that provides for their contribution towards the EU 2040 climate target of up to 5% of 1990 EU net emissions, from 2036, in a way that is both ambitious and cost effective, supporting the EU and third countries in achieving their Paris Agreement compatible emissions reduction trajectories. The EU will continue to propose that the respect of the Paris Agreement should be considered an essential element in future trade and investment agreements. The EU seeks a fair access to resources and clean technologies, noting the important role of industrial alliances, and the role of free and rules-based trade in accelerating the clean transition. In this context, EU businesses should be increasingly linked with EU-financed lending and global investments through Global Gateway and other instruments. The Council supports integrated bilateral and regional engagement strategies linking clean transition and investment promotion with climate adaptation, resilience and security cooperation. In this context, the Council takes note of the Trans-Mediterranean Renewable Energy and Clean Tech Cooperation Initiative (T-MED) under the Pact for the Mediterranean, which aims to channel private and institutional financing through politically framed investment platforms.
26. The Council stresses the urgent need to scale up climate adaptation and to continue supporting societies globally in enhancing their adaptive capacities, strengthening resilience and reducing vulnerabilities, in line with the Global Goal on Adaptation, and the UAE framework for Global Climate Resilience. The Council invites the High Representative and the Commission to intensify engagement on adaptation and resilience and continue to support partners in implementing their National Adaptation Plans.
27. Emphasising the role of the EU and its Member States, together with the European Investment Bank, as the world's largest collective provider of public climate finance, the Council emphasises the need to leverage current and new EU financial instruments in support of accelerated climate action. Together they should ensure that the EU's climate finance is politically visible, fully aligned with Paris Agreement goals, and gives recognition to partners willing to accelerate climate action.

28. The EU is committed to continue doing its part to deliver the New Collective Quantified Goal on Climate Finance agreed at COP 29, including the call for efforts to triple adaptation finance by 2035, acknowledging that public finance remains essential to support the most climate-vulnerable countries and communities. The Council underlines that all financial support tools need to remain climate, environment, and conflict sensitive, and stresses that the mainstreaming of climate goals by partner countries is necessary to unlock additional financing. The Council calls on the largest emitters, and all actors in a position to do so, to start providing and to scale up climate finance in line with growing responsibilities and capabilities. The Council stresses the importance of broadening the scope of contributors and drawing from a variety of innovative sources, including high-emission sectors, and takes note of the work of the Global Solidarity Levies Taskforce. Noting that climate adaptation and resilience enable economic and investment opportunities, the Council emphasises the importance of mobilising private finance. The EU calls on Multilateral Development Banks to scale up efforts towards achieving their 2030 climate finance targets, including increased investments into adaptation, and supports the continued reform of international financial institutions to align financial flows with Paris Agreement goals.
29. The Council reconfirms the importance of targeted environmental measures, such as the Carbon Border Adjustment Mechanism, in preventing carbon leakage, supporting the global uptake of effective carbon pricing systems and rewarding producers' decarbonisation efforts. The Council also highlights the role of the EU Deforestation Regulation in supporting the transition to sustainable, deforestation free value chains worldwide. The Council calls for continued and early diplomatic engagement with global partners throughout the implementation of such measures and recognises the need to remain responsive to their concerns, ensuring even-handed treatment.

30. The Council recognises that the triple planetary crises of climate change, biodiversity loss, and pollution as well as land, water and ocean degradation are interconnected and affirms its commitment to address them in an effective integrated and coherent way, in line with the Sustainable Development Goals and a One Health approach. The EU will continue promoting synergies among the UNFCCC and the Paris Agreement and key multilateral organisations and processes on the environment including the UN Convention to Combat Desertification and the Convention on Biological Diversity (CBD), highlighting the targets of the Kunming-Montreal Global Biodiversity Framework. The EU will also continue to advance the ongoing work on an international legally binding instrument to end plastic pollution, along with further impactful initiatives on, forests, soils, chemicals, waste, pollution and the circular economy. The Council acknowledges the role of oceans and seas in climate regulation, biodiversity support, food security as well as renewable energy production, and stresses the importance of strengthening international ocean governance, encouraging the ratification and effective implementation of the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction.
31. The Council underlines the need to accelerate global solutions for the decarbonisation of the international transport sector considering all appropriate technologies. The EU will continue to work with partners and through multilateral organisations and initiatives to enable the increasing deployment of sustainable net zero fuels, in particular in the maritime and aviation sectors, as appropriate.
32. The Council highlights the importance of ensuring a just transition towards climate neutrality that promotes decent work and addresses the social and economic dimensions of the transition, leaving no one behind. The EU supports efforts to alleviate global energy poverty ensuring access to clean, affordable, reliable, sustainable and modern energy to all.

33. The Council stresses that all aspects of EU energy, climate and environmental diplomacy will be conducted in a manner consistent with the right to a clean, healthy and sustainable environment and human rights obligations. In this context, the Council underlines the importance of remaining gender responsive, and recalls the EU's commitment to support women's and youth's equal, full, effective and meaningful participation and leadership, in all their diversity, in all spheres of public and political life, as per the EU Action Plan on Human Rights and Democracy 2020-2027. The Council also stresses the importance of protecting, empowering and cooperating with civil society, environmental human rights defenders, Indigenous Peoples, local communities and persons with disabilities.

Global security and resilience

34. The Council is aware of the severe impacts of climate change on global and European peace and security, acting as a threat-multiplier already at current warming levels. The Council is concerned about hostile actors exploiting climate fragility and displacement in vulnerable regions, highlighting threats to human rights and the disproportionately adverse impact on women and children. In this context, the Council urges the EU and Member States to strengthen global and regional stability by continuing to support the enhanced resilience, preparedness and adaptation action in third countries. The EU will place specific focus on climate-vulnerable, fragile and conflict-affected areas, Least Developed Countries, and the broad European neighbourhood. The Council highlights, in this context, the Pact for the Mediterranean and the upcoming revision of the EU Arctic policy and welcomes the presentation of the Joint Communication on the EU's strategic approach to the Black Sea region. The Council specifically recognizes the threats posed by rising sea levels to low-lying states and coastal communities, including the EU's outermost regions and territories, and looks to address the threats to the sovereignty and territorial integrity of Small Island Developing States in close cooperation with the UN.

35. The Council recalls the need to further strengthen EU capacity to respond to climate- and environment related security risks by continuing to integrate climate and environmental aspects into foreign, security and defence policy, including peacebuilding, mediation, conflict-prevention, and CSDP missions, in line with the full implementation of the 2023 Joint Communication on the *Climate-Security Nexus*. This requires additional evaluations supported by intelligence assessments, strengthened disaster risk reduction and adaptation efforts, and preparedness action. The Council calls for climate security to inform relevant foreign and security policy strategies. The Council also invites the Commission to integrate the foreign and security policy dimension into the upcoming ‘Integrated Framework for European climate resilience and risk management’ building on the EU Integrated Approach to Fragility. The Council calls for increased institutional cooperation on climate security and resilience, through multilateral partnerships, in particular with the UN, highlighting the UN Climate Security Mechanism and the Early Warnings for All Initiative, OSCE, NATO - in line with the EU institutional framework and with full respect to EU decision-making autonomy - and bilateral ‘Security and Defence Partnerships’, avoiding unnecessary duplications. The Council highlights the need to enhance cooperation with humanitarian organisations on climate change induced displacement and welcomes international efforts addressing climate related mobility.
36. The Council underlines that accelerating ecosystem degradation, including thawing permafrost, is a growing threat to global security and leads to geopolitical instability by exacerbating food and water insecurity, disasters, infectious disease and health risks and competition for natural resources. The Council recognises the growing importance of water resilience, sustainable water management and transboundary water cooperation, and calls for strengthened water diplomacy, underscoring the importance of the 2026 United Nations Water Conference.
37. Noting projections of declining EU fossil fuel import demand over the coming decade, the Council calls on the High Representative and the Commission together with Member States to continue to proactively develop policy response options and foresight into the geopolitical impact of this shift and strengthen engagement with relevant suppliers in support of orderly clean transitions.

38. In the context of a growing global competition over critical raw materials, the Council recalls the recommendations of the UN Panel on Critical Energy Transition Minerals and stresses the importance of projects strictly adhering to international law, human rights and sustainability standards, avoiding adverse social and environmental impacts along the whole value chain.
39. The Council is concerned that large-scale climate interventions, in particular solar radiation modification (SRM), pose significant risks for the climate, the environment, security, and geopolitics. The Council calls for the full application of the precautionary principle to geoengineering, a close monitoring of initiatives, and a moratorium on deployment of SRM technologies, in line with and reinforcing existing rules, notably relevant decisions taken under the CBD and the London Convention and Protocol. The EU will continue to engage in discussions on potential international governance arrangements, including research related aspects.

Foreign policy tools

40. The Council reiterates the EU's offer to build policy, regulatory and technical partnerships on clean transition, climate, environment, peace and security. In this context, the Council invites the High Representative and the Commission, to develop – together with Member States – holistic cross-sectoral approaches for intensified bilateral climate and energy diplomacy engagement and cooperation with key partners. The EU will engage partners, including sub-national authorities, in a coherent, integrated and tailored manner, including under Global Gateway. Dialogue formats must be better aligned and initiatives led by the EU and Member States better coordinated. The Council further underlines the need to proactively use a broad range of EU instruments to support, encourage and reward climate action ambition and the effective implementation of climate and environmental commitments.

41. EU and Member State diplomacy need to ensure responsiveness to partner country concerns throughout the EU policy making and implementation process, strengthening consultation and regulatory cooperation, and mobilising, where appropriate, targeted clean transition focused support, including EU Member State's expertise, to aid alignment with EU legislation.
42. The Council supports, and calls to enhance, all efforts to systematically address foreign information manipulation and interference along with disinformation on the clean transition, climate science, climate change impacts such as extreme weather events, environmental degradation, energy security and critical infrastructure. The Council calls to reinforce tools and capacities to expose and respond to this threat in full respect to human rights and fundamental freedoms, including through proactive and tailored strategic communication campaigns, in close coordination with Member States.
43. The Council underlines the need for the EU and Member States to strengthen common messaging and joint diplomatic action through exchange and continuous feedback on implementation, via the EU Climate Ambassadors Network, the Green Diplomacy Network, the Energy Diplomacy Group and relevant Council preparatory bodies. The Council calls for intensified joint energy and climate diplomacy with a multi-year perspective through the systematic and strategic mobilisation of Team Europe networks and platforms across EU Delegations and Member State missions.
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Luxembourg, 15 June 2026
(OR. en)

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GLOBAL GATEWAY 40	ECOFIN 798
COASI 103	FIN 842
COEST 457	CCG 23
COAFR 177	TRANS 400
MED 29	ENER 381
MAMA 142	ENV 697
COLAC 85	DEVGEN 98
COWEB 85	DIGIT 158
COMPET 745	

OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
On: 15 June 2026
To: Delegations
Subject: Council Conclusions on Global Gateway

Delegations will find attached Council Conclusions on Global Gateway, approved by the Council at its 4182nd meeting held on 15 June 2026.

Council Conclusions on Global Gateway**A. Preamble/ Context**

1. Global Gateway is the European Union's worldwide investment strategy, to mobilise public and private resources to bridge the global investment gap across the digital, climate and energy, transport, health, education and research sectors. Grounded in European values and high standards, it supports mutually beneficial partnerships with partner countries and strengthens the Union's geopolitical role by delivering, through a Team Europe and a comprehensive 360-degree approach, high-quality, trusted, secure, and sustainable investments combining infrastructure, connectivity, enabling frameworks and policy cooperation. It aims to support partner-country priorities by fostering sustainable development and resilience, including social inclusion, inclusive growth and skills development, while advancing the Union's strategic interests.
2. The Council reaffirms that, in a context marked by growing geopolitical and geoeconomic challenges and by increased pressure on democratic governance, the global environment and economic security, Global Gateway is part of a positive and comprehensive offer of the European Union and its Member States for strategic cooperation with partner countries. This offer brings together development cooperation, foreign and economic policy, trade and investment, to address shared global challenges, support sustainable development, resilience and human development, and contribute to strengthening the Union's strategic autonomy, competitiveness, economic security, in an open economy, through mutually beneficial partnerships.

3. The Council welcomes that the Global Gateway strategy has become an integral part of the Union's external action, having expanded significantly in operational scope and visibility and mobilising substantial resources. It supports the EU's engagement with partner countries, as part of the wider set of external action instruments, together with other development cooperation actions contributing to EU Official Development Assistance. Recalling its policy-setting role, the Council intends to provide clear political direction for the future evolution of the strategy as it enters its next phase. EU actions should support complementarity and coherence across the different areas of the Union's external action, including, where relevant, the Common Foreign and Security Policy (CFSP).
4. The Council recalls that the Global Gateway strategy is based on democratic values and high standards, including good governance and transparency, respect for the rule of law, human rights and gender equality, environmental and social sustainability. It further underlines that Global Gateway is implemented through equal and mutually beneficial partnerships driven by the needs and priorities of partner countries and reflecting the strategic interests of the European Union including its outermost regions, which as fully fledged EU regions, are an integral part of the EU, and the overseas countries and territories associated with the EU. It stresses the need to consolidate and scale up progress in order to deliver high-impact, transformative, sustainable and mutually beneficial outcomes for the European Union and its partner countries.

5. The Council recognises the geoeconomic challenges faced by the European Union, its Member States and partner countries, including vulnerabilities in supply chains and access to critical raw materials and other strategic inputs, and underlines the importance of Global Gateway initiatives that advance the Union's geopolitical priorities and contribute to a secure and stable environment for investments. At the same time, such investments should create opportunities for European companies, including through meaningful participation of SMEs, and support the sustainable economic development of partner countries, including by contributing to the diversification of supply chains. The Council further underlines that Global Gateway should remain fully aligned with the rules-based international order and global commitments, including the 2030 Agenda and its Sustainable Development Goals (SDGs), the Paris Agreement, the Kunming–Montreal Global Biodiversity Framework and the Seville Commitment on Financing for Development.

B. Strategic Vision and Objectives

6. The Council emphasises the importance of fostering mutually beneficial partnerships that contribute both to the sustainable development and resilience of partner countries, including in fragile contexts and least developed countries, and to the strategic interests of the Union. It underlines that Global Gateway has to be implemented through a comprehensive 360-degree approach, combining transformative infrastructure with enabling environment reforms, including regulatory frameworks, skills development and institutional strengthening, in order to maximise long term development impact, resilience, social cohesion and visibility. The Council stresses that Global Gateway can be applied across all partner countries, while noting that, in situations of fragility, it should appropriately complement the other dedicated approaches and tools. When operating in fragile settings, Global Gateway actions should be tailored to the context and based on risk-informed and conflict-sensitive approaches in line with the do-no-harm principle.

7. The Council stresses the focus of Global Gateway investments in its priority sectors, with an emphasis on where the Union has comparative advantages and partner demand is strong, notably digital transformation and secure and trusted connectivity, renewable energy, transport corridors and health systems, education and research. The Council underlines the importance of cooperation with partner countries on critical raw materials on a mutually beneficial basis, promoting local value and decent job creation, sustainability and inclusive local development, EU secure and sustainable supply chains, and the highest environmental and social standards. In addition, the Council underlines the importance of cooperation in sectors with beneficial impact on development, for instance agriculture, water and sanitation.
8. The Council highlights the Team Europe approach, as the backbone of Global Gateway delivery. It also recognises the central role of EU Delegations, Member States' Embassies and coordination with capitals in leading political and policy dialogue as well as coordinating with local stakeholders throughout the project cycle, ensuring that Global Gateway implementation is carried out in full respect of partner country ownership and grounded in mutually beneficial and equitable partnerships. The Council also invites the Commission to propose options to streamline the identification of Global Gateway flagship projects, in full respect of established formats and procedures.

C. Governance and Coherence

9. The Council recalls its key role in setting Global Gateway policy priorities in line with the Union's strategic priorities and in ensuring their consistency and effectiveness. Based on the overall political and strategic steer set by the European Council, the Council will provide political guidance on the thematic and geographical priorities of Global Gateway and on its integration into the Union's external action. The Council urges the Commission to ensure the early, systematic and meaningful involvement of Member States throughout the planning, selection and evaluation of Global Gateway actions, including through structured consultations.
10. The Council recognises the role of the Global Gateway Board in providing strategic guidance and taking stock of the implementation of the Global Gateway strategy, in support of the political orientations set by the Council, and in overseeing, monitoring and evaluation. The Council calls on the Commission to convene the Board at least once a year, whenever possible back-to-back with the Foreign Affairs Council in its relevant composition, and to ensure the timely and substantive preparation of its meetings and agendas in the appropriate Council preparatory body. The agendas of Board meetings should focus on issues of clear political relevance and allow for strategic discussions, including on the implementation of the strategy, between the Commission, the High Representative for Foreign Affairs and Security Policy and Member States.

11. The Council notes that the current governance arrangements may be reviewed in light of the governance of any future EU external action instruments.
12. The Council underlines the importance of transparency and effective cooperation across all Global Gateway governance structures. It strongly encourages the Commission to ensure closer, regular and effective involvement of the Council and Member States in the work of the Business Advisory Group (BAG) and the Civil Society and Local Authorities Advisory Platform (CSO/LA Platform). The Council further calls for a clear articulation of the roles of the BAG and CSO/LA Platform, and of their relationship with the Global Gateway Board and Member States.
13. The Council calls on Member States and the Commission to report regularly on the progress of the implementation of Global Gateway, with full transparency on mobilised funding, including the contribution to the EU policy objectives and interests, and the implementation of Global Gateway initiatives. Such reports should be standardised and inform the discussions of the Global Gateway Board. The Council further underlines the importance of Global Gateway financial reporting by all Team Europe actors in a timely, clear, transparent and structured manner.
14. The Council encourages coherent engagement of development finance institutions, public development banks, private sector actors, international cooperation agencies, export credit agencies and implementing agencies under the Team Europe approach and Team National, ensuring openness, non discrimination and responsible business conduct.

15. The Council underlines the importance of a whole of Commission approach to ensure a coherent implementation of the Global Gateway strategy across its services and through EU Delegations in partner countries. The Council welcomes the continued establishment and strengthening of Member States' "Team National" coordination structures in a whole of government approach, bringing together different Member State actors, including in the fields of foreign affairs, development, finance, trade and private sector, and linking them systematically with the Team Europe approach and Global Gateway delivery.

D. Local Ownership and mutually beneficial Partnerships

16. The Council reaffirms the importance of local ownership and alignment with partner country priorities, including their national sustainable development plans as well as early and continuous meaningful engagement with national, regional, and local authorities, regional organisations, civil society and social partners throughout the project cycle. Consultation with such actors can mitigate risks and boost Global Gateway project sustainability. Global Gateway corridors should be country and region driven, informed by political economic analysis and consultation at national and cross-border levels, and should support regional strategies and cross-regional corridors to strengthen policy convergence, sustainability and regional integration.
17. The Council stresses the need for enabling environments, civil society participation, strengthening of local regulatory, institutional and technical capacities as well as respect for the rule of law and good governance, including transparency and accountability, throughout the project cycle to ensure sustainability, local value creation and lasting development impact. Particular attention should be given to local development of skills and training of human resources, including for maintenance capacity.

18. The Council recalls the Busan development effectiveness principles of ownership, focus on results and alignment, transparency, mutual accountability and inclusive partnerships, and underlines their application across Global Gateway. The Council also highlights the added value of Global Gateway in its commitment to responsible and transparent financing, providing a sustainable offer that secures long-term viability and safeguards partners against debt vulnerabilities.

E. Private Sector Engagement and Small and Medium sized Enterprises (SMEs)
Participation

19. The Council underlines the central role of the private sector, including SMEs from Member States and partners, in delivering Global Gateway, including through mobilisation of private capital, technical expertise and the development of sustainable value chains. In this context, the Council underlines the importance of appropriate tools, methods and safeguards to ensure the confidentiality of companies' sensitive information across the project cycle to facilitate private sector engagement.
20. The Council welcomes the operationalisation of the Global Gateway Investment Hub and the relevant private sector engagement initiatives in all geographic areas, as predictable entry points and coordination mechanisms for the EU private sector. In this context, it underlines the importance of ensuring coherence and common standards for private sector actors and calls on the Commission to further enhance their coordination. The Council further calls on the Commission and Member States to strengthen efforts to involve the private sector in the implementation of Global Gateway and to clarify the concrete financial and non-financial benefits they provide.

21. The Council calls for improved access for EU SMEs to Global Gateway investment opportunities through early involvement and accessible and timely information on projects and procurement, including through regular and timely publication of upcoming opportunities via the Global Gateway Investment Hub and EU Delegations. This should also apply to the other relevant private sector engagement initiatives in all geographic areas covered by the Global Gateway Strategy. The Council further calls for reduced administrative and financial barriers, early stage and targeted project preparation, as well as matchmaking and appropriate risk mitigation tools to facilitate EU SMEs participation.
22. The Council invites the Commission and Member States to ensure that implementing partners benefitting from EU funding for external engagement strengthen strategic procurement policies and practices that foster fair competition and a level playing field, including in situations where EU companies face limited access to external markets, in particular through the effective use of standards and in full respect of relevant international trade rules and the United Nations (UN) Guiding Principles on Business and Human Rights.

In this context, the Council underlines the need to safeguard fair competition in Global Gateway investments by addressing market distortions and ensuring that procurement processes are not undermined by circumvention of international rules or the submission of structurally subsidised bids, including, where necessary, through targeted and risk-based measures in strategic sectors in line with the Union's strategic interests. The participation and the mobilisation of private sector entities from Member States should be supported,

whenever possible, including through the broader use of rated criteria focusing on value, quality, sustainability and resilience, and promoting the application of high standards by all implementing actors. These practices must also safeguard economic security, enhance local value creation and employment opportunities in partner countries, as well as strengthen the EU's competitiveness and strategic autonomy in an open economy, and also reduce high-risk dependencies in critical sectors.

23. The Council underlines that Global Gateway's infrastructure investments should adopt the highest social, environmental and labour standards that are in line with EU values and take place in full respect of international law.

F. Effective Multilateralism

24. The Council reaffirms its commitment to upholding the UN Charter, the 2030 Agenda and underlines the importance of supporting partner countries in their progress towards the SDGs, including its engagement in least developed countries and fragile contexts. It further reaffirms the Union's steadfast commitment to effective multilateralism as a crucial enabling environment for international development and for Global Gateway implementation and to the rules-based international order with the UN at its core. It encourages close cooperation with the UN system, the World Trade Organisation and the Organisation for Economic Cooperation and Development (OECD), international financial institutions, regional development banks, like-minded partners and other relevant development actors.

25. The Council stresses the importance of working with the OECD, G7 and G20 to promote high standards on transparency, rule of law, debt sustainability and environmental and social safeguards, as well as to ensure a level playing field while avoiding fragmented or duplicative infrastructure investment offers from the EU, its Member States, and like-minded partners.
26. The Council underlines that Global Gateway should contribute to global and regional public goods and remain aligned with global commitments on financing for development, transparency, sustainability and debt management, notably in line with the Seville Commitment on Financing for Development.

G. Strategic Use of EU Financial Instruments, Competitiveness and Economic Security

27. The Council recognises the central role of financial instruments such as guarantees and blending in mobilising sustainable investments for Global Gateway projects, and underlines the coherent deployment of the full EU toolbox, including technical cooperation, to deliver a competitive and predictable offer aligned with partner priorities and EU strategic interests.
28. The Council underlines the need for synergies and complementarity between external and internal financing instruments, including to support EU competitiveness, safeguarding the integrity of Official Development Assistance (ODA) eligible operations and ensuring transparent use of ODA and other resources. It stresses the importance of transparency and accountability in the use of financial instruments.

29. The Council encourages enhanced coordination between implementing agencies, Development Finance Institutions (DFIs) and Export Credit Agencies (ECAs), where appropriate and consistent with international rules, to support strategic sectors and projects, resilient and diversified value chains and secure infrastructure, while maintaining high environmental and social standards.
30. The Council underlines that strengthening the Union's economic security must rely on mutually beneficial partnerships that respect partner-country ownership and the interests of the EU. Global Gateway should be implemented in a strategic manner that ensures coherence with EU policies, strengthens the Union's resilience, security and competitiveness, reinforces delivery capacity, reduces high-risk dependencies, safeguards critical sectors and infrastructure, and supports the provision of high-quality and reliable offers in partner countries in a manner consistent with the Union's strategic interests and legal framework.
31. The Council welcomes targeted EU financial support to leverage operations of EU financial institutions and private sector in support of Global Gateway implementation. All Member States, also those without ECAs and/or DFIS, should have access to the respective EU-level funding so that they can participate effectively in Global Gateway. The Council further supports efforts towards new, budget neutral EU-level financing and guarantee tools to support operations of EU export credit agencies contributing to the implementation of the Global Gateway and the enhanced coordination of EU financial tools. These solutions should be simple and specifically tailored to support EU ECAs, ensuring additionality and complementarity to existing national systems, and that all Member States and their businesses, including SMEs, can participate effectively in Global Gateway.

H. Strategic Communication

32. The Council stresses the importance of a clear, consistent, fact-based, transparent and coordinated communication by all Team Europe actors to be implemented across all partner countries and regions, as well as in Europe, particularly around key missions, summits and milestones, to enhance Global Gateway's visibility, prevent and counter potential disinformation on Global Gateway and consolidate its recognition as a trusted brand with the ultimate objective of strengthening the recognition and credibility of the EU. It also emphasises the importance of effectively engaging audiences in partner countries through targeted communication campaigns to maximise the visibility of Global Gateway.
33. The Council stresses that communication on Global Gateway should convey a coherent narrative, based on branding guidelines, that reflects its role in advancing the Union's wider external action and strategic priorities, as well as its contribution to shared prosperity, improved connectivity and sustainable development. It also calls for a partner-centred approach focused on concrete results and mutual benefits, tailored to regional and national contexts, as well as targeted audiences.
34. The Council encourages strengthened joint communication efforts on Global Gateway, coordinated by EU Delegations, including on the basis of shared communication material, and conducted jointly with Member States to optimise outreach. Where relevant, Member States should integrate Global Gateway in their respective outreach, ensuring consistent yet differentiated messaging.

I. Cross cutting Synergies

35. The Council underlines the need to ensure synergies and coherence between EU external action and relevant internal policies across competitiveness, trade, digital, climate and energy, transport, health, education and research, while preserving distinct mandates and avoiding duplication and fragmentation.
36. The Council recalls the importance of integration of horizontal priorities, namely, climate and environmental sustainability, poverty reduction, agriculture and nutrition, gender equality, health, human rights, education, skills development and decent work, digital inclusion and the protection of cultural heritage across design, implementation and monitoring, and encourages structured exchanges of experience across regions and sectors to replicate successful models.
37. The Council encourages stronger alignment between Global Gateway investments and the Union's trade and industrial policy instruments, enhancing market access, investment facilitation, regulatory convergence, and sustainable supply chain integration to maximise the development and economic impact of Global Gateway projects.

J. Way Forward

38. The Council remains committed to advancing Global Gateway as a core element of the Union's external action, particularly in a geopolitical context marked by increased fragmentation, instability and competition.

39. The Council calls for continued structured dialogue with partner countries and all relevant actors at every level, on Global Gateway priorities, delivery and implementation. It looks forward to continued discussions on improving the governance structure, including the roles and interplay between its different elements. The Council underlines the importance of enhanced cooperation between EU Delegations and Member States to ensure coherent implementation and strengthen strategic communication.
40. The Council encourages governance and delivery arrangements that ensure political and strategic steering by the Council, effective coordination and timely exchanges within the Global Gateway Board. The Council further stresses the importance of clear and transparent criteria for project selection, regular and more uniform reporting, a strengthened focus on project preparation and timely implementation, and the monitoring of milestones and impact.
41. The Council calls on the Commission to conduct regular stocktaking of progress on Global Gateway implementation based on reporting provided by all Team Europe members, to provide investment and policy guidance for the Global Gateway implementation in the relevant regions. Such stocktakes should provide a clear overview of funding committed, investments mobilised, communication efforts, as well as lessons learned and best practices, including from flagship projects, and should be presented ahead of meetings of the Global Gateway Board. The Council underlines the need to reflect on the progress and potential improvements in the delivery of the Global Gateway strategy. The Council also calls for a transparent methodology to assess development outcomes, resources mobilised and contributions to the Union's strategic interests.
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EUROPEAN
COMMISSION

HIGH REPRESENTATIVE
OF THE UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

Brussels, 5.6.2025
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**JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT AND THE
COUNCIL**

An International Digital Strategy for the European Union

An International Digital Strategy for the European Union

The digital and Artificial Intelligence (AI) revolution is reshaping economies and societies in Europe and across the world. Economic players and countries that are able to master them do not only gain a decisive economic edge in terms of competitiveness and efficiency but can also use these technologies to strengthen their national defence and security, as well as ensure they are aligned with the core values of their society. Conversely, those who are late in embracing them risk lagging behind economically and undermining their sovereignty.

In such context, the EU is determined to boost its tech competitiveness and innovation capacity while working with partners and allies to support their own digital transition. No country or region can tackle the digital and AI revolution alone. The EU remains committed to the rules-based global order and to the defence of its fundamental values.

For the EU's competitiveness, economic security and defence capacity, it is crucial to closely cooperate with our partners and tech allies to enhance the ability of European tech companies to innovate and grow globally. Concerted EU efforts are necessary to ensure that global digital governance supports EU interests and fundamental values.

This strategy sets out the basis on which the EU will address these objectives, working in a joined-up way.

1. DIGITAL AS A CORE ELEMENT OF THE EU'S EXTERNAL ACTION

At the current geopolitical juncture, the EU remains a reliable and predictable partner, committed to strengthening its existing relations with allies globally, and forging new mutually beneficial partnerships with those willing to work towards shared objectives. The EU's support to the rules-based global order, aligned with the values of democracy, rule of law and fundamental rights, is steadfast.

The EU's growing network of bilateral and regional partnerships allows the EU to be stronger on the world stage, building coalitions in pursuit of shared objectives in key international fora and organisations. From shaping norms in multilateral fora to deepening bilateral partnerships, the EU aims to make progress on concrete and immediate priorities, protecting and promoting the EU's strategic interests.¹

As emphasised by the Draghi report², the increasing productivity gap between the EU and the United States since the mid-1990s is largely explained by the superior ability of the US to innovate, scale-up globally and succeed in the tech sector. The EU also faces the risk of weaponisation of its technological and economic dependencies and the risk of critical technology leakage. As outlined in the ProtectEU Strategy³, the lines between offline and online

¹ See the [Conclusions](#) of the European Council, 17th April 2024: “*The European Council also highlights the need to strengthen the EU's leadership in global digital affairs and invites the Commission and the High Representative to prepare a joint communication on the subject*” (p. 10)

² The future of European competitiveness: Report by Mario Draghi (2024)

³ Communication on ProtectEU: a [European Internal Security Strategy](#), COM(2025) 148

threats are increasingly blurred and the EU needs to cooperate better with its partners to combat the misuse of technologies.

In boosting its tech competitiveness and innovation capacity, as set out in the EU's Competitiveness Compass⁴, the EU can build on several strengths. The EU has a large and integrated digital single market and is the global leader in the import and export of digitally delivered services⁵. It hosts world-leading tech companies and has an increasing number of tech start-ups⁶. It can draw on world-class research and innovation and has the capacity to provide integrated technology solutions to partner countries seeking to uphold their digital sovereignty and to implement a human-centric digital transformation.

As part of its Digital Decade Policy Programme 2030⁷, the EU aims to boost investment in connectivity infrastructure, skills, and research⁸, and create more favourable conditions for EU disruptive start-ups to emerge and scale up. As technologies such as AI, semiconductors, cloud and quantum computing are fundamentally changing the industrial as well as defence and security landscape, Europe needs an industry capable of designing, developing, manufacturing and delivering these technologies and products faster and at scale.

An increasingly active **Digital Diplomacy** has built on these strong domestic foundations to advance our international priorities and to build partnerships⁹. Investments and initiatives launched under the **Global Gateway**, including in enlargement and neighbourhood countries, notably the EU Growth Plans, demonstrate the strategic importance of the digital sector from a geopolitical, security and economic point of view.

Building on the EU's strengths and internal policies and actions, the International Digital Strategy for the European Union will therefore focus on the following objectives:

- a) **Boost the EU's tech competitiveness through economic and business cooperation.** The EU will continue to cooperate with trusted partners to reinforce EU leadership in emerging tech, including through research and innovation and by attracting foreign investments and talents; use its international tools to develop and promote EU technology solutions worldwide; and expand its growing network of digital trade agreements
- b) **Promote a high level of security for the EU and its partners.** In line with existing commitments¹⁰, the EU will continue to strengthen its cybersecurity and cyber defence, particularly of key critical infrastructures; enhance the security of research while enhancing research in security-related fields; tackle hybrid threats and foreign information manipulation and interference; enhance the resilience, security, and stability of ICT supply chains, including beyond its borders; tackle cybercrime through joint operations¹¹, including through bilateral and multilateral cooperation; and promote trusted suppliers of digital technologies, including in dual-use technologies such as AI and quantum.
- c) **Shape global digital governance and standards with a network of partners.** The EU will continue to promote its values-based approach on digital governance and digital

⁴ Communication on a Competitiveness Compass for the EU, COM(2025) 30 final

⁵ See source [WTO](#)

⁶ COM(2025) 217 of 28/05/2025 – 'EU startup and scale-up Strategy'

⁷ See the full [Digital Decade Policy Programme](#)

⁸ As outlined in the Communication on the Union of Skills COM(2025) 90 final

⁹ As outlined by the Foreign Affairs [Council Conclusions on Digital Diplomacy](#) in June 2023

¹⁰ The [Protect EU Strategy](#) ((COM)2025 148), [Joint White Paper for European Defence Readiness 2030](#), [Preparedness Union Strategy](#) (JOIN(2025) 130), [Strategic Compass](#) (7371/22)

¹¹ For example: [Europol](#)

standards to shape a global digital transformation that is human-centric, trustworthy, and respects human rights and fundamental freedoms. By acting decisively, the EU can be a driving force of responsibly guided technological advancement on the global stage.

2. SCALING THE EU'S GLOBAL NETWORK OF PARTNERS

The EU has developed strong **regional and bilateral digital cooperation with partners** through Ministerial-level Trade and Technology Councils¹² and Digital Partnerships¹³, as well as Digital Dialogues¹⁴. It maintains Cyber Dialogues with a wide range of partners¹⁵, and digital issues are an increasingly important feature of the tailor-made Comprehensive and Strategic Partnerships¹⁶.

In addition, digital cooperation also builds on the association of partner countries to key EU programmes, notably Horizon Europe¹⁷ and the Digital Europe Programme¹⁸ for advanced research and innovation cooperation and the deployment of digital technologies.

Advancing the harmonisation of key digital transformation policies, investing in secure digital connectivity and boosting innovation are also at the heart of the EU's cooperation with **enlargement and neighbourhood countries**, via instruments such as Deep and Comprehensive Free Trade Agreements or Stabilisation and Association Agreements. These trade agreements and other related instruments such as the Growth Plans for the Western Balkans¹⁹, the Reform and Growth Facility for Moldova²⁰ and the Ukraine Facility²¹ set a strategic basis for the gradual integration of candidate countries into the Digital Single Market²².

The EU is developing a **New Pact for the Mediterranean** with partners of the Southern Neighbourhood, building on the 2021 Agenda for the Mediterranean, to deepen our political engagement and strengthen cooperation in areas of mutual interest, notably in the digital domain.

The EU is continuously expanding its network of **free trade agreements**²³ and digital trade agreements²⁴. Among others, these set high-standard digital trade rules that ensure a secure and safe online environment for consumers, bring transparency, predictability and legal certainty for companies, and prevent or remove unjustified barriers to digital trade including for cross-

¹² With the U.S. and India

¹³ With Japan, the Republic of Korea, Singapore and Canada

¹⁴ With Brazil, Mexico, Argentina, Australia and the Western Balkans

¹⁵ India, Japan, the Republic of Korea, Brazil, United States, Ukraine and the United Kingdom

¹⁶ With partners such as Tunisia, Egypt or Jordan

¹⁷ Nineteen countries are currently associated to Horizon Europe – listed [here](#). In addition, Switzerland, the Republic of Korea and Egypt are expected to become associated in 2025, whereas association negotiations are progressing with Japan

¹⁸ Countries associated to DEP are listed [here](#)

¹⁹ Communication new Growth Plan for the Western Balkans, COM(2023) 691

²⁰ See more information on the [Growth Facility for Moldova](#)

²¹ [Ukraine Facility - European Commission](#)

²² For example, following the transposition of the relevant EU acquis, Ukraine and Moldova are on their path to be granted mutual internal market treatment for roaming

²³ Free Trade Agreements with comprehensive digital trade chapters have been concluded with the United Kingdom, New Zealand and Chile, and are ongoing with India, Indonesia, Thailand, Philippines and Malaysia

²⁴ Signature of the EU-Singapore Digital Trade Agreement took place on 7 May 2025. Negotiations for the Digital Trade Agreement with Korea were concluded March 2025. Rules on cross-border data flows with Japan, complementing the EU-Japan Free Trade Agreement, entered into force in July 2024.

border data flows. Furthermore, the Commission liaises with other leading regulators and enforcers, building new networks on digital services and AI.

The Global Gateway strategy offers the opportunity to advance partnerships, policy dialogues, and investments with countries around the world, including through the EU-Latin America and Caribbean Digital Alliance²⁵, the administrative arrangement with Smart Africa²⁶, the Team Europe Central Asia initiative²⁷, and Digital Economy Packages with partners in Africa, Asia and Latin America²⁸, including with Least Developed Countries. The Clean Trade and Investment Partnerships²⁹ allow the EU to address the links between digital issues, trade and clean tech.

There is a growing appetite across the world for digital cooperation with the EU, and the current global landscape calls for new, deeper, and more flexible forms of cooperation to nurture mutually beneficial partnerships, which recognise the advances made by many of our partners across the digital arena, from digitising government services to facilitating electronic payments, from supporting citizens' rights to developing local resilience. The EU will keep seeking cooperation – not only with long-time like-minded partners, but with any country with which we share common objectives.

Faced with the need to accelerate its digital transformation in a more challenging geopolitical context, the EU will therefore scale its global network of partners in four directions:

- 1) **Deepening** its existing Digital Partnerships and Dialogues, to **advance cooperation in key areas**, such as research and innovation, industrial and policy cooperation on emerging tech, transparency and resilience of global supply chains, security and sustainability of digital infrastructure, AI deployment and innovation, with a focus on mutual economic benefits and enhancing economic security. The EU will propose a more significant integration of additional priorities into these partnerships, such as cybersecurity, research security, sensitive technology protection, and aspects related to dual-use technologies. It will continue engaging in advanced regulatory cooperation. Deepening the Digital Partnerships and Dialogues will also involve providing an enhanced role for businesses from the EU and partner countries, stimulating business-to-business and business-to-government cooperation and focusing on investment opportunities.
- 2) **Broadening** the existing cooperation network, with the establishment of **new Digital Partnerships and Dialogues** and expanding the network of **digital trade agreements**. Priority partners will be determined building on the EU's priorities and existing bilateral and regional cooperation at EU and Member State level. Under the Global Gateway, the EU will work to increase European investments in partner countries, linking the EU with centres of digital growth and contributing to the EU's economic security.
- 3) **Connecting** these partnerships to **operate as a network**. As the network of partnerships expands, so does the opportunity to work together in pursuit of shared interests. Likewise, cooperation is increasingly necessary as we face common challenges.

²⁵ https://international-partnerships.ec.europa.eu/policies/global-gateway/eu-latin-america-and-caribbean-digital-alliance_en

²⁶ <https://digital-strategy.ec.europa.eu/en/news/eu-and-africa-strengthen-cooperation-digital-transformation>

²⁷ https://ec.europa.eu/commission/presscorner/detail/pl/ip_22_6963

²⁸ Since 2022 the EU has launched Digital Economy Packages in Nigeria, Colombia, the Democratic Republic of Congo, Kenya and the Philippines.

²⁹ https://commission.europa.eu/topics/eu-competitiveness/clean-industrial-deal_en

Cooperation could take the form of regular technical exchanges on common issues (e.g. emerging tech, secure and trusted connectivity, standardisation or regulatory cooperation), the preparation of joint projects (e.g. research and innovation cooperation, interoperability pilots, joint projects in third countries), and the organisation of a network, involving high-level representatives from EU partners, the EU and EU Member States.

- 4) **Strengthening Security & Defence Partnerships**³⁰ as regards digital issues, given the increasing importance of advanced digital infrastructure and technologies. Leveraging investment into dual use advanced technological capabilities and promoting the EU security and defence tech industry as a central partner and driver of innovation in AI, quantum and other emerging technologies are among the priorities in this area.

The EU sees the development of AI as fundamental for the future of humanity. It cannot be reduced to the quest for supremacy among advanced AI powers. In response, the EU will continue to promote its open and collaborative model of developing trustworthy AI, which is based on participation of researchers and the private sector in ‘AI Factories’. In this regard, cooperation with like-minded partners and allies which share our respect for the rule of law and fundamental and democratic values, will be crucial.

Examples of forthcoming actions:

- Preparation of potential **new Digital Partnerships and Dialogues**, in a Team Europe approach, ensuring close cooperation with Member States, industry, stakeholders and partner countries, including in the context of the EU cooperation with neighbourhood countries.
- Establishment of a **Digital Partnership Network**, involving the EU’s partners, the EU and its Member States.
- Close cooperation to promote **synergies between Digital Partnerships** and the technology-related issues of the EU’s **Security and Defence Partnerships**.
- Expansion of the network of **Digital Trade Agreements** and continuation of negotiations of **Free Trade Agreements including on digital trade**.

3. THE EU TECH BUSINESS OFFER

To engage with a broader set of trusted partners, the EU will develop an integrated **Tech Business Offer**. Such a comprehensive Offer will support the deployment of secure and trusted connectivity, Digital Public Infrastructure, AI and software solutions, and beyond. The objective will be to tailor and combine technology components in a modular approach – balancing the interests of partner countries and the EU, in order to create **a package of mutual benefits**. This will be complemented with capacity-building and measures to bridge the global talent gap, coordinating training efforts on digital skills with international partners. The EU will actively promote digital solutions enabling more energy- and resource-efficient manufacturing, services and other applications.

The Tech Business Offer will be managed jointly by the EU and its Member States in a ‘**Tech Team Europe**’ approach, closely involving EU companies³¹, EU Development Finance

³⁰ The EU has secured such partnerships with the United Kingdom, Norway, Moldova, South Korea, Japan, Albania and North Macedonia.

³¹ Including through the [Global Gateway Business Advisory Group](#)

Institutions and Export Credit Agencies, with a strong facilitator role by the **D4D Hub**³² and the EU4Digital³³ umbrella initiative. The Offer will build on existing external financing tools and investments by the private sector. It will be essential to coordinate investments through the different programmes, between public and private sector and to continue improving the business environment. This will be done in close cooperation with EU Delegations and national Embassies, for example via the **Informal Digital Hubs**, which the EU has established in a number of partner countries³⁴ to promote Team Europe cooperation. In countries with which strategic partnerships have been concluded or are being negotiated, the Offer will be integrated in the existing or negotiated partnership framework.

4. PRIORITY AREAS OF COOPERATION WITH PARTNER COUNTRIES

Cooperation with partner countries will cover the following areas:

Secure and trusted digital infrastructure

The security and resilience of digital networks and infrastructures are essential to enable developments in critical sectors such as energy, transport, finance and health. While the EU has already demonstrated leadership in this area, work will continue, by drawing on instruments such as **the 5G Toolbox**³⁵, to assist partner countries who are equally concerned about the need to build their digital economy on secure foundations. In line with the recent Communication to strengthen the security and resilience of submarine cables³⁶, this approach could be extended to submarine cables and other critical digital infrastructure. This could be the subject of an annual conference to deepen technical contacts and understanding on opportunities and security requirements for future routes, partnerships, and financing, feeding into the Global Gateway process.

The EU will promote the deployment of secure digital connectivity and sustainable infrastructure worldwide – in particular secure and trusted 5G networks, submarine and terrestrial cables, satellite connectivity, Internet infrastructure, supercomputers and data centres. The EU will also work to support its partners' resilience through diversification and integration of networks, including through satellite connectivity and other forms of non-terrestrial networks. The EU will seek to develop a network of secure³⁷ submarine and terrestrial communication cables connecting the EU with partner countries, as well as sovereign and resilient space connectivity. This should support the EU's role as an international hub capable of hosting data and computing capacities in a resilient and reliable space, tapping the opportunities of the data economy, and attracting investments in sustainable data centres, computing and AI capacities. In cooperation with partner countries, the EU will actively seek to support digital solutions enabling more energy- and resource-efficient manufacturing,

³² The [Digital for Development \(D4D\) Hub](#) is a platform that aims to strengthen digital cooperation and coordination between the European Union and its Member States and partners in Africa, Asia-Pacific, Latin America and the Caribbean, and EU neighbouring countries.

³³ The EU4Digital umbrella initiative pools together EU funded programmes aimed at extending the benefits of the Digital Single Market to the [Eastern Partnership](#) countries and to the Western Balkans.

³⁴ Kenya, Tanzania, Nigeria, Colombia, Brazil.

³⁵ [Cybersecurity of 5G networks - EU Toolbox of risk mitigating measures](#)

³⁶ [Joint Communication on EU Action Plan on Cable Security](#), JOIN(2025) 9 final

³⁷ In line with the [Commission Recommendation on Secure and Resilient Submarine Cable Infrastructures](#), C (2024) 1181, and the [Joint Communication to strengthen the security and resilience of submarine cables](#), JOIN(2025) 9.

services and other applications, reducing the carbon footprint as well as facilitating climate adaptation and resilience.

Examples of forthcoming actions in the field of **secure connectivity**:

- **Arctic connectivity** is a strategic priority for the EU. The EU will work with partners to boost support for projects that advance new submarine cable routes in the region, by making use of the Connecting Europe Facility to catalyse public and private investments.
- A key element of **Global Gateway** investment in the digital sector is a network of strategic submarine communication cable infrastructure projects to provide secure and resilient links between the EU and partner countries. Investments include:
 - 1) **BELLA**, the first transatlantic optical fibre cable between the EU and Latin America and the Caribbean, which connects Latin-American research institutes, provides fast access to Earth Observation data from the Copernicus component of the EU's Space Programme. It will be further extended across Central America and the Caribbean and will support the growth of High-Performance Computing in the region.
 - 2) The **MEDUSA** submarine cable, supported by the European Commission and EIB Global, will provide high-speed connectivity between the northern and southern shores of the Mediterranean and will be extended to West Africa.
 - 3) **Blue-Raman** consists of a planned 11,700km secure submarine cable system connecting Europe to India, with landings in the Middle East and Eastern Africa, along the India-Middle East-Europe Economic Corridor (IMEC). With its strong connectivity dimension linking Europe and India via the Gulf region, it will facilitate the exchange of data and increase cooperation with partner countries.
- The EU's Black Sea strategy recognises the **Black Sea** as a key gateway linking Europe to the South Caucasus, Central Asia, and beyond. To increase connectivity and trade with the **Eastern Partnership** region, the EU will support targeted investments in digital infrastructure, with the development of Black Sea digital links aiming at creating secure, high-capacity internet connection, when conditions allow.
- The **Central Asia Team Europe Initiative** will provide enhanced secure connectivity, primarily to unserved and underserved areas in Central Asia, via satellite provided by the EU private sector.
- **IRIS²**, the new secure satellite-based connectivity component of the EU's Space programme, will provide global coverage when the entire constellation will have been deployed. At an early stage, it will set up pilot projects in Sub-Saharan Africa.
- The **EU-ASEAN Sustainable Connectivity Team Europe Initiative** under the Global Gateway includes a digital component promoting the expansion of the Copernicus mirror site in the Philippines to further countries in ASEAN, including Indonesia and Thailand.

Emerging technologies

- **Artificial Intelligence:** As outlined in the AI Continent Action Plan³⁸, the EU will continue to engage bilaterally, regionally and multilaterally with trusted partners to attract

³⁸ [Communication on an AI Action Plan](#), COM(2025)165

investments in the EU, support the establishment of a global level playing field for trustworthy AI, and to promote the good governance of AI globally. The EU will also act decisively to establish itself as a frontrunner in applying AI to science for its own competitiveness and to attract top scientists to Choose Europe³⁹. The EU will further seek cooperation with trusted partners, notably on innovation-related aspects of AI, such as the deployment of AI Factories outside the EU and their connection to the network of EU AI Factories. Such cooperation will also include providing access to AI models and algorithms, in particular on projects relating to AI for the Public Good (e.g. tackling climate change and supporting clean transition, improving healthcare or agriculture). This cooperation will also leverage EU public and commercial satellite data and services to enhance AI-driven solutions for global challenges, such as environmental monitoring and disaster response. Given the dual-use nature of some AI applications, the EU will continue to work on the role of Artificial Intelligence in the Common Foreign & Security Policy (CFSP) and Common Security and Defence Policy (CSDP), working with Member States to ensure that the EU's CFSP and CSDP are able to profit from the technological advances of AI.

- **5G/6G:** The EU is the global innovation leader in advanced connectivity, such as 5G and fixed network solutions. The objective to reach common standards for the next generation sustainable by design (6G) requires cooperation with like-minded countries, starting with research and innovation cooperation and standardization. The main challenge is the development and choice of 6G technologies, notably Radio Access Network technologies, including integration of terrestrial and non-terrestrial networks. EU industry can lead 6G development in line with EU standards notably on cybersecurity, interoperability and compliance with legal access standards and will benefit from cooperation with countries having complementary strengths in the value chain, including microelectronics, devices, cloud or AI.
- **Semiconductors:** Geopolitical uncertainty and the growing complexity of semiconductor supply chains demand a tailored, country-specific approach, ensuring that the EU partners with global leaders of the semiconductor ecosystem while safeguarding its own technological, economic and security interests. The EU will continue engaging with countries where collaboration in areas like pre-competitive research and development and supply chain resilience is mutually beneficial. In line with the Economic Security strategy⁴⁰, the EU will also defend its economic security interests, including through bilateral, regional and multilateral engagement, encouraging information sharing to prevent supply chain disruptions, mitigating risks, and attracting global talents to address the skills gap in the European semiconductor ecosystem.
- **Quantum technologies:** Advancing common standards and applications in quantum technologies demands robust international collaboration, particularly in research and innovation. The EU will strengthen ties with countries that offer complementary strengths in the quantum technology value chain, including computing, sensing, communication, post-quantum safe encryption, and related fields on a reciprocal basis. The EU remains attentive to the role of quantum technologies in the future security landscape and maintains regular contact with NATO and other relevant partners in the field. The EU will join forces with partner countries on concrete applications of quantum technologies in sectoral policies, for example to develop new materials.

Examples of forthcoming actions in the field of **emerging technologies**:

³⁹ [Choose Europe: advance your research career in the EU](#)

⁴⁰ Communication on a European Economic Security Strategy, COM(2023) 20 final

- The EU will implement joint research and innovation projects in Quantum technologies with **Japan, the Republic of Korea and Canada**.
- As part of the **EU-India Trade and Technology Council**, the EU and India are working on developing a dedicated programme that will facilitate talent exchanges and foster semiconductor skills among students and young professionals.
- In the context of the EU-LAC Digital Alliance, the EU will establish a robust partnership to federate High Performance Computing resources in **Latin America and the Caribbean** and to enhance their interoperability and integration with the European HPC ecosystem.
- The EU will follow up on the commitments of the **EU-African Union Ministerial Meeting** (May 2025), to work together to develop regional innovation ecosystems, establishment of AI strategies and digital governance frameworks.
- The EU will support the deployment of **AI Factories** in trusted partner countries, supporting them with developing their compute infrastructure while also securely connecting them to the EU and its AI Factories ecosystem.
- The EU will work with Member States to outline areas where **Artificial Intelligence** can support the implementation of the Common Foreign & Security Policy and Common Security and Defence Policy.
- The EU will continue to support **defence innovation** through the **EU Defence Innovation Scheme (EUDIS)** and will explore ways to enhance collaboration with Ukraine in this domain.
- The EU will, in close dialogue with trusted partners such as Norway and Ukraine, explore new ways for supporting synergies with the Hub for European Defence Innovation (HEDI).

Cybersecurity

In today's hyper-connected world and evolving geopolitical landscape, cyber threats from state and non-state actors do not stop at the borders. A cyber-attack or incident in one country can cripple businesses and infrastructure worldwide, and our citizens and businesses rely on digital products and solutions from third countries. Strengthening cybersecurity and cyber defence, including the capacity to detect, prepare for and response to cybersecurity threats and incidents, and enhancing information sharing on cyber threats with international partners to improve response time and resilience, is a direct investment in the EU's own security. Nowhere is this truer than in the EU's neighbourhood, where the EU is fully committed to supporting enlargement countries to ramp up their cybersecurity and cyber defence capabilities.

The EU also has the tools to lead at a global scale on cybersecurity. With the Cyber Resilience Act⁴¹, the EU is setting a new standard for secure-by-design products. As countries worldwide seek to secure their supply chains, the EU's expertise in product security offers a powerful foundation for international partnerships. In a similar vein, as the EU's global partners are investing into securing their critical infrastructures, market opportunities arise in areas where the EU has strong European industrial leadership such as cryptography and highly secure digital products.

With its strong impact on businesses and hospitals, ransomware remains a global scourge, one that no single country can combat alone. In line with the ProtectEU Strategy, the EU will push for stronger international cooperation to take down the infrastructure that ransom groups rely

⁴¹ Regulation (EU)2024 2847

on, break their financial lifelines, ensure more efficient sanctions against perpetrators and facilitators, and bring the cybercriminals to justice.

As part of these efforts, the EU will also promote enhanced cyber resilience in sectors increasingly reliant on digital technologies, such as transport and smart mobility, where secure infrastructure, data and services are essential to ensure operational continuity and public trust.

Recent efforts have ensured that candidate countries that are associated to the Digital Europe Programme would be able to access the EU-level Cybersecurity Reserve established by the Cyber Solidarity Act⁴². In addition, the European Union Agency for Cybersecurity, ENISA, will continue cybersecurity cooperation with relevant third countries, including capacity building in candidate and Neighbourhood countries.

Examples of forthcoming actions in the field of **cybersecurity**:

- The EU will work with relevant partners to explore the potential for **mutual recognition agreements** regarding the Cyber Resilience Act and respective frameworks of the partners to facilitate compliance with product cybersecurity requirements.
- The EU will continue cooperating with partner countries to enhance global cyber resilience and contribute to a free, open, safe and secure cyberspace. Firmly anchored in the Global Gateway strategy, cybersecurity and **cyber capacity-building** support will focus on securing critical infrastructures, and strengthening cyber ecosystems, including through the development and implementation of relevant regulatory and policy frameworks, as well as cyber hygiene and literacy.
- At the UN and within regional security bodies, the EU will continue to promote **responsible state behaviour in cyberspace**, based on the UN General Assembly-endorsed framework. This includes upholding international law, adhering to globally accepted norms of state conduct in peacetime, developing confidence-building measures, and supporting states in building the capacity to implement these framework elements.
- The EU will reinforce its attribution of **cyber-attacks** to malicious actors, including state-based actors, and continue to develop the associated **sanctions mechanisms**.

Foreign Information Manipulation and Interference (FIMI)

Together with its partners, the EU will also better protect citizens from Foreign Information Manipulation and Interference (FIMI) campaigns or other societal risks stemming from online platforms. To do so, ensuring algorithmic transparency in how content is recommended and moderated is essential to enhance accountability and public trust.

This is also relevant for candidate, potential candidate and neighbourhood countries, in view of their specific vulnerabilities to disinformation and foreign interference and will in turn allow to strengthen our mutual resilience, including democratic resilience.

Examples of forthcoming actions in the field of **FIMI**:

- Following an expansion of its work on attributing cyber-attacks to defined actors, the EU will expand the **attribution of incidents** of FIMI.

⁴² Regulation (EU)2021 694

Digital identities and Digital Public Infrastructure (DPI)

The EU's experience in developing open-source digital identity wallets and secure and data protection compliant Digital Public Infrastructure offers significant value beyond EU borders. International cooperation and mutual recognition arrangements with key partners can simplify cross-border business for companies and facilitate citizens' mobility. The EU will notably continue to pursue cooperation with third countries (such as Ukraine, Moldova, the Western Balkans, Japan, India, Egypt) to achieve seamless cross-border usage of trust services. It will also promote the European Interoperability Framework⁴³ to help partner countries with fostering administrative modernisation and cross-border digital integration, including aligning with EU standards and practices. The EU will continue to promote the use of common specifications and open standards to ensure interoperability, transparency, and reuse.⁴⁴

Examples of forthcoming actions in the field of secure Digital Public Infrastructure:

- The EU will support the development of **trust services and digital identity solutions** (based on the EU Digital Identity Wallet specifications), putting them at the core of an interoperable and scalable suite of digital building blocks and solutions, including open-source ones, to support the digital transformation of public administrations and businesses of partner countries. The EU will also continue its work with Ukraine, Moldova and the Western Balkans, to prepare for their gradual integration with the EU Digital Identity Wallet.
- The EU will be cooperating with countries such as India, Egypt, Uruguay and Brazil in the area of **e-signatures and DPI interoperability**, with the view of creating benefits for businesses and citizens both in the EU and in partner countries.
- The EU will support an **interoperability-by-default** approach, based on the European Interoperability Framework, to facilitate seamless exchange of data across borders.
- The EU will continue to work with key international partners (Japan, India, Singapore, Australia, New Zealand, Malaysia) to promote the EU model for **eInvoicing**, based on the European eInvoicing standard and interoperable technical specifications.

Online platforms

The EU's Digital Services Act⁴⁵ protects democracy, free speech, privacy, the safety and security of children online, and provides a secure framework for the sale of legally compliant goods. The Digital Markets Act⁴⁶ and EU competition policy promote the contestability of digital markets, a level playing field and fair competition between digital players. These acts complement the protection provided in the digital environment by the GDPR⁴⁷ and consumer protection laws.

The protection and empowerment of minors online is a global priority. Under the Digital Services Act, all online platforms have to ensure a high level of privacy, safety, and security of

⁴³ Part of the Communication on a European Interoperability Framework – Implementation Strategy, COM(2017) 134

⁴⁴ A relevant example is the [Data Catalogue Vocabulary Application Profile](#), which has become a de facto standard, which facilitates harmonised metadata descriptions and seamless data sharing across borders.

⁴⁵ Regulation (EU)2022 2065 and amending Directive(2000) 31 EC (Digital Services Act) (OJ L 277, 27.10.2022).

⁴⁶ Regulation (EU)2020 1828

⁴⁷ Regulation (EU) 2016/679

minors, on their service. In addition, the largest online platforms must annually assess and mitigate any systemic risks that their services pose – including for the respect of the rights of the child and the protection of minors more generally. The Digital Services Act is supported and complemented by the Better Internet for Kids Strategy (BIK+). In particular, the EU co-funds the network of hotlines in Member States to tackle the dissemination of child sexual abuse material online. Global cooperation is ensured via the INHOPE network with 55 hotlines operating worldwide.

Strong and consistent consumer protection across online marketplaces is another priority the EU shares with many of its international partners and a key issue addressed by the Digital Services Act, as well as consumer protection and product safety frameworks. Under the Digital Services Act all online marketplaces are required to meet strong standards for safety, transparency and accountability to ensure that illegal and unsafe products cannot be sold to EU consumers through their services. The 2025 Communication on e-commerce⁴⁸ complements this by setting out new actions to address challenges linked to the surge of unsafe, counterfeit and otherwise illicit products sold through online platforms. The EU will prioritise cooperation with partner countries and in multilateral fora to find joint solutions to common risks to consumer safety stemming from online marketplaces.

Examples of forthcoming actions in the field of **online platforms**:

- The EU will continue to promote its regulatory approach and its underlying principles bilaterally and multilaterally and share its experience in implementing them.
- The EU will organise **regional events** with international organisations, third-country legislators, regulators and civil society to promote freedom of expression and safety online.

5. GLOBAL DIGITAL GOVERNANCE

To advance its goals in the digital domain, the EU will continue to pursue a **multilateral and multi-stakeholder approach** and ensure meaningful participation of relevant stakeholders including civil society, academia and the private sector, building on the strong existing ties with partner countries.

The EU's Digital Partnerships and Dialogues allow for **coordination** ahead of discussion in multilateral and regional fora, building strong coalitions in pursuit of shared objectives in key international fora and organisations, such as the United Nations, G7, G20, OECD and the Council of Europe, as well as global Internet Governance institutions. In particular, with G7 partners, the EU will continue to promote the development and uptake of **Economic Security Standards** – including when relevant for digital technologies – taking into account various criteria such as transparency, diversification of supply, security, sustainability, trustworthiness and reliability.

The **Global Digital Compact** (GDC) of the United Nations was adopted by consensus as the first comprehensive framework for global digital governance. It sets out the objectives, principles, commitments and actions to develop an open, free and secure digital future for all. The EU will remain actively involved in the GDC implementation work to defend its

⁴⁸ A comprehensive EU toolbox for safe and sustainable e-commerce, COM(2025) 37 final

achievements, while ensuring non-duplication of efforts and maximizing synergies with the existing global digital architecture, including the Internet Governance framework.

In addition to these processes, the EU will focus on **standardisation** as a key tool to advance its goals. The EU has strengths to rely on, including a strong research and innovation base, world-leading tech companies and many innovative SMEs and start-ups that need to be encouraged to take part in international standards setting. By leveraging on the EU standardisation system to increase its influence in international standards setting for key digital technologies, the EU aims to strengthen the competitiveness of its industry, foster digital and tech sovereignty, and protect and promote its fundamental values and interests while pursuing international cooperation in standard setting. The EU acknowledges the important role of the ITU in the context of global standardisation.

The EU will also continue to defend a rules-based, equitable allocation of **radiofrequencies** under the global framework of the International Telecommunication Union (ITU), acknowledging that the radio spectrum is a scarce natural resource that underpins all wireless digital applications.

Multilateral cooperation is also crucial to address the digital aspects of other sectors, including the energy sector due to the rapidly increasing energy demand of AI. The EU is engaged in **international energy initiatives**, like the Clean Energy Ministerial, which develop collaborative approaches to meet these challenges.

As digital technologies continue to evolve rapidly, **global Internet Governance** must adapt to new geopolitical challenges, such as fragmentation risks, increased misuse of digital tools for practices such as Internet shutdowns and censorship and widening digital divides. Moreover, the transition towards **Web 4.0** – driven by core technologies like artificial intelligence, extended and virtual reality, blockchain, and quantum computing – introduces new governance complexities that require updated, effective, and inclusive multi-stakeholder frameworks. The EU will continue to shape the inclusive multi-stakeholder approach to Internet Governance and is committed continuously to improve its effectiveness, opposing initiatives for state-controlled Internet architectures that could fragment and undermine the openness and security that have characterised the Internet since the Tunis Agenda⁴⁹.

The EU will continue to proactively defend the general availability and integrity of the Internet as a global, interoperable network of networks, reflecting the importance of the multi-stakeholder model of internet governance, for example in the upcoming editions of the Internet Governance Forum (IGF) and World Summit on the Information Society 20-year review (**WSIS+20**) negotiations. The EU acknowledges the central role of ICANN in managing the foundations of the Internet architecture.

Examples of forthcoming actions in the field of **global digital governance**:

- The EU will work to ensure **proper** follow-up and review of the implementation of the **Global Digital Compact** (GDC) commitments.
- The EU will work as Team Europe to ensure a suitable outcome to the **World Summit on the Information Society (WSIS+20) Review** negotiations.

⁴⁹ [Tunis agenda for the Information Society](#), 18 November 2005

- The EU will support an international extension and broadening of the **Open Internet Stack**, referring to the foundational structure of protocols that enable communication and information sharing on the Internet, to address the needs of partner countries, including enhancing trust and security.

6. A COMPETITIVE AND SECURE EUROPE, OPEN FOR BUSINESS, CONNECTED TO THE WORLD

In a volatile world, the EU is a consistent, predictable and reliable partner. In the context of complex tech value chains, no country or region can advance on the digital and AI revolution alone. The EU's internal and external efforts on digital policy are closely intertwined and mutually-reinforcing. That is why the EU is not only boosting its own digital sector, from AI Factories to defence tech, but is also concluding substantial partnerships that bring visible benefits for the EU's citizens and businesses and for our partners.

As a champion of multilateral solutions to global challenges, the EU is a steadfast supporter of the UN, G7, G20, OECD and other bodies that enable us to tackle together the defining challenges of our time.

The EU is ready to join forces for new, deeper, and flexible forms of cooperation nurturing mutually beneficial partnerships, to reinforce Europe's competitiveness and security. The EU will continue to engage constructively based on respect for the international rules-based order.



EUROPEAN
COMMISSION

HIGH REPRESENTATIVE
OF THE UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

Brussels, 5.6.2025
JOIN(2025) 140 final

ANNEX

ANNEX

to the

Joint Communication to the European Parliament and the Council

An International Digital Strategy for the European Union

ONGOING AND PLANNED ACTIONS

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
1. Secure connectivity			
Support to Arctic connectivity	Arctic connectivity is of strategic importance for the EU. It will help reduce data latency and facilitate trusted data flows between the EU, Greenland, Canada, the US and Japan, providing an alternative cable route and enhancing cable security and resilience between the EU and its partners. The EU will work with its partners to boost support for projects that advance new submarine cable routes in the region, by making use of the Connecting Europe Facility to catalyse public and private investments.	Japan, US, Canada, Greenland	2025-2030
Promote secure connectivity in enlargement countries	Promote the alignment with the EU 5G Cybersecurity Toolbox and support to adopting a legislative framework that would allow for and lead to imposing exclusions and/or restrictions on high-risk suppliers.	Enlargement countries	Continuous
Promote secure connectivity in Global Gateway partner countries	Promote secure and trusted connectivity, including 5G, submarine cable and space connectivity, in line with the EU 5G Cybersecurity Toolbox and the 2025 EU Action Plan on Cable Security, through diplomatic outreach, technical assistance and financial support under the Global Gateway.	Global	Continuous
National and regional 5G implementation guidelines and development of the LAC Connectivity Toolbox	These guidelines will address security, infrastructure challenges, and priority use cases in various Latin America and Caribbean national contexts. Another key focus will be the development of the LAC Connectivity Toolbox, which shall provide practical tools, best practices, and guidance for addressing cross-border connectivity, secure and resilient infrastructure, and meaningful connectivity challenges. This includes co-developing actionable recommendations, providing technical support, and fostering bi-regional coordination for 5G deployment.	Latin America and Caribbean countries	Ongoing under the EU-LAC Digital Alliance – until Q4 2027

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
Annual conference on secure connectivity	Possibly establish an annual conference on secure connectivity, hosted in Brussels, to deepen technical contacts and understanding on opportunities and security requirements for future routes, partnerships, and financing, feeding into the Global Gateway process.	Global	Annual
2. Emerging technologies			
<i>Artificial Intelligence</i>			
Cooperation on AI safety	The EU AI Office has signed an administrative arrangement on cooperation on AI safety with Singapore, and bilateral exchanges have started with other AI Safety Institutes – Japan, Korea, the United Kingdom and Australia. Cooperation arrangements with partner countries, to be pursued further e.g. including topics such as boosting innovation and AI uptake and cooperation on AI for public good (Japan), AI safety (India and Canada) and governance and regulatory aspects (Australia). The EU AI Office will continue to deepen the cooperation on AI safety in the Network of AI Safety Institutes, in particular, addressing the safety of general-purpose AI models through information exchanges and best practices, joint testing and evaluations, development of tools and benchmarks, as well as research into AI safety.	Japan, the Republic of Korea, India, Australia, Canada, the US, the United Kingdom, Ukraine, Moldova Western Balkans, Africa, Latin America and the Caribbean	Continuous
Global Partnership on AI and OECD	The EU is a founding member of the Global Partnership on AI and continues to engage in this initiative after it formed an integrated partnership with the OECD Working Party on Artificial Intelligence Governance (AIGO). The AI Office holds one of the Vice-Chair posts in the OECD AIGO. In addition, the AI Office is involved in all the AI-related working groups of the OECD and actively contributing to this work.	Multilateral	Continuous
G7 and G20	The EU will continue to engage actively in the AI discussions in G7 and G20. This includes the Hiroshima AI Process and its reporting framework as well as the Hiroshima Friends Group, a voluntary framework of countries supporting the spirit of the Hiroshima AI Process towards achieving safe, secure and trustworthy AI.	Multilateral	Continuous

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
	Moreover, the EU will continue to explore the possibility of G7 guidelines on AI in Science. One of the G20 South African Presidency priorities is Artificial Intelligence and Innovation for Sustainable Development, which is a priority in Africa, Asia and LAC countries.		
Clean Energy Ministerial	The Republic of Korea, host of the 16th Clean Energy Ministerial meeting 2025, made “AI & Energy” one of its priority themes. The EC will actively engage with the ministerial programme and explore international collaboration in the field of digitalisation and AI in the energy sector.	Multilateral	Continuous
Research cooperation under Horizon Europe	The association of a number of non-EU partner countries to Horizon Europe will support research cooperation in AI and AI-based applied research.	Associated Countries to Horizon Europe	Continuous
AI for Public Good	As part of the AI for the Public Good initiative, the EU supports the deployment of AI solutions for the public good, including Generative AI, technology transfer and capacity building, with partner countries in Africa and Latin America and the Caribbean (building on EU-LAC Alliance). The EU also supports scientific cooperation and development of AI-based Local Digital Twins underpinning urban reconstruction in Ukraine.	Africa, Latin-America and Caribbean, Asia-Pacific Ukraine	Continuous
AI Hub for Sustainable Development and AI collaboration with Smart Africa	The AI Hub for Sustainable Development is co-designed by the Ministry of Enterprises and Made in Italy (MIMIT) and the UNDP, aiming at strengthening local AI ecosystems in partnership with African countries. Smart Africa has launched the Africa AI Council and the EU is structuring its collaboration with Smart Africa under the Global Gateway strategy, building on the administrative arrangement between the European Commission and Smart Africa and following a Team Europe approach.	Africa	Continuous
GovTech4all	Development and piloting of AI solutions in the public sector for enhancing decision making, service delivery and internal administrative tasks. The goal is to support and	EU and EU candidate and potential candidate countries	Q4 2025/2026

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
	accompany the goals of the Interoperable Europe Act, as well as wider policy goals of public sector innovation and start-up growth in Europe.		
5G/6G			
6G research and innovation aligned 2026 call	Research and innovation cooperation on 6G AI powered RAN. One project from Smart Networks and Services Joint Undertaking mirroring one project from Japan and the Republic of Korea.	Japan and the Republic of Korea	Project running 2027-2030
6G research and innovation aligned call	6G research and innovation cooperation focused on physical layers, advanced antennas and AI RAN.	Taiwan	Potential aligned call in 2026 or cooperation between existing projects
5G testbed	To support the development of 5G use cases, the EU is partnering with Costa Rica on a 5G testbed, with Nokia and Ericsson expected to provide the equipment.	Costa Rica	Continuous
Semiconductors			
Joint research and innovation projects in the field of semiconductors	Research and innovation projects in semiconductors, jointly funded by the European Commission and Japan and the Republic of Korea. With the Republic of Korea, projects aim at advancing heterogeneous integration of chips as well as neuromorphic computing technologies. With Japan calls are planned for 2026 on per- and polyfluoroalkyl substances (PFAS) replacement, heterogeneous integration and chiplets, and devices and processes beyond 2 nanometres.	Japan, Republic of Korea	Continuous
Early warning mechanism on supply chain & public subsidies	Joint early warning mechanism, between the European Commission and the US and Japan respectively, aimed at identifying supply chain disruptions, and transparency mechanism on public subsidies provided to the semiconductor sector.	US, Japan	Continuous

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
Attracting talent and skilled workforce	As part of the EU-India Trade and Technology Council, EU and India committed to developing a dedicated programme that will facilitate talent exchanges and foster semiconductor skills among students and young professionals.	India	Continuous
G7 semiconductor Point of Contact group	The G7 Point of Contact (PoC) group on semiconductors is dedicated to facilitating information exchange and sharing best practises among G7 members, on issues impacting the semiconductor industry, including pre-competitive industrial research & development priorities, sustainable manufacturing, the effect of non-market policies and practices, and crisis coordination channels.	Multilateral	Continuous
World Semiconductor Council – Government / Authorities Meeting on Semiconductors (GAMS)	The Government/Authorities Meeting on Semiconductor (GAMS) has a unique setting where Governments and Industry Associations representing together 95% of world's semiconductors production (EU, US, South Korea, Japan, Taiwan, and China), meet to respond to common challenges facing the industry. The European Commission is representing the EU.	Multilateral	Continuous
<i>Quantum and High-Performance Computing</i>			
EU-Japan Quantum Computing Collaboration	Joint research and innovation projects focusing on hybrid Quantum-HPC algorithms and optimizing applications in areas of mutual interest such as biomedical and environmental sciences. It aligns with the EuroHPC Joint Undertaking's objectives to support the EU-Japan Digital Partnership.	Japan	Continuous (2026-2029)
EU-Canada Quantum Research Initiatives	Establish collaborative projects in quantum computing, sensing, and communication, leveraging Canada's National Quantum Strategy and existing research hubs.	Canada	Continuous (2023-2026)
EU-Republic of Korea Quantum Technology Calls	Coordinate calls for joint projects in quantum computing, sensing and communication, enhancing research and innovation collaboration and aligning with the strategic priorities of Republic of Korea in quantum technology development.	Republic of Korea	2027-2030
G7 Quantum Technology Working Group	Under Canada's G7 presidency, establish a working group to enhance information sharing on quantum developments and promote common standards.	Multilateral	Ongoing

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
EU-LAC Supercomputing Network	Establish a robust partnership to federate High Performance Computing resources in Latin America and the Caribbean and to enhance their interoperability and integration with the European HPC ecosystem.	Latin America and the Caribbean	Possible kick-off at the CELAC-EU Summit 2025
3. Cybersecurity			
Advance cyber dialogues with partner countries	The EU has Cyber Dialogues with the US, Ukraine, the United Kingdom, Japan, India, the Republic of Korea and Brazil. Cybersecurity is also discussed in the Digital Partnerships with Japan, the Republic of Korea, Singapore and Canada and the Digital Dialogues with Brazil, Mexico, Argentina, Australia and the Western Balkans.	US, Ukraine, United Kingdom, Japan, India, Republic of Korea, Brazil, Singapore, Canada, Mexico, Argentina, Australia, Moldova, Western Balkans	Continuous
Mutual recognition agreements (MRA) regarding product cybersecurity	The Cyber Resilience Act (CRA) sets out requirements for the cybersecurity of products with digital elements in the internal market. The EU will work with relevant partners to explore the potential for mutual recognition agreements regarding the CRA and respective frameworks of the partners to facilitate compliance with product cybersecurity requirements.	Bilateral discussions	By the time of CRA application (end 2027)
Extension of the EU's Cyber-Reserve to Ukraine and the Republic of Moldova	Amendments to the Association Agreements related to the participation of Ukraine and the Republic of Moldova in the Digital Europe programme will pave the way for extending the EU's Cyber-Reserve to both countries.	Enlargement countries	Continuous
Engagement in the G7 Cybersecurity Working Group	The Commission represents the EU in the G7 Cybersecurity Working Group. Among other topics, the Commission will pursue cooperation on healthcare cybersecurity, in line with the European action plan on the cybersecurity of hospitals and healthcare providers (COM(2025) 10 final).	Multilateral	Continuous
Advancing the UN Framework of Responsible	At the UN and within regional security bodies, the EU will continue to promote responsible state behaviour in cyberspace, based on the UN General Assembly-endorsed framework. This includes upholding international law, adhering to globally	Multilateral	Continuous

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
State Behaviour in Cyberspace	accepted norms of state conduct in peacetime, developing confidence-building measures, and supporting states in building the capacity to implement these framework elements.		
Engagement in the Counter Ransomware Initiative	The Commission represents the EU in the International Counter Ransomware Initiative (CRI). The EU will continue its active participation in CRI. Moreover, the European action plan on the cybersecurity of hospitals and healthcare providers commits to advancing cooperation in the CRI.	Multilateral	Continuous
Cyber capacity-building	The EU is carrying out external cyber capacity-building projects with partner countries across the world. The EU will continue these initiatives, by prioritising activities addressing cybercrime and building cyber resilience, including support for building strategic frameworks, developing incident management capabilities and enhancing expertise through trainings.	Global	Continuous
LAC4	LAC4 is the regional hub for cybersecurity education and training in Latin America and the Caribbean. LAC4's objective is to provide cybersecurity and cybercrime expertise to support digital transformation and collaboration in Latin American and Caribbean to counter cyber threats.	Latin America and the Caribbean	Continuous
EU-LAC Cybersecurity Community of Practice (CoP)	Under the EU-LAC Digital Alliance, a Community of Practice (CoP) of cybersecurity experts and practitioners will be established to encourage the exchange of best practices on cybersecurity between both regions. Future activities may include institutionalising mechanisms to swiftly mobilise cybersecurity experts in case of cyber-attacks and emergencies and capacity-building.	Latin America and the Caribbean	Continuous (until Q4 2027)
4. Digital identities and Digital Public Infrastructure			
Mutual recognition of electronic signatures and other trust services	Advance towards mutual recognition of electronic signatures and other trust services with third countries in order to create a global trust framework. This includes developing a set of tools and services implementing trust anchors for the global recognition of trust services and digital identities, and dropping digital barriers by reusing and replicating the European Trust Services infrastructure in their territory.	Ukraine, Moldova, Western Balkans, Egypt, India, Brazil, Japan, Uruguay, members of the Central America Integration System (SICA)	Continuous (2025-2027)

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
		(Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama)	
Promote cooperation on Digital Public Infrastructures on the basis of the EU eID wallet	Promote cooperation on Digital Public Infrastructures by supporting the creation of a scalable suite of open-source digital building blocks and solutions around EU wallets. In addition, demonstrate interoperability between the EU eID Wallet and similar initiatives in third countries on the basis of practical use-cases.	Japan, India, Singapore Multilateral	Continuous (2025-2027)
Prepare onboarding of digital public services in scope of the Single Digital Gateway	Cooperate with EU accession countries to prepare onboarding and development of interoperable solutions for online administrative procedures and the Once-Only Technical System in scope of the Single Digital Gateway. Those services facilitate access of business and citizens to do business, work and live in EU countries.	Western Balkans, Moldova, Ukraine	Continuous (2025-2030)
Standardisation of digital identity solutions	The Architecture and Reference Framework for the European Digital Identity Wallets aims to set a global example for trusted and secure identification at a high level of assurance. Cooperation between the EU and like-minded countries on the development of common identity standards on the basis of the EU model shall be pursued, including in international organisations.	Japan, India, Canada Multilateral	Continuous (2025-2030)
Global Digital Health Certification Network (GDHCN)	The Global Digital Health Certification Network is an initiative aimed at creating a standardized, interoperable framework for digital health credentials and certifications. This network, created by the European Commission to fight against COVID-19 and later on taken up by WHO is intended to facilitate the secure and efficient exchange of health-related information across borders (e.g. COVID-19 certificates, Digital International Certificate of Vaccination or Prophylaxis/Yellow Booklet, Vaccination Card, International Patient Summary), promoting global health security and improving healthcare delivery.	Global	Continuous (2025-2028)
5. Online platforms and integrity of the information ecosystem			

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
DSA/DMA alignment support for EU accession countries	Support alignment of EU accession countries with EU DSA and DMA.	Moldova, Ukraine, Western Balkans	Continuous (2025-2027)
Marketplaces and e-commerce	Raise EU key concerns (closed market for digital services, illegal goods on Chinese marketplaces) and possible areas of closer cooperation (data sharing on illegal Chinese sellers), in line with the EU-China Administrative Arrangement on product safety cooperation and an Action Plan on Safety of Products Sold Online.	China	Continuous (2025-2027)
Global human rights-based implementation of online platform laws	Promote universal principles underpinning the DSA and DMA in global instruments (including OHCHR guidance on UN Cybercrime Convention).	UN, OHCHR, UNESCO, OECD	Continuous (2025-2027)
Regional human rights-based implementation of online platform laws	Prioritise regional engagement on human rights-based implementation of online platform laws, organised in cooperation with the UN (where possible), to bring together policymakers, regulators and civil society.	ASEAN, LAC, countries under the CEFTA	Continuous (2025-2027)
EU election observation missions (EOM) social media observation	EU EOMs integrate observation and of social media behaviour during electoral processes in their overall assessment of electoral integrity.	Global	Continuous
Advance partnerships to bolster resilience against FIMI	Promote resilience and technological awareness on FIMI attacks; expose and increase costs to perpetrators.	Global	Continuous
6. Internet Governance			
Promote an inclusive multi-stakeholder governance model for the Future Internet	In the negotiations for the World Summit on the Information Society (WSIS+20) Review, the EU aims at enhancing inclusivity, notably from partner countries and youth communities. This includes upholding an open, human-centric Internet based on human rights, enhance multi-stakeholder Governance, and bridge the new digital divides by	Multilateral	Q4 2025

OBJECTIVE	DESCRIPTION	PARTNER COUNTRY / REGION / MULTILATERAL	INDICATIVE TIMELINE
	establishing an operational connection with the Sustainable Development Goals (SDGs) and the Global Digital Compact (GDC). The EU will also engage youth in shaping the future of Internet Governance by integrating their perspective into the forthcoming annual Youth Policy Dialogue on digital, fostering informed participation, strengthening digital civic responsibility, and equipping young leaders with the tools to uphold an open, secure, and inclusive Internet.		
Work towards an Open, Free and Sustainable Internet	The EU will support accountability, comprehensive monitoring and promotion of internet freedom worldwide while strengthening the openness and sustainability of the internet infrastructure and empowering civil society organisations (CSOs) to hold their own governments accountable. This includes addressing internet shutdowns via diplomatic channels and promote policies that maintain an open and interconnected internet.	Global	Continuous
Improving the security, resilience and openness of the Internet	Implement a multi-stakeholder strategy for the comprehensive deployment of Internet standards across the EU Internet infrastructure. Charting the EU Influence in Web 4.0: Conduct an extensive mapping of potential EU contributions to improved or new networking protocols and solutions required and enabled by impacts of core technologies like AI, extended reality (XR) / virtual reality (VR), blockchain, and quantum computing that are currently shaping the Web 4.0.	Global	2026-2030
Promote the Open Internet Stack	The EU will support an international extension and broadening of the Open Internet Stack, referring to the foundational structure of protocols that enable communication and information sharing on the internet, to address the needs of partner countries, including enhancing trust, reducing costs, avoiding vendor lock-in, supporting customizability and integration, and upholding values such as privacy, security, and data protection.	Global	Continuous

3. Empowering the Green Deal: significant delegation and constitutional limits in CBAM and CRMA

Merijn Chamon and Thomas Verellen

1. INTRODUCTION

The influence of the European Union's Green Deal extends beyond the EU's environmental policy. In the trade policy context, for example, the EU has introduced instruments that link market access for products to their environmental performance, as is the case for example with the Deforestation Regulation or the Carbon Border Adjustment Mechanism (CBAM). Likewise, internal market instruments such as the Foreign Subsidies Regulation or the Critical Raw Materials Act (CRMA) empower the Commission to take into account environmental objectives in its assessment of whether a foreign subsidy scheme should be sanctioned.

A feature which all these initiatives have in common is the extent to which the actual functioning and implementation of the mechanisms which they establish depends on the empowerment, by the legislative acts in question, of the Commission or other executive bodies. This is unsurprising, since the typical reason for the legislator to delegate powers to the executive branch is to ensure the effective and efficient application of legislation.¹ At the same time, this practice prompts several constitutional questions about the delegation patterns in this emerging policy area: (1) Does the EU legislator's effort to achieve a green transition still align with the constitutional framework for delegating powers to executive bodies? By assessing the constitutionality of delegation choices made by the EU legislator, this chapter engages with a core aspect of the rule of law, which is that in a Union governed by the rule of law, both

¹ Annalisa Volpato, *Delegation of Powers in the EU Legal System* (Routledge 2022) 7.

legislator and executive must act within the limits set out by the EU's basic constitutional charter. (2) Is this framework helping or hindering the achievement of Green Deal goals?

The present chapter addresses the above two questions, relying on a dedicated study of two instruments: the Carbon Border Adjustment Mechanism (CBAM),² and the Critical Raw Materials Act (CRMA).³ Where the former is an example of a new unilateral trade instrument, the latter illustrates how an internal market measure may combine security and sustainability objectives.⁴ For both measures, the chapter will retrace the delegation choices made (and not made) by the EU legislator and will assess these choices against the constitutional framework. That evaluation will in turn feed into a preliminary assessment of what the EU's Green Deal tells us about the propriety of the current constitutional framework governing delegation.

2. THE CONSTITUTIONAL FRAMEWORK AND POLITICS OF DELEGATION

The constitutional framework governing the delegation of powers in the EU is a patchwork of Treaty provisions, case law and 'infra' constitutional rules, but can be summed up and rationalized as follows:

The EU typically regulates through legislation, adopted pursuant to a legal basis in the EU Treaties. Where that legal basis prescribes a legislative procedure, the EU will be adopting formal legislation as foreseen in Article 289(3) TFEU.⁵ Article 290 TFEU subsequently provides that the legislator can delegate a power to the Commission, empowering it to amend or supplement legislation, albeit only its non-essential elements. The Court has clarified that the essential elements of legislation are those that should be subject to political choices.⁶ The formal legislator (typically both Parliament and Council) exercises control over the Commission when it adopts 'delegated' acts.

² Regulation 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52 ('CBAM Regulation').

³ Regulation 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials [2024] OJ L1252 ('CRMA').

⁴ The specific sustainability provisions will not be discussed in this chapter.

⁵ The Court has confirmed that EU acts are only formally legislative acts when adopted pursuant to a legislative procedure. See Joined Cases C-643/15 and C-647/15 *Slovakia & Hungary v Council* ECLI:EU:C:2017:631, paras 62–64.

⁶ Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516, para 67.

This is different from Article 291 TFEU, which deals with the normative activity of ‘implementation’. On this, Article 291(1) TFEU makes clear that this is normally a task of the Member States’ administrations.⁷ Where EU law requires uniform implementation, the Commission can be exceptionally entrusted with its implementation, as foreseen in Article 291(2) TFEU. Precisely when this threshold of ‘requiring uniform conditions’ is met has not been properly clarified yet by the Court.⁸ The same provision prescribes that exceptionally the Council, rather than the Commission, may be granted an implementing power, in duly justified specific cases.

The Court has clarified that implementing acts, just like delegated acts, cannot alter the essential elements of legislation.⁹ Regardless of whether the Commission or the Council implements EU law, the same material limits apply.¹⁰ Those limits are rather generous, given that ‘within the framework of the Commission’s implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that act, provided that they are not contrary to it’.¹¹ Where the Commission implements EU law, and given that it is exercising a power normally exercised by the Member States’ administrations, it will be assisted and scrutinized by committees composed of national civil servants, as regulated by the comitology regulation.¹²

While the control mechanisms applicable to ‘delegation’ and ‘implementation’ are therefore different, the Court has recognized that there is an overlap

⁷ This is also referred to as ‘executive federalism’. On this see generally Robert Schütze, ‘From Rome to Lisbon: “Executive Federalism” in the European Union’ (2010) 47 *Common Market Law Review* 1385.

⁸ For some clarification, see Case C-146/13 *Spain v Parliament & Council* ECLI:EU:C:2015:298, paras 77–83.

⁹ Case C-65/13 *Parliament v Commission* ECLI:EU:C:2014:2289, para 45.

¹⁰ Case C-695/20 *Fenix International* ECLI:EU:C:2023:127, para 47.

¹¹ *Parliament v Commission* (n 9) para 44.

¹² Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L55/13. Criticizing the rationale for Member State control over the exercise of implementing powers as being formalistic, considering that both implementing and delegated powers are delegations of power by the legislator to the executive, see Robert Schütze, ‘“Delegated” Legislation in the (New) European Union: A Constitutional Analysis’ (2011) 74 *The Modern Law Review* 661, 687.

between the normative activities under Articles 290 and 291 TFEU.¹³ This overlap results in a discretionary choice on the part of the EU legislator in deciding whether to prescribe delegated or implementing acts to adopt additional rules in relation to a legislative act.¹⁴

To facilitate making these choices, in 2019 the EU institutions concluded non-binding criteria to clarify the delimitation between Article 290 and 291 TFEU.¹⁵ But the criteria are so open-ended that it seems doubtful that they will contribute to clearer comprehension during the legislative procedure of how to frame empowerments. While the Court has not yet accepted a discretionary choice where the legislator is faced with the question of whether it entrusts the implementation of EU law under Article 291(2) TFEU to the Commission or to the Council, the Court's test of this choice is so marginal that the choice is effectively discretionary in nature.¹⁶

The same arguably applies to the option of choosing other possible 'recipients' of an empowerment. Despite the Treaties' silence on the issue, the Court has accepted that the EU legislator may create new executive bodies (EU agencies), independent from the legislator or the Commission, entrusting these bodies with executive powers. On this, the Court, in *Short-selling*, has held that these powers must be precisely delineated and amenable to judicial review.¹⁷ As a result, the EU legislator is granted a discretionary choice as regards the authorities responsible to implement EU law: Member States, Commission, Council, EU agencies, and so on.

It is within this constitutional framework that the politics of delegation plays out. Based on the framework originally worked out by Brandsma and Blom-Hansen and elaborated by Chamon,¹⁸ the legislator will first have to choose whether to delegate powers. An alternative is to forego delegation and instead

¹³ Case C-427/12 *Commission v Parliament & Council* ECLI:EU:C:2014:170, para 38; *Fenix International* (n 10) para 44.

¹⁴ See *Commission v Parliament & Council* (n 13) and case C-88/14 *Commission v Parliament & Council* ECLI:EU:C:2015:499.

¹⁵ See Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union [2019] OJ C223/1.

¹⁶ Case C-156/21 *Hungary v Parliament & Council* ECLI:EU:C:2022:97, para 188. In a similar sense, see Carlo Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform' (2017) *European Law Review* 29, 681, referring to the discretion as 'nearly absolute'.

¹⁷ Case C-270/12 *UK v Parliament and Council* ECLI:EU:C:2014:18, para 53.

¹⁸ Gijs Jan Brandsma and Jens Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (OUP 2017); Merijn Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Hart Publishing 2022) 180–96.

include more detailed prescriptions in the legislation, to remain silent on who is to apply or implement EU legislation – in which case the default rule of Article 291(1) TFEU will apply – or to prescribe the adoption of soft law. If the legislator decides to delegate powers, it will have a choice between empowering the Commission, Council, EU agencies or Member States. Next to the decision on who to empower, the legislator will have to determine what type of power to grant. The choice will often turn on whether to grant a delegated or an implementing power to the Commission, but, as noted, soft law powers are also an option. Typically, the Parliament here prefers delegations through Article 290 TFEU, since that Article gives it greater control. Conversely, the Council prefers empowerments to the Commission through Article 291(2) TFEU, since the comitology committees are intimately involved in the drafting of implementing acts.¹⁹ However, even when powers are delegated, the legislator can circumscribe the mandate by including more detailed material prescriptions binding the delegate authority or by circumscribing the latter in a procedural manner (e.g. by imposing consultation requirements).²⁰ Finally, preferences in relation to delegation can always be traded off in the negotiation process against preferences regarding policy outcomes.

3. CBAM

The basic purpose of the carbon border adjustment mechanism is rather straightforward: within the EU, several CO₂-intensive industries are subject to an Emissions Trading System (ETS).²¹ Under the ETS, companies need to acquire allowances to emit greenhouse gases. The share of free allowances allocated to market participants facing international competition gradually

¹⁹ This arguably has remained so after the Council managed to get the concession from the Commission that a de facto comitology system would also apply to the drafting of delegated acts. See section 2 of the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts annexed to the 2016 Interinstitutional agreement on Better Law-Making [2016] OJ L123/1.

²⁰ See in this sense Thomas Verellen, ‘Shifting Sands: Enhancing Democratic Oversight in the EU’s Unilateral Trade Policy’ (CLEER Papers 2024/3) 33–35.

²¹ Academic literature on the CBAM Regulation as finally adopted is limited so far. See however, Henrique Morgado Simões, ‘EU Carbon Border Adjustment Mechanism: Implications for Climate and Competitiveness’ (EPRS Briefing PE 698.889, 2023); Lecture of Prof. dr. Stefan Weishaar, ‘The Carbon Border Adjustment Mechanism: Encouragement of Cleaner Industries across the World?’ (2024) <www.youtube.com/watch?v=Ebw-Mc0JRvo> accessed 28 May 2024.

decreases to create an incentive to lower emissions.²² Measures like the ETS create a competitive disadvantage for EU industries that compete with industries established in third countries that are not subject in their home jurisdiction to an ETS-equivalent. To remedy this risk of ‘carbon leakage’, the CBAM requires companies to acquire CBAM certificates in order to import certain carbon-intensive goods into the EU, in so far as these goods originate from a jurisdiction in which no ETS equivalent to the EU ETS is in force.

However, the practical implementation of the mechanism presents a series of challenges: the price of the CBAM certificates needs to evolve in line with the (internal) greenhouse gas allowances under the EU’s ETS; the scope of the CBAM must be defined in terms of goods entering the EU customs union (and cannot mirror that of the ETS which is defined in terms of industries); a procedure to assess the ‘equivalence’ of a foreign ETS system with that of the EU must be elaborated; methodologies and rules need to be in place to calculate the emissions-intensity of the imported goods, and so on. The effectiveness of a mechanism such as the CBAM thus depends on the legislator entrusting these ‘practical’ aspects to the executive, but how such a mandate is formulated and which authority receives that mandate largely comes within the political discretion of the EU legislator.

The final CBAM regulation contains 5 delegated empowerments in the sense of Article 290 TFEU and 11 empowerments to the Commission under Article 291(2) TFEU. While these cannot all be discussed in detail, it may be noted that all the delegated powers proposed by the Commission in its original proposal were retained in the final regulation and that one was even added.²³ For example, as originally foreseen in its proposal, the Commission has the crucial power to amend the list of exempted third countries that have an equivalent emissions trading system in place, and it also has a power to amend the list of goods covered if it notices that ‘similar’ (but different) goods than those covered are suddenly entering the EU market.²⁴

The most contested delegation issue concerned the administrative design of the CBAM. In its impact assessment accompanying its proposal, the Commission had noted there were two broad options to put the mechanism into effect: under a centralized approach a dedicated EU body would be entrusted with implementing and managing the mechanism, while under a decentralized

²² See Directive 2003/87 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32.

²³ The latter concerns the power in Article 20(6) of the CBAM Regulation to supplement rules on the management of the sale and repurchase of CBAM certificates.

²⁴ See CBAM Regulation, art 2 paras 10 and 11.

approach the operation of the mechanism would be entrusted to the national competent authorities. The former would be beneficial in terms of costs (cf. economies of scale) and uniformity but would take time to realize. The decentralized option in turn would be the fastest to implement, since it would rely on existing administrative structures at Member State level, but intense coordination between national authorities would be required to come to the same degree of harmonization.²⁵ The Commission's proposal was to go for the decentralized approach, while the Parliament wanted to set up a centralized mechanism. The final regulation (in Chapter III) reflects the Council's preferred option, resulting in a CBAM that functions in a more centralized way than envisaged by the Commission, but a less centralized way than requested by the Parliament. At the moment of writing, the CBAM Regulation has entered into force but it is in a transitional phase until the end of 2025. At the moment of writing, the mechanism should still apply fully as of 1 January 2026.

4. CRMA

The Critical Raw Materials Act (CRMA) aims to address the challenges posed by the scarcity and strategic importance of certain raw materials (CRMs) vital for various industrial sectors and products, including those at the heart of the green transition such as batteries, equipment related to hydrogen production, heat pumps and advanced chips. The CRMA codifies critical raw materials lists, enhances capacities, strengthens value chains, improves the EU's preparedness for supply disruptions caused by external shocks such as COVID-19 or military conflicts and establishes a European Critical Raw Materials Board (European CRMs Board). It aims for sustainability, resilience and strategic partnerships. Published on 3 May 2024, it came into effect on 23 May 2024.

In addition to imposing obligations on Member States and private undertakings, the CRMA also delegates powers to the Commission. In total, the Act delegates implementing powers to the Commission on 11 occasions, and it empowers the Commission to act by delegated act no fewer than 16 times.

Many of these delegations relate to the Act's sustainability objectives. For example, the Commission is empowered to adopt delegated acts to set benchmarks for the EU's recycling capacity expressed as a share of the strategic raw materials available in relevant waste streams.²⁶ However, for benchmarks related to the EU's capacity to extract, process and recycle strategic raw materials as a percentage of total consumption in the EU, the Act itself

²⁵ See Commission, 'Impact Assessment Report accompanying the document Proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' SWD (2021) 643 final, 27–8.

²⁶ CRMA, art 5(3).

sets benchmarks.²⁷ The Act also grants the Commission a power to adopt implementing acts to label products, materials and waste streams as having ‘relevant critical raw materials recovery potential’²⁸ and to establish the format of labels that undertakings will have to attach to magnets.²⁹ Similarly, the Commission is asked to provide, by means of a delegated act, for a list of Combined Nomenclature codes and product descriptions to assist customs authorities, which will have to verify that companies seeking to put covered products on the EU market comply with the Act’s requirements.³⁰

Relevant also from a sustainability perspective is the power the CRMA grants the Commission to adopt delegated acts to establish rules to calculate and verify the environmental footprint of different critical raw materials,³¹ and the power it grants the Commission to recognize national sustainability schemes by means of an implementing act adopted through the examination procedure.³² With regard to the former, the Act requires the Commission to follow a predetermined methodology set out in an annex to the Act to calculate and verify this environmental footprint.³³ For those materials for which the Commission adopted rules to calculate their footprint, undertakings that sell such materials (or products that contain them) will have to issue an ‘environmental footprint declaration’ in accordance with the calculation rules determined by the Commission.³⁴ The Commission is empowered to set the format of the declaration through an implementing act adopted in accordance with the examination procedure.³⁵

The European CRMs Board is an important institutional innovation of the CRMA. The European CRMs Board will issue opinions on whether proposed Strategic Projects meet the Act’s criteria.³⁶ This is not its only responsibility under the Act, however. The Board will also offer strategic guidance on supply

²⁷ CRMA, art 5(1).

²⁸ CRMA, art 26(7).

²⁹ CRMA, art 28(2).

³⁰ CRMA, art 28(12). Combined Nomenclature (CN) codes are part of the nomenclature system used by the EU for the classification of goods. This system is crucial for customs, trade statistics, and various tariff measures. The CN is integrated into the Harmonized System (HS) developed by the World Customs Organization, which is used internationally to standardize the classification of items traded across borders.

³¹ CRMA, art 31(1).

³² CRMA, art 30(2).

³³ CRMA, art 31(1).

³⁴ CRMA, art 31(6).

³⁵ CRMA, art 31(10) para 2.

³⁶ CRMA, art 7(6).

and sustainability issues,³⁷ and it will support the evaluation of initiatives critical for raw materials security.³⁸ More generally, the Board is meant to operate as a central hub to coordinate and advise on national efforts, with the aim of ensuring an effective implementation of the Act.³⁹ As such, the Board's responsibilities are more encompassing than those of comitology committees, whose responsibilities are limited to reviewing draft implementing acts.

5. PATTERNS OF DELEGATION IN THE CBAM AND CRMA

The usual pattern of the Parliament pushing for delegated empowerments can be seen in both the CBAM and the CRMA negotiations. It is now a standard feature of inter-institutional negotiations that the Parliament proposes amendments changing implementing empowerments to delegated empowerments. This strategy is not necessarily based on an assessment of the empowerment in question. Rather, by doing so, the Parliament is creating its own bargaining currency for the trilogue negotiations.⁴⁰

While both Parliament and Council have their clear preferences (see above), the Council is more attached to the implementing empowerments than the Parliament is to delegated empowerments. Also similar to what has been seen in other legislative files is that the Council generally seems more successful in managing to see its delegation preferences reflected in the final text of legislation. This again stresses the importance of a clever and experienced honest broker in the trilogues, mediating between Parliament and Council.⁴¹ At least in the CBAM negotiations, playing this role apparently proved a challenge. The Commission lead DG in this file was DG Taxud (rather than DG Clima), which, given the policy field concerned, had little experience facilitating a compromise between the co-legislators in the OLP.

³⁷ See the list of tasks in CRMA, art 36(7).

³⁸ *Ibid.*

³⁹ Recital 9 of the preamble to the CRMA states that the Board is established 'to support the implementation of tasks pertaining to the development of Strategic Projects and their financing, exploration programmes, monitoring capacities or strategic stocks and to advise the Commission appropriately'.

⁴⁰ Chamon (n 18) 180–96.

⁴¹ On the role of the Commission as a broker in trilogues, see eg, Lara Panning, 'Building and Managing the European Commission's Position for Trilogue Negotiations' (2021) 28 *Journal of European Public Policy* 1, 32, depicting the Commission as a committed rather than neutral broker willing to mediate while ensuring it has a strong position.

5.1 A Commission that Does Not Seek Self-aggrandizement

The negotiations on the governance system of the CBAM present a number of counterintuitive elements, since the Commission preferred a more decentralized governance of the mechanism compared to both Parliament and Council. From a rational choice perspective, which sees a bureaucracy such as the Commission as continuously looking to self-aggrandize, this does not seem to make sense.⁴² Two points seem to have been crucial to explain the reticence of the Commission, one of them being very relevant for the EU's ambition to realize the green transition.

First, the Commission resisted more centralized governance simply for budgetary reasons, since it linked a choice for a fully centralized governance model⁴³ with the condition that also the necessary resources would be made available.⁴⁴ The Commission then failed to have a provision included in the regulation on the CBAM's financing,⁴⁵ and it failed to convince the Council to agree to a Joint Declaration on human resources for managing the CBAM.⁴⁶

⁴² Under rational choice institutionalism, institutions to which powers have been delegated will seek to further increase their power. That the Commission continuously seeks to expand its own competences has been a mainstay of the literature on the EU. See eg, Mark Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (OUP 2003) 35.

⁴³ It is to be noted that an initial (leaked) draft of the proposal foresaw the establishment of a centralized mechanism. See the draft proposal annexed to Kira Taylor, 'LEAK: EU's Carbon Border Tariff to Target Steel, Cement, Power' (Euractiv, 3 June 2021) <www.euractiv.com/section/energy-environment/news/eus-carbon-border-tariff-to-target-steel-cement-power/> accessed 28 May 2024. It was this option that was recycled by the Parliament in its amendments, in line with its earlier calls for a centralized mechanism. See European Parliament resolution of 10 March 2021 towards a WTO-compatible EU carbon border adjustment mechanism [2021] OJ C474/2, point 40.

⁴⁴ Commission, GRI Meeting of 8 July 2022, SI (2022) 272/2, 7.

⁴⁵ See the proposed Article 13a in Commission, GRI Meeting of 4 November 2022, SI (2022) 392/2, 6. In the final regulation, there is only Article 30(2)(e), foreseeing a review of CBAM's 'governance system, including the administrative costs'.

⁴⁶ Commission, GRI Meeting of 9 December 2022, SI (2022) 486/3; Commission, GRI Meeting of 27 January 2023, SI (2023) 9/2, 4. In response, the Commission adopted a unilateral statement, see Council of the European Union, Council Doc 8342/23. For the Commission proposal to revise the annual budget to take into account the extra resources required within the Commission to manage CBAM, see Commission, 'Draft amending budget No 1 to the General Budget 2023' COM (2023) 150 final.

Second, and apart from the Commission's budgetary concerns, its preference for a decentralized approach seemed inspired by its priority to have the CBAM up and running as quickly as possible. The Commission thus prioritized policy considerations over the possibility to self-aggrandize and to extract more resources from the budgetary authority. Politically, the apparent preference of the Commission to outsource the task of managing the CBAM suggests that the Commission styles itself more as a political actor than a technocratic actor.

Another example where the Commission had envisaged a smaller role for itself than that which Parliament and Council ultimately granted it is in the setting of the default values of imported goods where the actual embedded emissions cannot be calculated. The Commission had envisaged that, in the absence of reliable data from the exporting country, these values would be based on those of the 10 per cent worst performing EU installations.⁴⁷ Yet in point 4.1 of Annex IV of the final regulation this percentage is not fixed by the legislator, but is left to the Commission to define through implementing acts.

In the CRMA legislative process, the Commission also professed restraint. In the impact assessment, the Commission had put forward three policy approaches: a minimalist, a maximalist and a middle-of-the-road approach.⁴⁸ Under the maximalist approach, the CRMA would have set up a new decentralized agency or established a new directorate within an existing agency, and it would have set up a designated European CRM Fund to finance Strategic Projects. Under the minimalist approach, the Act would (merely) set up a framework to facilitate setting 'guiding' targets and developing strategies towards more stable and secure supply of critical raw materials. There would be neither an agency nor a board, nor would a fund be established. Ultimately, the Commission opted for a second, middle-of-the-road approach in its legislative proposal, which did not include the abovementioned fund and which would introduce a European CRMs board rather than an agency, not only because the public consultation had revealed that the in-between option had the greatest support among stakeholders and Member States but also – similar to the CBAM – because of budgetary constraints. A new agency and a designated fund would have put further pressure on the EU budget and would have required new Member State contributions.⁴⁹

⁴⁷ See point 4.1 of Annex III of the CBAM proposal.

⁴⁸ Commission, 'Commission staff working document. Impact assessment report accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020' SWD (2023) 161 final (the 'CRMA Impact Assessment') 32–3.

⁴⁹ Ibid 72–73.

As with the CBAM, budgetary considerations seem to shape delegation patterns in the CRMA, and the Commission tried to pre-empt possible disagreements during the trilogue negotiations by adopting a proposal that it considers to be a balanced, middle-of-the-road option. In contrast to the CBAM negotiations, however, during the CRMA trilogues Parliament did not insist on a new agency-type body to manage the Act.

5.2 Perennial Hagglng over Delegated and Implementing Acts

Regarding the different empowerments in the CBAM and CRMA, the Parliament followed its usual approach to amend the Commission's proposal so that an envisaged implementing empowerment would be requalified as a delegated empowerment. In many instances, these attempts were rebuked by Commission and Council.

Unsurprisingly, during the trilogues on the CBAM the Parliament had proposed the inclusion of more delegated empowerments, 12 in total, but these additional demands were all rebuked by the Council.⁵⁰ A number of these empowerments constituted empowerments which in the Commission's proposal were already foreseen but which were proposed as empowerments to adopt implementing acts.⁵¹ Other delegated empowerments proposed by the Parliament ended up as implementing empowerments in line with the position of the Council during the trilogues. The Commission's wary stance during the trilogues,⁵² favouring its initial proposal as backed by the Council, no doubt contributed to the Parliament having to back down. Thus, the Commission is empowered to adopt implementing acts, rather than delegated acts proposed by the Parliament, (i) to define the conditions under which the CBAM applies to structures in the exclusive economic zones of Member States or on the continental shelf;⁵³ (ii) to flesh out the verification principles allowing to ensure that declared embedded emissions in goods are correct;⁵⁴ (iii) to adopt the

⁵⁰ For the relevant four-column document of 2 December 2022, see NEGO_CT(2021)0214. All trilogue documents can be consulted at <www.europarl.europa.eu/RegistreWeb/> accessed 28 May 2024.

⁵¹ Eg, CBAM Regulation, arts 7(7), 8(3), 31(2), 35(6). Regarding the implementing empowerment foreseen in Article 7(7), it may be noted that while the Parliament did not succeed in turning this into a delegated empowerment, the legislative prescriptions in the final regulation are much more detailed than in the Commission's proposal, resulting in a reduced degree of discretion on the part of the Commission when it exercises its implementing powers.

⁵² Commission, GRI Meeting of 30 September 2022, SI (2022) 324, 15.

⁵³ CBAM Regulation, art 2(2).

⁵⁴ See CBAM Regulation, art 8(3).

methodology through which account is taken of the number of free allowances granted under the EU ETS,⁵⁵ and (iv) to define the reporting requirements for indirect emissions in imported goods.⁵⁶

Similarly, in the CRMA, the list of products, components and waste streams that should be considered as having relevant critical raw materials recovery potential will be established by the Commission through an implementing rather than a delegated act.⁵⁷ That this was the only instance of the Parliament pushing for delegated acts in the CRMA may be explained by the fact that most of the delegations in the Commission's initial proposal were based on Article 290 TFEU (delegated acts), which gives the Parliament little reason to complain. As mentioned, earlier research suggests that, by introducing amendments changing implementing to delegated empowerments, the Parliament aims to build its 'negotiation capital', allowing it to subsequently trade off these demands to achieve its preferred (policy) outcome on other issues.⁵⁸

The CBAM and CRMA negotiations again illustrate how Parliament pushes for delegated acts somewhat carelessly, since it is difficult to see how specifying reporting requirements or methodologies should not be considered 'implementation'. Still, Parliament's approach is buttressed by the 2019 non-binding criteria, where the EU institutions explicitly, but unhelpfully, agreed that

[m]easures establishing a procedure (that is to say a way of performing or accomplishing something in order to achieve a certain result defined in the basic act) can be laid down either in a delegated act or in an implementing act (or can even be an essential element of the basic act), depending on their nature, objectives, content and context.⁵⁹

In another instance in the CRMA negotiations, concerning the calculation of the share of minerals recovered from manufacturing waste or post-consumer waste in magnets, Parliament and Commission both supported action through delegated acts, whereas the Council preferred to empower the Commission to adopt an implementing act. Here, the power balance favoured Parliament and Commission, and the Commission was ultimately empowered to adopt a delegated act to establish the rules.⁶⁰ This instance serves as a useful reminder that, while the Council's preferences carry much weight, the Council does not always get its way in the trilogue negotiations.

⁵⁵ CBAM Regulation, art 31(2).

⁵⁶ CBAM Regulation, art 35(7)(e).

⁵⁷ CRMA, art 26(7).

⁵⁸ Chamon (n 18) 180–96.

⁵⁹ See point II.E.1 of the Non-Binding Criteria (n 15).

⁶⁰ CRMA, art 29(2).

That said, it is interesting that the Council did not push for more implementing acts in the face of the relatively large number of delegations on the basis of Article 290 TFEU which the Commission had proposed. One might speculate whether the speed of the trilogues, and the perceived need to reach an agreement before the 2024 European Parliament Elections, may have favoured the Commission's proposal.

5.3 Attempts at Reducing the Commission's Discretion

Where powers are delegated (in a generic sense), the principal may try to maximize its control by limiting the discretion of the agent, this being possible, among other ways, by elaborating the mandate (substantively) or by making stricter the procedural requirements which the agent must respect.⁶¹

Article 22(1) of the CRMA offers an example of a procedural disagreement whereby Parliament tried to expand its role in the implementation of the Act. Parliament had proposed that the Commission share information on Union stocks for strategic raw materials with the European CRMs Board and with Parliament. The Council and Commission had proposed to share that information only with the Board, not with Parliament. In the final text, only the Board is entitled to receive the information. Of course, given the Parliament's observer status within the Board, it will have access to that information anyway.

In a similar spirit, on several occasions during the CRMA negotiations the European Parliament insisted on more stringent time limits on the exercise of delegated powers as compared to those proposed by the Commission. Such disagreements matter as time limits can be enforced by the CJEU.⁶² An example of a disagreement on time limits can be found in the CRMA's provisions on Strategic Projects, where Parliament had proposed that the European CRMs Board be obliged to issue its opinion on a proposed Strategic Project within 30 days of receipt. Commission and Council disagreed, and the final regulation does not contain any deadline.⁶³ Similarly, Parliament proposed to oblige the Commission to introduce rules on the calculation and verification of the environmental footprint of different critical raw materials by the end of 2025.

⁶¹ See here already Pollack (n 42) 27, distinguishing between *ex ante* administrative procedures and *ex post* oversight mechanisms as two types of control mechanisms whereby the principal aims to monitor and exercise control over the agent.

⁶² Specifically for time limits imposed on the Commission, Member States or other EU institutions could bring an action for failure to act if the Commission does not adopt an act within the window laid down in the Act. For an example, see Case T-521/14 *Sweden v Commission* ECLI:EU:T:2015:976.

⁶³ CRMA, art 7(6).

The final regulation does not contain this deadline, but it does require the Commission to take a preliminary step in this process by the end of 2026, that is, one year after the deadline proposed by Parliament.⁶⁴

An example of a disagreement on the substantive conditions attached to a delegation can be found in Annex IV of the CRMA. This annex contains the criteria by which the Commission is empowered to recognize the abovementioned national sustainability certification schemes. Parliament had proposed significantly more detailed certification requirements divided by specific environmental risk categories such as air pollution, water pollution, soil pollution and so forth. Despite a lack of Council and Commission support, Parliament's amendment was nonetheless withheld in the final text.⁶⁵ Again in the same vein, and as a result of a Council amendment, Article 6(6) of the CBAM substantively limits the Commission's discretion in defining the arrangements for the surrender of CBAM certificates to a greater extent than envisaged in the Commission's proposal.

5.4 The Continued Pluralization and Intergovernmentalization of the EU Executive

Both the CBAM and the CRMA negotiations show that when discussing delegation, it is important to be mindful that the Treaty-ordained agents (Commission and Council) are not the only options open to the legislator. By establishing decentralized agencies, the EU legislator has contributed to what the literature has referred to as a creeping 'pluralization' of the EU executive.⁶⁶ Where these new actors are less supranational than the default actor (the EU Commission), this pluralization typically goes hand in hand with intergovernmentalization. Both the CBAM and the CRMA fit within this broader trend. At the very least, they demonstrate that allocating executive powers to the Commission is not a self-evident decision, and that alternatives are seriously considered by Council and Parliament.

In the CBAM negotiations, Parliament unsuccessfully tried to establish a new agency-type body to administer the CBAM, while the CRMA effectively innovates by establishing the European CRMs Board. In recent years EU legislation has introduced several such bodies, the European Data Protection Board being a well-known example. However, the European CRMs Board innovates compared to other boards through its membership, which includes

⁶⁴ CRMA, arts 31(1) and (2).

⁶⁵ CRMA, annex IV, (2).

⁶⁶ See here eg, Herwig Hofmann and Alessandro Morini, 'The Pluralisation of EU Executive: Constitutional Aspects of "Agencification"' (2012) 37 *European Law Review* 419.

not only Member State representatives, but also Parliament as an observer and civil society actors if the Commission so wishes. As mentioned, the broadening of the membership of the Board is the result of Parliament's efforts. Neither Commission nor Council favoured involving Parliament, EU agencies and bodies or civil society actors in the Board's operations, let alone at the level of the Board's thematic sub-groups.

The final CRMA is a compromise: Parliament obtained permanent observer status within the Board,⁶⁷ whereas the European Defence Agency, the European Chemical Agency, the European Environmental Agency and the European External Action Service, as well as 'representatives of industry, especially small and medium sized enterprises, civil society, academia, trade unions local or regional authorities, third countries, overseas countries and territories', may, 'where appropriate', be invited by the Chair of the Board to attend meetings.⁶⁸ The Board is chaired by a representative of the Commission, which will thus be able to decide which agencies, bodies or civil society actors to invite.⁶⁹ Regardless, the presence of Parliament within the Board is an important feature as it enables the Parliament to have its voice heard not just within the legislative process leading up to the adoption of the CRMA, but also further downstream at the level of its implementation.

6. ASSESSING THE DELEGATION OF POWERS IN THE CBAM AND CRMA

When assessing the delegations in the two selected acts, a distinction should be made between an assessment in light of the constitutional framework, on the one hand, and an assessment of the propriety of the delegation choices to achieve the objectives of the legislative acts in question and of the Green Deal more generally, on the other hand.

6.1 Compliance with the Constitutional Framework

As regards compliance with the constitutional framework, most of the legislator's choices in the CBAM and the CRMA seem unproblematic. Of course, this is due in no small part to the flexibility of that framework. Nonetheless, some aspects of the resulting legislation raise questions. For example, it is difficult to see on what basis the delegation found in Article 26(7) CRMA, over which Council, Parliament and Commission held differing views in the

⁶⁷ CRMA, art 36(2).

⁶⁸ CRMA, art 36(3).

⁶⁹ CRMA, art 36(1).

trilogue, can fit in the implementing acts box. The provision empowers the Commission to specify which products have a ‘relevant critical raw materials recovery potential’. The Commission’s position in its initial proposal that this exercise of rule-making authority should have been discharged by means of a delegated act is more persuasive, as compiling such a list may significantly impact the scope of the CRMA and could thus be seen as ‘supplementing’ non-essential elements of the Act.

The important role foreseen for the European CRMs Board also requires further analysis. The Board will play an important role in the recognition of Strategic Projects. Strategic Projects under the CRMA are projects that will benefit from streamlined processing. The Commission will propose specific projects for approval. The Board will issue opinions on whether proposed projects meet the criteria for recognition set out in the CRMA (e.g. the project has to contribute to the security of supply).⁷⁰ The Commission must take the Board’s opinion into account before it takes a decision.⁷¹

At first sight, the process looks similar to a comitology procedure. There, too, the Commission adopts a draft on which a committee issues an opinion. There are, however, two important differences between the European CRMs Board on the one hand, and the comitology process on the other. First, as mentioned, the European CRMs Board’s membership differs from that of the comitology committees. In contrast to comitology committees, the European Parliament is a member of the European CRMs Board, albeit with an observer status (and thus no vote). Second, and arguably most importantly, the Board operates on the basis of consensus.⁷² This stands in contrast to comitology committees, which operate on the basis of reversed qualified majority voting whereby Member States can oppose a draft Commission implementing act. The CRMA does not make provision for decision-making by qualified majority, reversed or otherwise. As a consequence, the abovementioned consensus will be sought under the shadow of the *veto* rather than the shadow of the *vote*.⁷³

On the flipside, it should also be remembered that the European CRMs Board’s opinions are non-binding, whereas comitology opinions – at least those adopted under the examination procedure – are binding on the Commission. This does put the Commission in a stronger position than is the case within,

⁷⁰ CRMA, art 7(6) and art 6(1).

⁷¹ CRMA, art 7(9).

⁷² CRMA, art 36(10) provides that the ‘Board shall use its best endeavours to take decisions by means of consensus’.

⁷³ On the distinction between decision-making under the shadow of the vote and the shadow of the veto, see Joseph Weiler, ‘The Transformation of Europe’ (1991) 100 Yale Law Journal 2403, 2461.

for example, the trade defence context, where a qualified majority of Member States can torpedo a Commission draft. That said, within the Strategic Projects decision-making process under the CRMA, the Member State that would host the Strategic Project does hold a veto power over the Commission's decision to recognize a project.⁷⁴

While the European CRMs Board thus holds weaker cards than a comitology committee does under the examination procedure, the Strategic Projects process introduces a questionable decision-making procedure in the implementation of EU law. The Commission's decision to recognize a project as a Strategic Project is neither a delegated nor an implementing act. It is a *sui generis* decision adopted pursuant to a *sui generis* decision-making procedure. This raises questions about the EU legislator's ability to opt for alternative modes of executive rule-making to those set out in Articles 290 and 291 TFEU. As mentioned earlier, it is well established that the legislator can allocate implementing powers to agencies, despite the language of Article 291 TFEU suggesting that such powers can only be allocated at the EU level to the Commission (or Council). In some instances, the legislator can also allocate *sui generis* implementing powers to the Council. This is possible, in particular, where the implementing power could not be properly exercised by the Member States, as the Court held in the *Spain v Council* case.⁷⁵ It is not obvious, though, that opting out of Article 291 TFEU and the comitology process that accompanies it is permissible in the context of the CRMA's Strategic Projects chapter. After all, one could imagine a system whereby individual Member States hold the power to recognize Strategic Projects within their territories, which suggests the requirements set out in *Spain v Council* are not met.

6.2 Choices Not Made

In light of the overarching objective of the EU's Green Deal, it is also useful to reflect on the delegation choices not made and whether the constitutional framework would have allowed for more far-reaching empowerments, potentially offering more effective tools to reach the Green Deal's objectives. In this regard, the suggestion of the European Parliament to establish a CBAM authority would not have been problematic from the perspective of the *Short-selling* doctrine, since the powers which Parliament envisaged for the CBAM authority arguably were 'precisely delineated'.⁷⁶ What seemed more

⁷⁴ CRMA, art 7(8).

⁷⁵ See here Case C-521/15 *Kingdom of Spain v Council* ECLI:EU:C:2017:982.

⁷⁶ On the non-delegation doctrine following from *Short-selling*, see Merijn Chamon, 'Granting Powers to EU Decentralised Agencies, Three Years Following *Short-selling*' (2018) 18 ERA-Forum: scripta iuris europaei 597.

questionable, however, is the fact that Parliament proposed that the CBAM be not a proper decentralized agency but instead a *sui generis* body, to be established by the Commission.⁷⁷ Such instructions may seem innocuous, but they raise the question whether, by giving such instructions, the legislator does not interfere with the organizational autonomy of the Commission, which is itself protected by the Treaties.⁷⁸

As to the propriety of choosing a hybrid mechanism rather than the decentralized approach foreseen in the Commission's CBAM proposal and the centralized approach advocated by Parliament, there seems merit in the Commission's argument to get the CBAM up and running as soon as possible. However, following the review of the CBAM at the end of the transitional phase, it would seem more appropriate to move to a centralized system, which will require the Member States to make more resources available to the Commission to perform these tasks, which could in part be financed by the proceeds of the certificates. The main caveat here is, of course, that in light of its very purpose, a CBAM should only be a temporary mechanism.

A second issue relates to the scope of the CBAM. Differently from the ETS, the scope of which is defined by (a list of) economic sectors, that of the CBAM is determined by the types of goods imported (listed in Annexes I and II) and the exporting countries (the exempted ones being listed in Annex III). A delegated power was only foreseen for the Commission to update the latter, while Annexes I and II will be reviewed at the conclusion of the transitional phase, when the Commission may propose to extend the scope of the goods covered. The CBAM Regulation then only provides a very limited power for the Commission to amend Annex I to add 'slightly modified products' (i.e. goods that are Annex I goods but slightly modified so that they would escape the CBAM) where such products are imported to circumvent the application of the CBAM.

Could the legislator not have delegated a general power to the Commission to amend Annexes I and II to include further goods that are at risk of carbon leakage? This was envisaged by the Parliament but apparently considered by the Council Legal Service to touch on essential elements. Whether that is really so is debatable, however, as long as the legislator lays down the principle that only goods for which there is a risk of carbon leakage must be covered and when the legislator defines when such a risk can be said to exist. The risk of carbon leakage is as such already defined in Article 10b(1) of the ETS Directive, because under the ETS the industries faced with that risk are

⁷⁷ See line 235 of the four-column document of 2 December 2022, NEGO_CT(2021)0214.

⁷⁸ TEU, art 17(3).

granted a set of free allowances.⁷⁹ An empowerment in the CBAM to identify goods presenting a risk of carbon leakage would then mirror the Commission's empowerment under the ETS to identify the sectors at risk of carbon leakage.⁸⁰ Such an approach would offer greater guarantees that the goods covered by the CBAM are determined based on technical and scientific grounds, reducing the risk that they become the subject of political negotiations (at the end of the transitional phase).

With regard to the CRMA, the path not taken is that of the establishment of a dedicated Critical Raw Materials Fund under the maximalist policy scenario mentioned earlier. Such a Fund would have been managed by its own 'governance structure'.⁸¹ The details of this structure have not been developed as the Commission chose not to pursue this scenario in its CRMA proposal. Regarding the capability of the CRMA to achieve its stated objectives, particularly that of ensuring a sustainable supply of critical raw materials, a well-funded entity with substantial financial resources capable of providing loans, equity and grants to projects at all stages of the CRM value chain would have been a transformative instrument. As the Commission itself pointed out in its impact assessment, such a Fund would have been able to provide more and riskier financing, and could also be less bound by profitability considerations and operate more freely as compared to a funding structure whereby public monies are used to leverage private investment.

Apart from the Fund, several key amendments proposed during the trilogues did not make it into the final CRMA text. For example, Parliament suggested obliging the Commission to include sustainability measures in the 'Strategic Partnerships' with raw material-rich countries. This, along with the proposal to empower the Commission to adopt a second-tier list of secondary strategic raw materials, was not included. Additionally, the amendment to consider human rights records in Strategic Project applications did not make it into the final regulation. These exclusions suggest that policy decisions, rather than legal constraints, influenced the final text.

⁷⁹ The introduction of CBAM allows these free allowances to be phased out. See art 10a(1a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32 ('ETS Directive').

⁸⁰ See ETS Directive, art 10b(5). The Commission identified these sectors in Commission Delegated Decision 2019/708 supplementing Directive 2003/87/EC of the European Parliament and of the Council concerning the determination of sectors and subsectors deemed at risk of carbon leakage for the period 2021 to 2030 [2019] OJ L120/20.

⁸¹ See the CRMA Impact Assessment (n 48) 33.

6.3 The Constitutional Framework: Helping or Hindering the Achievement of Green Deal Goals?

The second question which this chapter set out to address was the question whether the constitutional framework governing the delegation of powers in the EU is ‘fit for purpose’, or whether the ambitious objectives of the Green Deal show that it hampers the EU in realizing its sustainability goals. The above discussion highlights two points. First, the discussion of the framework and the actual choices by the legislator in the CBAM and CRMA show how flexible the constitutional framework is and how different possibilities for more far-reaching empowerments were not relied upon. This suggests that the framework is fit for purpose and that if instruments like the CBAM and CRMA fail to allow the EU to realize the Green Deal’s objectives, this would not be because the constitutional framework governing delegation is too restrictive.

On the other hand, the previous section has also highlighted how the legislator has made some choices which appear questionable in light of the constitutional framework on delegation. It is important to stress however that this does not automatically equate to a finding that that framework is too restrictive. In essence, this would only be the case if those specific choices, such as the procedure to identify Strategic Projects under the CRMA, are necessary prerequisites for achieving a sustainable transition. Instead, it seems that Green Deal instruments, despite the pressing challenges presented to the EU, are not immune from the typical political power struggles and institutional turf wars. Those instances are then not situations in which the constitutional framework is in tension with the Green Deal’s ambitions. Instead, they show that the EU legislator at times chose an approach, for instance when defining the decision-making rules for the CRMs Board, that stands in tension with the constitutional framework, even though other equally effective options that align better with the constitutional framework were available.

The main outstanding question, then, is whether instruments such as the CBAM and CRMA will realize their objectives and, if not, whether the deficiencies in these acts can be remedied by further exploiting the remaining scope, under EU constitutional law, to resort to more significant delegated empowerments.

7. CONCLUSION

The analysis of the CBAM and CRMA highlights how the EU legislator has navigated the constraints of the EU’s constitutional framework on delegation in its efforts to pursue an ambitious environmental agenda. The analysis made clear that, while the framework is indeed flexible and seems fit for purpose, the choices made by the legislator often reflect political negotiations rather than

legal limitations. The CBAM's hybrid mechanism and the CRMA's absence of a dedicated fund underscore the need for pragmatic approaches to immediate implementation. However, a shift towards a centralized CBAM system post-transitional phase and the potential for more comprehensive delegated powers could enhance the efficacy of these instruments, since centralization arguably ensures a more uniform (and thus more effective and efficient) implementation. Ultimately, the success of the CBAM and CRMA will depend on exploiting the constitutional framework's remaining scope to foster significant delegated empowerments, thereby ensuring that political and institutional dynamics do not undermine the EU's Green Deal ambitions. At the same time, it is crucial that any significant empowerments include effective accountability mechanisms to maintain legitimate decision-making. The constitutional framework can support these requirements to an important extent.

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1

EU as a Global Digital Actor

I. Overview: The EU The Internationalist:
Becoming a Global Data Actor

In any discussion of the EU as a global actor it is important to remember that the EU appears as a distinctively consistent 'internationalist' in a world recently shifting towards populism and localism. Data institutionalisation can arguably now be understood to be a central part of this global agenda, as driving convergence in data protection laws and practices with global reach and effects of a once proclaimed law-free space, explicitly.¹ The success of the EU as a global data actor is argued here to have largely been constructed through the institutionalisation of data.

Moving towards international standards may inevitably involve deference to technocratic processes, as those of the EU amply demonstrate (it is arguably a specialisation of the EU).² However, many of those framing the discourse on global data flow increasingly single out EU data protection law as an impediment to digital trade.³ Proponents of global data flows label the EU approach to personal data protection as 'overly restrictive', 'onerous', and 'protectionist'. Yet this presupposes a very specific view of the relationship between data and trade.⁴ The 'economisation of human rights' other than privacy leads to human rights being instrumentalised for economic ends such as market access and creates tensions of this nature. The GDPR has been said to 'create[s] barriers to cross-border data transfers to such an extent that they are effectively data localization requirements'.⁵ The hypothetical consequences for the EU, by frightening estimations, could lead

to a 3.9 per cent loss in the EU's GDP, or up to \$193 billion in absolute numbers.⁶ It is probably also fair to say that the global debate on privacy has had an upward trajectory, towards the European discourses. The world's social media giants now argue for an EU GDPR and co-locate themselves strategically between Europe and the US and subject themselves to significant regulation. However, it seems fair to say that such views as to data localisation are important to bear in mind in a world of geo-blocking and internet divisions based on borders. More practically, there are many assertions of the unsuitability of the legal instruments used to protect privacy and grapple with surveillance and commercial concerns.⁷ The place of setting and context is a broader one also. From a geopolitical perspective, many key questions arise, for instance, within the context of the recent so-called US-China Silicon Curtain or tech war.⁸ It raises the question of who was caught in the middle? The G7 countries no longer form a majority of the world's GDP and a significant split amongst G20 countries exists as to their relationship with China; the power balance of the global economy has never been more complex. The EU was also caught in the midst of one of the most complex tech wars ever, relating to the place of 5G, the future of many ICT industries and the place of digitisation in trade, arguably exacerbating the lack of agreement on digital trade.

The GDPR is highly significant because it establishes a coherent and consistent data protection framework by offering a uniform set of substantive rules that are enforced by a network structure of national data protection authorities, who cooperation with each other under the coordination of the European Data Protection Board (EDPB).⁹ The resulting architecture is a complex system of bodies at EU and national level who are charged with responsibility for the enforcement of the rules in the GDPR. The sophistication and complexity of this regime is exacerbated by many of the world's social media networks having their European headquarters in

¹ Yakovleva and Irton, (n 3).

² eg M Kaminski, 'Why Trade Is Not the Place for the EU to Negotiate Privacy' (*Internet Policy Review*, 23 January 2015), <https://policyreview.info/articles/news/why-trade-not-place-eu-negotiate-privacy/354> accessed 23 February 2022.

³ See also M Lewis, 'Criminalizing China' (2020) 111 *Journal of Criminal Law and Criminology* 145, on the China Initiative of the US Department of Justice launched in 2018 to counter national security threats emanating from China.

⁴ 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 (GDPR) [2016] OJ L119/1, is a significant attempt on the part of EU law to modernise its approach to data protection and to engage in regulatory coherence in the aftermath of landmark CJEU decisions. The new Regulation is perceived to mark a significant extension of the extra territorial application of EU law with respect to EU and non-EU established companies pursuant to Art 3 thereof and thereby refining the landmark developments begun by the CJEU in Case-131/12, *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317. National authorities had not been satisfied with the pre-existing regime precisely because it had resulted in 'ad hoc transnational enforcement'. The GDPR is thus understood to have generated a process of 'Europeanisation' whereby there is a significant shift from decentralised application of data protection law to centralised enforcement.

⁵ European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' COM(2017) 07 final; E Fahy, 'The Global Dimension of the EU's ATIS: On Internal Transparency and External Practice' (2014) Jean Monnet Working Paper Series 2014/4. See also JP Barlow, 'A Declaration of the Independence of Cyberspace' (1996), www.eff.org/cyberspace-independence accessed 23 February 2022.

⁶ A Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press, 2013) 189.

⁷ Yakovleva and K Irton, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) *International Data Privacy Law* 201.

⁸ Ibid; MF Ferracane et al, 'ECIPE Digital Trade Restrictiveness Survey Index' (ECIPE, 2018), https://ecipe.org/wp-content/uploads/2018/05/DITRI_FINAL.pdf accessed 23 February 2022.

⁹ M Sharma, 'Approaching Data Localization' (*Medium*, 10 June 2019), <https://medium.com/@madhavsharma/approaching-data-localization-c90282cb975> accessed 23 February 2022.

Ireland, one of the smallest member states of the EU, with a data protection commission with *de facto* and *de jure* capacity to regulate all of Europe – and, by extension of law, many global social media and tech companies. The scale of the resources and capacity to do is a matter for elsewhere. However, the institutional design of this system and its autonomy has already shown teething problems – as well as evolution and growth: the EDPB adopted its first Article 65 decision in November 2020 with respect to a dispute between the Irish Data Protection Commission and many other DPAs on a draft decision of the DPC concerning Twitter International Company breaching certain GDPR provisions. The respective places of enforcement, oversight, consistency and accountability are to the fore here. In its Grand Chamber decisions, the CJEU has developed significant case law to permit exceptions to the place of Ireland as lead supervisory authority.¹⁰ The effects of such case law remain to be seen. The CJEU has re-emphasised the one-stop-shop in *Facebook Ireland Limited and Others v Gegevensbeschermingsautoriteit*¹¹ but is aware of the unevenness of resources and alive to risk of institutional forum shopping against that background.¹² However, it is clear that the dense institutional design and autonomy of individual actors furthered by the GDPR continues to be a core metric of its operation and a hallmark of EU regulatory capture of data and global reach.

Chapter 1 contains the following sections: (II) EU global reach over the web; (III) global reach through large-scale data flow regimes; (IV) global alternatives to the GDPR; (V) the EU as a soft data localisation actor; (VI) the EU the emerging digital sovereign; (VII) global capture of Big Tech in data spaces and the DMA/DSA; (VIII) the EU's emerging architectural infrastructure on AI; and (IX) Conclusions.

II. EU Global Reach Over the Web: An Architecture of Scale

Country after country around the world replicates the EU's GDPR.¹³ Some struggle with its force and bureaucracy but ultimately comply.¹⁴ However, many of the

most extraordinary developments of our times on jurisdictional issues, eg transatlantic 'showdowns' over the US CLOUD Act or liability for intermediaries, show international law-making mediated by major multinational cooperation.¹⁵ Evidence indicates that, for example, Facebook was concerned about a possible change in the liability for intermediaries under the Digital Single Market back in 2015.¹⁶ The E-Commerce Directive governing social media platforms does not hold companies such as Facebook liable for illegal content posted by their users.¹⁷ However, companies must take down illegal content once it has been flagged as such. In 2016, Facebook lobbied that additional liability would be a barrier to Facebook and the new business models on the platform. These efforts were ultimately initially successful, as the E-Commerce Directive was not re-opened and Facebook became a repeat player in lobbying on EU law.¹⁸ Significant regulatory shifts do not look likely under the EU's draft Digital Services Act (DSA), discussed below in further detail.¹⁹ Instead, the 20-year-old legal infrastructure of the E-Commerce Directive remains mostly in place. The Digital Services Act (DSA) is proposed as a regulation rather than a directive, and does not repeal the E-Commerce Directive but builds on it, including the internal market principle found in Article 3 of the E-Commerce Directive. It provides for several types of online intermediary provider and a very broad range of exemptions. It allows intermediaries to continue to benefit from comprehensive liability exemptions so, as a result, will not be held liable for user content. The DSA provides for new due

¹⁰ See Case C-645/19, *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit*, EU:C:2021:483.

¹¹ *Ibid.*

¹² L. Woods, 'Who Has Jurisdiction over Facebook Ireland? The CJEU Rules on the GDPR "One Stop Shop" (EU Law Analysis, 16 June 2021), <http://eulawanalysis.blogspot.com/2021/06/who-has-jurisdiction-over-facebook.html> accessed 24 February 2022.

¹³ eg Thailand, China, California. See A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

¹⁴ F. Lusca Bordin, 'Is the EU Engaging in Impermissible Indirect Regulation of UN Action? Controversies over the GDPR (EJIL: Talk!, 11 December 2020) www.ejiltalk.org/is-the-eu-engaging-in-impermissible-indirect-regulation-of-un-action-controversies-over-the-general-data-protection-regulation/ accessed 24 February 2022.

¹⁵ J. Daskal, 'Microsoft Ireland, the CLOUD Act, and International Law Making 2.0' (2018) 17 *Stanford Law Review Online*, 9.

¹⁶ L. Kayali, 'Inside Facebook's Fight against European Regulation' (*Politico*, 23 January 2019), www.politico.eu/article/inside-story-facebook-fight-against-european-regulation/ accessed 31 December 2021. Facebook Inc has now changed its name to 'Meta'.

¹⁷ *Ibid.*

¹⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

¹⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM (2020) 825 final; Cf. European Commission, 'Proposal for a Regulation of the European Parliament and Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final; European Commission, 'Press remarks by President von der Leyen on the eu/commission/presscorner/detail/en/speech_20_294 accessed 24 February 2022; cf. C. Schmon and K. Gullio, 'European Commission's Proposed Digital Services Act Got Several Things Right, But Improvements Are Necessary to Put Users in Control' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/european-commissions-proposed-regulations-require-platforms-let-users-appeal accessed 24 February 2022; A. de Streel et al., 'Digital Markets Act: Making Economic Upgrades to Platforms Fit for the Digital Age' (2020) CERRE Report, https://cerre.eu/wp-content/uploads/2020/11/CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age-Full-report-December2020.pdf accessed 24 February 2022; M. Schnake, 'EU Needs to Think Bigger than Big Tech' (*Tech Monitor*, 27 November 2020), <https://techmonitor.ai/interviews/mariete-schnake-eu-think-bigger-than-big-tech> accessed 24 February 2022.

diligence obligations for flagging illegal content for all providers of intermediary services, and establishes special type and size-oriented obligations for online platforms, including the very large ones.²⁰ The largest platforms can be fined up to six per cent of their annual revenue for violating rules about hate speech and the sale of illegal goods. At the time of writing, significant developments were ongoing as to eg improving the criteria for the designation of gatekeepers but clearly reach here is of much significance.

The case law of the CJEU also displays an increasingly reluctant approach to shielding online intermediaries with the immunities of the E-Commerce Directive, though arguably framed more 'glamorously'. Recent case law²¹ offers a striking insight into the place of Facebook in the intricate regulatory jigsaw of EU law, in litigation instigated by an Austrian parliamentarian who had asked Facebook to delete a comment that was ultimately found by Austrian courts to be defamatory against her reputation. She had demanded that Facebook delete the post but in a geographically segmented way, including not just the specific post but also identical or equivalent posts. The novelty of the case is that one week previously the Court of Justice (Grand Chamber) had limited the reach of the infamous 'right to be forgotten' developed by the CJEU in 2014 in Case-131/12 *Google Spain*, allowing individuals to request search engines to remove links containing personal information from web results appearing under searches for their names.²² In Case C-507/17 the CJEU in *Google v CNIL* were confronted with a notice served on Google by the French National Data Protection Authority for links to web pages to be removed from the list of results displayed following a search conducted to apply for removal of all the search engine's domain name extensions.²³ The CNIL regarded Google's geo-blocking proposal as insufficient. The CJEU held that a search engine operator could not, under current EU law, be required to de-reference on all versions of its search engine.²⁴ Rather, the internet was a global network without borders.²⁵ Many suggested that *Google v CNIL* would de jure predict the result in *Eva Glawischnig-Piesczek*, and that the latter case could conceivably trigger a global assault on freedom of speech.²⁶ However, this is arguably not the case. The Austrian Supreme Court in *Eva Glawischnig-Piesczek* asked the CJEU to determine whether the wording of Article 15(1) of

Directive 2000/31 covered removal not just of illegal or defamatory information but also other information: (1) worldwide; (2) in EU Member States; (3) of the relevant worldwide user; or (4) of the user in the circumstances. Although willing to consider the extraterritorial effects of EU law, Advocate General Szpunar in his Opinion said that the proceedings did not come within the scope of EU law. He held that Directive 2000/31 had to be interpreted as meaning that it did not preclude a host provider from being ordered to remove information characterised as illegal. In contrast, the CJEU in its decision found that although Facebook was not liable for the disparaging comments that had been posted, it had an obligation to remove comments after they were found to be defamatory. It held that, in view of the global nature of e-commerce, the Directive did not preclude injunctive measures with worldwide effect. The Court found that the lower court had jurisdiction to require the host provider to block access to the information stored. It also held, somewhat cryptically, that global injunctions would be limited 'by the relevant international law', possibly making reference here to issues of comity.²⁷

Case C-18/18 exposes a considerable gap between the Court's decision and the Opinion of the Advocate General in the case, who was also the Advocate General in the recent *Google v CNIL* decision. This could be indicative of significant disputes internally in the Court. Arguably, however, the most significant difference between the two cases relates to the role of the latter case as concerning a public figure and political speech. For some, the case gives the green light for global orders against the thrust of the E-Commerce Directive and assumes a level of technological sophistication and specificity that does not exist. What must Facebook (the overarching owner of which has been renamed as Meta, but the Facebook platform name remains unchanged) do? Take down a particular post globally and look for other additional posts?²⁸ Others argue that it represents an important shift in the burden of proving legal exceptions to 'Big Tech'.²⁹ Or is there a shift in power inside the Court room?³⁰ Such cases expose interesting power dynamics, in which EU law continuously intervenes against Big Tech in the realm of data but arguably only goes so far – just far enough for EU institutions to fairly assert that they have considerable ongoing authority over it through the institutionalisation of the web. Facebook has ultimately shown itself to be a Europeanist, as it ostensibly now

²⁰ M. Effert et al, 'Taming the Giants: The DMA/DSA Package' (2021) 58 *Common Market Law Review* 987.

²¹ Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, EU:C:2019:821.

²² *Google Spain* (n 9).

²³ Case C-507/17, *Google LLC v Commission nationale de l'information et des libertés* (CNIL), EU:C:2019:772.

²⁴ *Ibid* para 72.

²⁵ *Ibid* para 56.

²⁶ J. Daskal and K. Klonick 'When a Politician Is Called a "Lousy Traitor", Should Facebook Censor It?' (New York Times, 27 June 2019), www.nytimes.com/2019/06/27/opinion/facebook-censorship-speech-law.html accessed 24 February 2022.

²⁷ *Eva Glawischnig-Piesczek* (n 21) para 53. See A. Keane Woods, 'Litigating Data Sovereignty' (2018) 128 *Yale Law Journal* 328.

²⁸ J. Daskal, 'A European Court Decision May Usher in Global Censorship' (State, 3 October 2019), <https://state.com/technology/2019/10/european-court-justice-glawischnig-piesczek-facebook-censorship.html> accessed 24 February 2022.

²⁹ D. Desierto, 'Human Rights Regulation in the Tech Sector? The European Court of Justice's Facebook Decision and California's AB5 Gig Economy Bill' (*EJIL:Talk!*, 8 October 2019), www.ejiltalk.org/human-rights-regulation-in-the-tech-sector-the-european-court-of-justices-facebook-decision-and-californias-ab5-gig-economy-bill/ accessed 24 February 2022.

³⁰ Daskal, 'A European Court Decision May Usher in Global Censorship' (n 28).

adheres to significant amounts of EU law, eg the GDPR and voluntary EU codes on hate speech.³¹ On the face of it, this is no surprise: 250 million users in Europe contribute 25 per cent of Facebook's global revenue. However, although Facebook stated that it would apply the GDPR in spirit across the globe, in practice matters were different. The company made internal logistical changes to ensure that the GDPR would not circumscribe the majority of its operations, 'quietly' moving 1.5 billion user files from Ireland to the US in April 2018 so that they would hence be governed by US privacy law. Similarly, Google swiftly moved millions of UK Google users to US 'control' post-Brexit in 2020, to reduce the impact of the GDPR and eliminate the possibility of any of those users filing claims in the Irish courts.³² However, Facebook purportedly remains a 'strong' advocate of EU law, at least as regards certain aspects of data law, even to the point of increasingly advocating for the GDPR to be the global standard, in the absence of any truly global equivalent. It has helped, along with Apple, Microsoft and Google, to create a position where concern for privacy has the same canonical status as freedom of speech does in the US. Privacy has been 'nudged' and is now being touted as Europe's 'First Amendment'.³³ It has also fostered debates and developments on a US Federal Privacy law, pre-empting developments in Californian law.³⁴ Facebook continues to object to intense efforts on the part of EU regulators to subject it to EU law and to demonstrate EU law's authority over a vast range of evolving regulatory domains. This is both a direct and indirect call for institutionalisation of immense significance.

III. EU Global Reach Through Large-Scale Data Flow Regimes: On Adequacy

Global reach is how pop music, fashion, sport and art achieve critical mass and acclaim. EU law is no different. The GDPR is particularly relevant to the future of global digital trade because it leaves countries that want to access a market of 400 million consumers with no alternative. Such countries must update their

domestic laws to comply with the EU regime or enter into specific individual regimes with the EU.³⁵ The EU now has data transfer regimes and flows with third countries which count as some of the largest on the globe – eg the EU-US Privacy Shield, 2016, covering over a billion citizens; the EU-Japan Data Adequacy Decision, 2018, relating to the world's largest safe data flow area between the EU and Japan.³⁶ These regimes evolved through somewhat different legal processes but ultimately hinge upon a process of negotiating convergence. The European Commission has the power to determine, on the basis of Article 45 of the GDPR, whether a country outside the EU offers an adequate level of data protection. In doing so, it examines wider factors such as the country's judicial system, the rule of law and its national security policies. The overall system for data protection must be deemed 'essentially equivalent' to the EU's before a positive decision will be made. The decision is periodically reviewed by the European Commission and it can be revoked at any time. While the European Commission has never revoked an adequacy decision following a review, the CJEU has. It is a complex practice but also an interesting one, where the EU's institutionalisation practices have dominated and where it has had a significant impact on third country partners, sometimes beyond the scope of what was anticipated.

The concept of an 'adequate' level of protection has been significantly developed by the CJEU in Case C-263/14, *Schrems v Data Protection Commissioner*, relating to arrangements with the US, where 'partial' adequacy decisions exist involving self-certification practices, similar to the arrangements in place with Canada. These adequacy decisions do not cover data exchanges in the law enforcement sector, which are governed by the 'Police Directive' (Article 36 of Directive (EU) 2016/680). The notion of adequacy has been put under considerable strain during the Covid-19 crisis, where many key EU partners with adequacy decisions have adopted measures that impinge on privacy or that strengthen surveillance.³⁷

Adequacy has now also been subjected to extraordinary pressures by the CJEU decision in *Schrems II*, discussed in particular in Chapter 4 below. There, the Court has added layers of complexity to the possibility of truly free flows of data and has presented significant challenges to business and data protection authorities. The capacity of the CJEU to 'insert' itself into the adequacy procedure and upset and overturn adequacy decisions made by the European Commission – reached after immense negotiations – leaves international partners at the mercy of extremely stringent European values. Adequacy in the time of Covid-19 posed many additional challenges, as the activities, freedom and essential health data of all citizens

³¹ Bradford (n 13); GDPR.

³² D Ingram, 'Exclusive: Facebook to Put 1.5 Billion Users out of Reach of New EU Privacy Law' (*Reuters*, 19 April 2018), www.reuters.com/article/us-facebook-privacy-eu-exclusive-idUSKBN1HQ00P accessed 24 February 2022; 'Google Moves UK User Data to US to Avert Brexit Risks' (*Financial Times*, 20 February 2020), www.ft.com/content/13565b66-53fb-11ea-90ad-25e377c0eef1 accessed 24 February 2022. Africa, Asia, Australia and Latin American are governed by terms of service issued by the company's international headquarters in Ireland: see S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, 2019) Ch 17.

³³ B Perkova, 'Privacy as Europe's First Amendment' (2019) 25 *European Law Journal* 140.

³⁴ eg C Kerry et al, 'Bridging the Gaps: A Path Forward to Federal Privacy Legislation' (2020), www.brookings.edu/wp-content/uploads/2020/06/Bridging-the-gaps_a-path-forward-to-federal-privacy-legislation.pdf accessed 24 February 2022.

³⁵ P Sauvé and M Sopranà, 'The Evolution of the EU Digital Trade Policy' in M Hahn and G Van der Lo0 (eds), *Law and Practice of the Common Commercial Policy* (Brill Nijhoff, 2020) 298–99.

³⁶ See S Stefano, 'The EU as a Global Standard Setting Actor: The Case of Data Transfers to Third Countries' in E Carpanelli and N Lazerini (eds), *Use and Misuse of New Technologies* (Springer, 2019).

³⁷ C Docksey, 'The Coronavirus Crisis and EU Adequacy Decisions for Data Transfers' (*European Law Blog*, 3 April 2020), <https://europeanlawblog.eu/2020/04/03/the-coronavirus-crisis-and-eu-adequacy-decisions-for-data-transfers/> accessed 24 February 2022.

globally have become an everyday part of life in ways that could not have previously been imagined. The time limitations on adequacy decisions, and the fact that they are capable of being withdrawn, are also of much concern because of their possible impact on partners. Whether EU data protection standards are relevant to data-gathering activities carried out in third countries to combat Covid-19 remains to be seen, not least in those countries who are considered to be handling the crisis most effectively. It is clear that there is an equivocality at root here which is difficult to capture – forcing the world to accept high standards and possibly divorcing Europe from lesser global standards of protection.

The EU's data adequacy system is ultimately highly politicised and institutionalised, as the CJEU has inserted itself into the adequacy process, institutionalising global data flows like no other process, in its extraordinary interventions in its landmark decisions in *Schrems I* and *II* relating to the EU-US Privacy Shield and previous Safe Harbour Agreement.³⁸ This means that data flow agreements are politicised but also heavily legalised and have autonomously generated a significant jurisprudence and analytical outline. These processes self-evidently present themselves as forms of institutionalisation and have failed because of weak institutionalisation (eg in *Schrems II* where the Ombudsman was found by the CJEU to be insufficiently robust and independent in the EU-US regime). The EU's approach to data flows was originally unilateral and 'treaty-light' in its locus and is now inserted into provisions of its trade agreements in much detail, eg the EU-UK Trade and Cooperation Agreement (TCA), which has significantly evolved its institutional design. These global data flows are subject to layers of bureaucratisation and convergence requirements, which generate significant forms of institutional interaction.

Some contend that the European Commission 'cloaks efforts to promote the spread of EU law in the language of encouraging third countries and international organisations to adopt strong data protection standards.'³⁹ However, this promotes a rather skewed vision of a process that is an evolution of convergence. The institutional configurations of this transfer of data matter considerably. The EU's data regimes vary in scale and complexity and very much in terms of institutional design. A turn to institutions and deeper forms of institutional oversight, accountability and legitimisation is regarded as 'European' or 'EU-centric' and differs substantially from US and Asian models of looser accountability and oversight.⁴⁰ The EU-US Privacy Shield came into force in 2017, as a legal instrument intended to replace the US Safe Harbour Agreement, the voluntary self-certification system with public enforcement by the US FTC, which requires US companies to treat data

on EU citizens as if the data were physically in Europe.⁴¹ As further developed in Chapter 4, it specifically addresses the concerns about data collection and privacy that arose in the case of *Schrems I*.⁴² In 2018, the European Parliament threatened to vote for suspension of the Privacy Shield unless considerable changes were made, to comply with EU data protection rules on clarity on data control, remedies and oversight. It remains the subject of much scrutiny and litigation.⁴³ The CJEU ultimately struck down the Privacy Shield in *Schrems II*, drawing attention to its weakly institutionalised oversight and US surveillance laws.⁴⁴ The development of a Trans-Atlantic Privacy Framework Agreement comprises a court and robust independent scrutiny mechanisms. Will the mechanisms developed after the decision be understood as institutionalisation of EU-US relations?

Other regimes are important too: the US regime is not in fact the only large-scale regime of significance. In 2018, the EU and Japan agreed to recognise each other's data protection systems as 'equivalent', to allow data to flow safely between the EU and Japan.⁴⁵ The EU maintains that its mutual adequacy arrangement will create the world's largest area of safe transfers of data based on a high level of protection for personal data and also complement the EU-Japan Economic Partnership Agreement (EPA), though not a leading innovation in trade terms.⁴⁶ It is thus another significant global endeavour, ostensibly creating global reach. The instruments surveyed now constitute some of the broadest and increasingly important global legal instruments adopted, with enormous regulatory reach across the Atlantic and global territory, literally and metaphorically, and show the scale of the EU's intent. Substantial critique has been leveled against the EU-Japan data adequacy agreement for its lack of both institutionalisation and transparency.⁴⁷ Countries 'closest' to the EU in terms of agreements reached often have partial adequacy decisions (eg EU-US). The EU-Japan agreement is heralded as one of the most far-reaching of all time in terms of area *qua* adequacy decision. What forms of checks and balances are appropriate and sufficient of this space?

⁴¹ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (notified under Document C (2016) 4176) [2016] OJ L207/1.

⁴² *Schrems I* (n 38).

⁴³ Civil Liberties MEPs Want EU-US Privacy Shield Suspended by September (Euractiv, June 2018), www.euractiv.com/section/data-protection/news/civil-liberties-meps-want-eu-us-privacy-shield-suspended-by-september/ accessed 24 February 2022.

⁴⁴ *Schrems II* (n 38).

⁴⁵ Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA) [2018] OJ L330/3; EU-Japan Adequacy Decision: Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information (EU-Japan Adequacy Decision) [2019] OJ L 76/1.

⁴⁶ H Suzuki, 'The New Politics of Trade: EU-Japan' (2017) 39 *Journal of European Integration* 875.

⁴⁷ M Bart and K Irton, 'The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun' (2017) Amsterdam Centre for Information Law Institute Working Paper, www.ivri.nl/publicaties/download/Transfer-of-personal-data-to-the-land-of-the-rising-sun-FINAL.pdf accessed 24 February 2022.

³⁸ Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, EU:C:2015:650 (*Schrems I*) and Case C-311/18, *Facebook Ireland v Schrems*, EU:C:2020:559 (*Schrems II*).

³⁹ C Kune, 'The Internet and the Global Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press, 2019) 112, 137.

⁴⁰ P Schwartz, 'The EU-US Privacy Collision: A Turn to Institutions and Procedures' (2013) 126 *Harvard Law Review* 1966.

How can the concerns of civil society be abated? What evidence is there of 'learning' in institutional design? What role is given to civil society in the development of initiatives to abate concerns? And what about regimes that appear to fail to enforce any theoretical rights?

The EU-Japan adequacy decision was also said to complement the EU-Japan EPA.⁴⁸ However, it has been criticised for the ease with which Japan received the decision relative to its capacity to satisfy a stricter view of equivalence, and so the politicisation of the process has come to the fore. While the EU is typically described as a global actor in trade, the EU-Japan trade negotiations and the parallel data adequacy negotiations provide a setting to study how the EU actorness in data has developed alongside its actorness in trade.

China is an extraordinary potential partner for the EU. It has adopted EU law GDPR principles and relevant case law into its recent cybersecurity law, yet it severely restricts the regulation of data and appears to constitute a form of reverse Brussels Effect. An adequacy decision with China seems increasingly unlikely and improbable. It is only recently, after years of dialogue, that China is beginning to engage with the EU in trade in a legalistic sense. China has notably for years only engaged with individual Member States on law enforcement. This sits against a broader backdrop of many EU Member States engaging with China's Belt and Road Initiative (BRI) whilst the EU was taking part in rounds of negotiations with China on an investment agreement; this is considered further in Chapter 6.

Nonetheless, the reviews of all EU adequacy decisions planned in 2022, of all 14 to date, including high-profile decisions with the UK and Korea in 2021, make this likely to become an extraordinary period of reflection on the future of convergence with EU values and the institutional design structures of the adequacy process itself.

IV. Global Alternatives to the GDPR Lack Institutionalisation

As human rights go, privacy is relatively new; Samuel Warren and Louis Brandeis were the first to advance the notion that privacy is a right deserving of legal protection.⁴⁹ Privacy is distinctive among the core civil and political rights, because it was enshrined in international law before it was comprehensively guaranteed by any domestic constitutional system.⁵⁰ Prior to the adoption of the Universal

⁴⁸ Suzuki (n 46).

⁴⁹ S Warren and L Brandeis, 'The Right to Privacy' (1980) 4 *Harvard Law Review* 193.

⁵⁰ S Schulhofer, 'An International Right to Privacy? Be Careful What You Wish For' (2016) 14 *International Journal of Constitutional Law* 238; V Krishnamurthy, 'A Tale of Two Privacy Laws: Law Unbound 26; D Cole and F Fabbri, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' (2016) 14 *International Journal of Constitutional Law* 220.

Declaration of Human Rights (UDHR) in 1948, a tiny number of domestic legal systems had only protected certain aspects of what we now consider the right to privacy.⁵¹ The *travaux préparatoires* of the UDHR, the ICCPR, and the European Convention on Human Rights indicate that the right to privacy was included as an afterthought. Some illumination of the meaning of the right to privacy enshrined in Article 17 of the ICCPR may be found in General Comment 16, which the UN Human Rights Committee adopted in 1988 and which recognises that the right to privacy 'is required to be guaranteed against all [arbitrary or unlawful] interferences and attacks whether they emanate from State authorities or from natural or legal persons'.

As Krishnamurthy states,

the GDPR certainly provides the strongest privacy protections of any law in the world today for those matters within its material scope. No comparable law endows individuals [...] with such strong rights over data relating to them, and no other law imposes such strong conditions on the collection and use of personal data by private- and public-sector entities [...]. This is doubtless why privacy campaigners around the world have held up the GDPR as a model that their own jurisdictions should emulate.⁵²

However, it is 'neither sufficient on its own to comprehensively protect the right to privacy, nor a necessary means for states to meet their obligations under Article 17 of the ICCPR'.⁵³ Arguably, other international standards such as the Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR) could become geographically more significant in the advent of broader membership, particularly from larger jurisdictions, such as the UK post-Brexit, if it joins the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) successfully. The 'first-mover' advantage of the EU in data regulation is arguably frequently over-stated as to its reach – data privacy comprises only one specific facet or contour thereof. Digital trade is frequently omitted from this analytical rubric yet is the site of significant developments as the EU attempts to evolve its global actorness into trade agreements.

In *The Brussels Effect: How the European Union Rules the World*, Bradford describes how EU regulations impact standards around the world through the process of unilateral regulatory globalisation.⁵⁴ There is a significant challenge in formulating EU global action in law and its effects. Many authors diverge on its precise delineation as a subject field and also as a methodological question. The EU is not a unified or homogenous global actor. The precise movement of EU rules beyond borders is also highly contested as an idea across disciplines. Arguably one of the clearest accounts is as to the digital economy in relation to the acceptance by leading social media tech giants in the US of EU law principles, from hate speech to the GDPR.⁵⁵

⁵¹ Krishnamurthy (n 50).

⁵² *Ibid* 28.

⁵³ *Ibid* 29.

⁵⁴ Bradford (n 13) Ch 5.

⁵⁵ *Ibid* Ch 5.

When dealing with transborder data flows, the EU is faced with different systems of personal data protection, which has resulted in both fragmentation and competition in standard setting. As trade and the global economy rely ever more on data, countries from North America to Asia are becoming aware of the importance of data flows in trade and potential challenges for data protection, which explains the increase of regulation on cross-border data flows in recent years.⁵⁶ Legal frameworks at the international and regional level have existed since the 1980s, under the auspices of the UN,⁵⁷ the OECD,⁵⁸ the APEC Privacy Framework, the Council of Europe Convention 108,⁵⁹ One week before the GDPR came into force in 2018, the modernisation of data protection Convention 108 was completed by the Council of Europe.⁶⁰ Most arguments as to the force of Convention 108+ assume a controversial understanding of the reach of the jurisprudence of the Council of Europe and European Court of Human Rights, which seems difficult to maintain.⁶¹ Convention 108+ lacks a sanctions regime and significantly lacks extraterritoriality in the sense of the GDPR – thus lacking ‘bite’.⁶² The CBPR system was first established in 2011 by the APEC as a ‘regional economic forum’ of 21 Asia-Pacific member economies.⁶³ The APEC Privacy Framework is a set of principles and implementation guidelines that were created in order to establish effective privacy protections that avoid barriers to information flows, and ensure

continued trade and economic growth in all 27 countries of the APEC region. The APEC Privacy Framework set in motion the process of creating the APEC CBPR system. However, unlike the GDPR – which is a binding regulation that applies to all EU countries – the CBPR is a voluntary, principles-based framework that only extends to APEC members that have formally joined.

The CPTPP includes commitments to privacy in its Chapter 14 (on e-commerce), but *without* specifying the APEC CBPR. TPP endorsed the ‘Silicon Valley Consensus’ mainly as to data governance, preventing its parties from restricting transnational data flows and from requiring the use of domestic computing facilities.⁶⁴ However, it let the mere existence of a legal framework for the protection of personal information suffice.⁶⁵ Yet, CPTPP is arguably a good example of how trade negotiators might understand the importance of data governance questions. Regulators and trade negotiators have in the main long operated without reliable data about the global digital economy and continue to overlook the losers of the digital transformation, underappreciate the right to regulate and misjudge the extent to which global digital corporations transcend territorial jurisdictional boundaries.⁶⁶ CPTPP is also notable because it interested countries with privacy authorities which were members of the Asia-Pacific privacy authorities’ forum and institutionalised intersections. With respect to the e-commerce chapter, the CPTPP text remains the same as that found in the earlier versions of TPP, particularly with regard to the key provision, Article 14.8 on personal information protection, which imposes positive obligations on each party to maintain or adopt a legal framework that provides for the protection of the personal information of the users of electronic commerce. It includes references to broader international frameworks, possibly the APEC CBPR system.⁶⁷ This raises the question of the meaning of ‘globalness’.

In 2017, 44 trade agreements were shown to have established specific provisions on personal information protection.⁶⁸ By 2021, data suggested truly significant global convergence on personal data protection laws: over 98 per cent of

⁵⁶ C. Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, 2013) 10.

⁵⁷ General Assembly of the United Nations, Guidelines for the Regulation of Computerized Personal Data Files UN Doc/E/CN.4/1990/72 of 14 December 1990.

⁵⁸ OECD Council Recommendation, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD, 1980).

⁵⁹ Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (1981) CETS 108 28 January 1981.

⁶⁰ G. Greenleaf, ‘Modernised’ Data Protection Convention 108 and the GDPR (2018) 154 *Privacy Laws and Business International Report* 22; C. Sullivan, ‘EU GDPR or APEC CBPR? A Comparative Analysis of the Approach of the EU and APEC to Cross Border Data Transfers and Protection of Personal Data in the IoT Era’ (2019) 35(4) *Computer Law & Security Review* 380; G. Greenleaf, ‘Renewing Convention 108: The CoE’s “GDPR Lite” Initiatives’ (2016) 142 *Privacy Laws & Business International Report* 14; LA. Bygrave, ‘The “Strasbourg Effect” on Data Protection in Light of the “Brussels Effect”: Logic, Mechanics and Prospects’ (2021) 40 *Computer Law & Security Review* 1; G. Greenleaf, ‘A World Data Privacy Treaty? “Globalisation” and “Modernisation” of Council of Europe Convention 108’ in N. Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014) 92.

⁶¹ eg Bygrave (n 60) 3; ... the Strasbourg Effect on data protection did not begin with the adoption of CI08+. Ever since the 1970s, the CoE has been enormously influential in shaping regulatory discourse in the field, primarily within Europe but also beyond! See ibid 10. There is currently little appetite in major economies outside the EU to accede.

⁶² G. Greenleaf, ‘Modernised Data Protection Convention 108 and the GDPR’ (2018) 154 *Privacy Laws and Business International Report* 22–23.

⁶³ Like the EU GDPR, the CBPR also governs the transfer of personal information across the borders of participating nations. To date, eight nations have joined the CBPR system: the US, Canada, Mexico, Japan, Singapore, Taiwan, Australia and the Republic of Korea; G. Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (Oxford University Press, 2014); G. Greenleaf, ‘The Right to Privacy in Asian Constitutions’ (2020) University of New South Wales Law Research Series No 53.

⁶⁴ T. Streinz, ‘Digital Megaregulation Uncontested? TPP’s Model for the Global Digital Economy’ in B. Kingsbury et al (eds), *Megaregulation Contested* (Oxford University Press, 2019).

⁶⁵ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Art 14.8 (personal information protection), Art 14.11 (cross border transfer of information by electronic means) and Art 14.13 (location of computing facilities).

⁶⁶ See eg Streinz (n 64) 313; M. Burri, ‘Data Flows and Global Trade Law’ in M. Burri (ed), *Big Data and Global Trade Law* (Cambridge University Press, 2021); G. Greenleaf, ‘Looming Free Trade Agreements Pose Threats to Privacy’ (2018) 152 *Privacy Laws & Business International Report* 23; E. Oh, ‘Digital Trade Regulation in the Asia-Pacific: Where Does It Stand? Comparing the RCEP E-commerce Chapter with the CPTPP and the JSF’ (2021) 48 *Legal Issues of Economic Integration* 403.

⁶⁷ Notably the UK intends to pursue accession to the CPTPP as part of its trade negotiations programme.

⁶⁸ J.-A. Monteiro and R. Teh, ‘Provisions on Electronic Commerce in Regional Trade Agreements’ (2017) WTO Working Paper ERSD-2017-11, 51.

nations have a personal data protection law and 64 per cent have a comprehensive approach.⁶⁹ The overall picture is still one of extraordinary legal fragmentation,⁷⁰ reflecting divergent approaches, preferences and priorities, split between the EU's high standards and the self-regulatory approaches of the US and Asia.⁷¹ In addition to national legislation, less than ten years ago there were around 10 binding bilateral agreements and instruments to govern transborder data flows in place,⁷² as well as a series of private sector instruments, such as contractual clauses and non-binding codes of practice.⁷³ Elsig and Klotz have analysed 91 digital trade-related provisions in 347 trade agreements signed 2000–2019, and find that almost half (48 per cent) of such provisions were first introduced in trade agreements to which the US is a member.⁷⁴ These developments demonstrate why there is no global standard on privacy and nothing coming close to rivaling the GDPR, but still, it is only one facet of the overall 'jigsaw'.

Calls for a global regulatory framework have not dissipated even in the US, as discussed in Chapter 4. In the face of rising expectations of digital protection, there are increasingly calls for 'global data laws'⁷⁵ and 'international privacy standards'.⁷⁶

⁶⁹ See the Digital Trade and Data Governance Hub: <https://datagovhub.letsnod.com/> accessed 24 February 2022.

⁷⁰ Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 26.

⁷¹ RH Weber, 'Transborder Data Transfers: Concepts, Regulatory Approaches and New Legislative Initiatives' (2013) 3 *International Data Privacy Law* 117.

⁷² *Ibid.* See Binding Corporate Rules: Article 29 Working Party, 'Working Document setting up a framework for Binding Corporate Rules' (WP 154, 24 June 2008), Standard Contractual Clauses Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council [2010] OJ L39/5; Commission Decision 2004/915/EC of 27 December 2004 amending Decision (EC) 2001/497 as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries [2004] OJ L383/74; Safe Harbor Privacy Principles issued by the US Department of Commerce on 21 July 2000, and recognized as 'adequate' under European Commission Decision 2000/520/EC of 26 July 2000 [2000] OJ L215/7; Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service [2008] OJ L213/49; Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security [2012] OJ L215/5; Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11; Reports by the High Level Contact Group (HLCG) on information sharing and privacy and personal data protection (23 November 2009); Infocomm Development Authority of Singapore (IDA) and the National Trust Council of Singapore (NTC) Voluntary Model Data Protection Code for the Private Sector; Madrid Resolution 'International Standards on the Protection of Personal Data and Privacy' (non-binding); Treasury Board of Canada, 'Taking Privacy into Account before Making Contracting Decisions' (2006).

⁷³ Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 21.

⁷⁴ M Elsig and S Klotz, 'Initiator Conditions and the Diffusion of Digital Trade-related Provisions in PTAs' (2021) *International Interactions*.

⁷⁵ See eg Satya Nadella, Microsoft CEO, in D Hurst, 'Japan Calls for Global Consensus on Data Governance' (*The Diplomat*, 2 February 2019), <https://thediplomat.com/2019/02/japan-calls-for-global-consensus-on-data-governance/> accessed 24 February 2022.

⁷⁶ P Fleischer, Global Privacy Counsel, 'Call for Global Privacy Standards' (*Public Policy*, 14 September 2007), <https://publicpolicy.googleblog.com/2007/09/call-for-global-privacy-standards.html> accessed

Nonetheless, the EU has the advantage of being the 'first mover', and also the first mover with the highest standards and some of the deepest institutionalisation to date, as well as ambitious extra-territorial reach to follow through on its internationalist ambitions in generating a global standard.⁷⁷

V. Is the EU a 'Soft Data Localisation' Actor?

Data transfers are one of the most significant and complex areas that the EU attempts to regulate. The EU has invested much political and legal capital in transnational cooperation and cross-border data regulation projects.⁷⁸ It has also, however, invested soft power resources into them too.⁷⁹ Information control is central to the survival of authoritarian regimes but is also a device with many economic and social benefits and challenges. One useful area for 'narrower' reflection, where the EU appears to be increasingly pushing for institutionalisation, is cloud computing. The origins of cloud computing are disputed but it is understood to date back to around 2010, when it had complex vague contours.⁸⁰ Far from being vague, cloud computing has dictated how companies, business and consumers alike store, utilise and assess data. This revolution has led to security issues, with an increasing number of countries asserting the need for a national cloud.⁸¹ The circularity in the processes of evolution here are remarkable. Data localisation requirements may ultimately prevent access to global cloud computing services.⁸² While governments assume that global services will simply erect local data server farms, this may mean that local companies are denied access to the many companies that might help them scale up, or to go global.⁸³ In the European Commission's Data Strategy of 2020, the European Commission has proposed to invest and developed a cloud infrastructure to store and process data in Europe and to support European

⁷⁴ February 2022; C de Tervangne, 'Is a Global Data Protection Regulatory Model Possible?' in S Gutwirth et al (eds), *Reinventing Data Protection?* (Springer, 2009).

⁷⁷ P de Hert and M Czerwikowski, 'Expanding the European Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in Its Wider Scope' (2016) 6 *International Data Privacy Law* 3; PM Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 *New York University Law Journal* 771; Yakovleva and Irton (n 3); Krishnamurthy (n 50).

⁷⁸ eg Amendments to the Council of Europe Budapest Convention, discussed in Ch 3 below.

⁷⁹ eg the Phaedra project: www.phaedra-project.eu/the-phaedra-project/ accessed 31 December 2021.

⁸⁰ A Regalado, 'Who Coined "Cloud Computing"?' (*MIT Technology Review*, 31 October 2011), www.technologyreview.com/2011/10/31/257406/who-coined-cloud-computing/ accessed 24 February 2022.

⁸¹ eg 2018 BSA Global Cloud Computing Scorecard: <https://cloudscorecard.bsa.org/2018/> accessed 31 December 2021.

⁸² A Chander, 'Googling Freedom' (2011) 99 *California Law Review* 1, 20.

⁸³ See A Chander and U Lé, 'Breaking the Web: Data Localization vs. the Global Internet' (2014) UC Davis Legal Studies Research Paper No 378, <https://ssrn.com/abstract=2407856> accessed 24 February 2022.

cloud providers in a significant attempt to bolster the institutionalisation of data through localisation.⁸⁴ Prior to this, the European Commission proposed to create an enabling and trust-building policy framework for cloud services in Europe. The European Cloud Initiative of 2016 presented a strategy for public investments to build European Open Science Cloud and European Data Infrastructure, building upon the 2012 European Cloud Strategy.⁸⁵ These are significant institutionalisation investments on the part of the EU in grounding cloud computing on EU soil. This increasing territorialisation of data is, of course, not uncontroversial.

Cross-border data flows are hallmarks of twenty-first century globalisation and perceived as 'glue' holding the global economy together.⁸⁶ One estimate shows that cross-border data flows added \$2.8 trillion to world GDP in 2014.⁸⁷ Their valuation process is computationally complex.⁸⁸ It is not only the sheer amount of data and global dependence on data that has exponentially increased; there are more actors – specifically governments – seeking to assert control over global data flows. From China to Europe and beyond, there are many important examples arising as to control of data flows. A new generation of regulation of internet controls seeks to keep information from going out of a country rather than stopping it from

entering the sovereign state space. It is arguably a clear example of the global institutionalisation of data flows. Some contend that this is not a new phenomenon and is in fact widespread, as a form of informational sovereignty.⁸⁹ Arguments for and against extending such boundaries to the Internet are arguably reflected in the debate from the late 1990s and early 2000s between David Post and Jack Goldsmith with regard to closed electronic networks.⁹⁰ As Kuner eloquently puts it, the transfer of national borders to the online space reflects society's ambivalence about globalisation: on the one hand, we are all accustomed to the global availability of goods and services, but on the other hand, we are unsettled by the breakdown of barriers that threatens national and regional identities which makes us suspicious and uneasy about barriers to data flows.⁹¹

One important way of viewing these developments is to consider them through the lexicon and prism of the phenomenon of data localisation. Data localisation is a growing phenomenon where globally more attempts are made to impose structures, architecture, actors, controls, reviews and access controls on data. Data localisation is a complex trend to regulate because it is about *reducing* access to data and digital technologies. It seems to address cybersecurity concerns of data vulnerability by requiring data to be kept in a single jurisdiction, making it easier to target and possibly preventing data back-ups in globally distributed data centres.⁹² However, data localisation also raises the costs of access to, and use of, data, thereby reducing gains from digital trade.⁹³ Of course, data localisation laws affect businesses and ordinary individuals in countries in various ways: data localisation is a cost that possibly falls disproportionately on digital exporters, who are required to meet the data localisation requirements. This is challenging for small and medium-sized enterprises.⁹⁴ Most literature is heavily centred on the economic, and law and economics, understandings of the costs and implications of regulation of data. For instance, there is a concern that where the data relates to the provision of services, data flow restrictions can also undermine the value of WTO members' GATS services commitments.⁹⁵ As a result, it is sometimes stated that countries pushing for data localisation are 'hotbeds' of cyber crimes.⁹⁶ Governments across the world also increasingly cite foreign surveillance as an

⁸⁴ See European Commission, 'Shaping Europe's Digital Future: Cloud Computing (Policy)', <https://ec.europa.eu/digital-single-market/en/cloud> accessed 24 February 2022.

⁸⁵ See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Cloud Initiative – Building a competitive data and knowledge economy in Europe' COM (2016) 178 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Unleashing the Potential of Cloud Computing in Europe' COM (2012) 529 final.

⁸⁶ WG Voss, 'Cross-Border Data Flows, the GDPR, and Data Governance' (2020) 29 *Washington International Law Journal* 485.

⁸⁷ US Department of Commerce, 'Measuring the Value of Cross-Border Data Flows' (2016) 2, www.ntia.doc.gov/files/ntia/publications/measuring_cross-border_data_flows.pdf accessed 24 February 2022; McKinsey Global Institute, 'Digital Globalization: The New Era of Global Flows' (2016), www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows accessed 24 February 2022; McKinsey Global Institute, 'By 2025, Internet of Things Applications Could Have US\$11 Trillion Impact' (2015), www.mckinsey.com/mgi/overview/in-the-news/by-2025-internet-of-things-applications-could-have-11-trillion-impact accessed 24 February 2022; Voss, 'Cross-Border Data Flows, the GDPR, and Data Governance' (n 86).

⁸⁸ A Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (Palgrave, 2020) 164 and 225. See OECD Digital Economy Papers, 'Measuring the Economic Value of Data and Cross-border Data Flows' (OECD, 26 August 2020), www.oecd-ilibrary.org/docserver/6345995e-en.pdf?expires=1605107203&id=id&accname=guest&checksum=7631AE9F2929B79DAB35E25BC1124DEE accessed 24 February 2022. Cross-border data flows include in one US government taxonomy the following interesting outline: 1) Purely non-commercial data traffic, including government and military communications; 2) Transaction data flows between buyers and sellers at a market price, including direct purchases between buyers and sellers, such as in online banking or advertising, and services transactions that involve digital platforms acting as intermediaries between buyers and sellers; 3) Commercial data and services exchanged between or within businesses or other related parties, including supply chain, personnel, or design information; 4) Digital data and services delivered to and from end-users, including free email, search engine results, maps and directions, and information via social media; see US Department of Commerce, 'Measuring the Value of Cross-Border Data Flows' (n 87) 3.

⁸⁹ C Kuner, 'Data Nationalism and Its Discontents' (2015) *Emory Law Journal Online* 2089.

⁹⁰ Kuner, *Transborder Data Flows and Data Privacy Law* (n 56) 28–31; JL Goldsmith, 'Against Cyberanarchy' (1996) 65 *University of Chicago Law Review* 1199; DR Johnson and D Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367; D Post, 'Against Cyberanarchy' (2002) 17 *Berkeley Technology Law Review* 1365, 2092.

⁹¹ Kuner, 'Data Nationalism and Its Discontents' (n 89).

⁹² J Metzger, 'Governing Digital Trade' (2019) 18 *World Trade Review* 23, 25.

⁹³ *Ibid.*

⁹⁴ *Ibid.* 25.

⁹⁵ *Ibid.*, giving the example of where WTO members have scheduled a GATS commitment, they must also allow the data flow to deliver the service. Yet localisation measures can reduce access to, or raise the cost of transferring, such data.

⁹⁶ A Chander and UP Lé, 'Data Nationalism' (2015) 64 *Emory Law Journal* 677.

argument for preventing data from leaving their borders, allegedly into foreign hands.⁹⁷ Consequently, governments are increasingly said to localise data within their jurisdiction.⁹⁸ Data localisation can be understood as measures that encumber the transfer of data across jurisdictional borders.⁹⁹ It includes rules preventing information from being sent outside the country, rules requiring prior consent of the data subject before information is transmitted across national borders, rules requiring copies of information to be stored domestically, and even a tax on the export of data. Quite how the phenomenon plays out is another matter. Some contend that since much data sharing seems to be carried out between different intelligence services around the world, in the end data nationalism may only facilitate access by local intelligence services.¹⁰⁰ Others contend that data localisation and innovation where adopted.¹⁰¹ Requiring local data storage arguably weakens, rather than strengthens, fundamental rights if it facilitates the access of intelligence services to data locally, who then share that data with other countries.¹⁰² For instance, French intelligence services conducting widespread Internet surveillance in France and sharing the data collected with the US inevitably makes it unclear what the privacy benefits are of French data localisation.¹⁰³

As countries increasingly apply their national law to cross-border activities on the Internet, will it become increasingly necessary to 'tag' or otherwise mark data to indicate the country whose law is processing it? This is where the EU has a different 'story' to tell. The landmark decision of the CJEU in *Schrems II* is said to mark a key shift towards data localisation in Europe and less openness, evinced through technology surveillance.¹⁰⁴ In either case, market pressures will contribute to the current increase of data localisation measures, as much as the rise of firewalls, yet redress issues will remain.¹⁰⁵ For instance, a number of US Internet

companies have set up local data processing centres as a way to deal with strict European standards, which means that market pressures dictate location. They also indirectly then enhance the EU's own institutionalisation of data notably, as to capacity, reach, authority and regulatory capabilities. It might be contended that similar issues exist as to so many other regimes, particularly strict and/or authoritarian regimes, to the effect that those jurisdictions also seek to institutionalise data. Such a claim is not denied; on the contrary, institutionalisation of data unquestionably constitutes a growing phenomenon.

These issues matter because barriers to data flows impinge upon trade and the capacity of a data-innovative economy to succeed. In recent years, many PTAs have started to include provisions on data localisation, either banning or limiting requirements on the location or use of data. An important difference with the data flows provisions is that almost all data location provisions found in trade agreements are of a binding nature.¹⁰⁶ Yet whether data localisation is actually harmful to the institutional structures of trade is a much larger intellectual question. Arguably, most analysis is heavily economically-oriented and wedded to modelling of barriers to trade that take little cognisance of rights and obligations. Is it correct to argue that those criticising the harmful effects of data localisation adopt a weak framework of fundamental rights protections? Can an open and free internet be achieved in the absence of a global pact on the subject matter? What about its intersection in all contemporary trade agreements? It can be argued that data localisation threatens Big Data by limiting data aggregation by country, increasing costs and adding complexity to the collection and maintenance of data. Data localisation requirements can reduce the size of potential data sets, eroding the informational value that can be gained by cross-jurisdictional studies.¹⁰⁷ It is likely to have quite a pernicious effect on cloud computing, innovation and data agility. In addition to digital services taxes, the Digital Markets Act (DMA) and the DSA, combined with data localisation measures, could cumulatively amount to a litany of measures to develop a *de facto* and *de jure* European firewall.¹⁰⁸ As a result, it is consistently argued that EU digital protectionism is stifling and hampers trade and diplomatic ties.¹⁰⁹

The EU rejects, in principle, the assumption of an obligation to allow cross-border data flows.¹¹⁰ Instead, it argues for a form of data localisation, outlawing

⁹⁷ *ibid* 680.

⁹⁸ M Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51(56) *University of California Davis Law Review* 65, 70; Chander and L , 'Data Nationalism' (n 96).

⁹⁹ Chander and L , 'Data Nationalism' (n 96).

¹⁰⁰ Kuner, 'Data Nationalism and Its Discontents' (n 89).

¹⁰¹ Chander and L , 'Data Nationalism' (n 96) 682, reviewing measures in Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Kazakhstan, Malaysia, Nigeria, Russia, South Korea, Sweden, Taiwan, Thailand, and Vietnam, as well as the EU and a handful of other countries (an astonishing array of countries ...).

¹⁰² C Kuner, 'Requiring Local Storage of Internet Data Will Not Protect Privacy' (*OCUP Blog*, 6 December 2013) <https://blog.oup.com/2013/12/data-security-privacy-storage-law/> accessed 24 February 2022; Kuner, *Transborder Data Flows and Data Privacy Law* (n 56).

¹⁰³ *Schrems II* (n 38); European Council, 'Special meeting of the European Council (1 and 2 October 2020) - Conclusions' *EU CO 13/20* (2020): '... to be digitally sovereign, the EU must build a truly digital single market. Define its own rules, to make autonomous technological choices. At international level, the EU will leverage its tools and regulatory powers to help shape global rules and standards ...'

¹⁰⁴ C Kuner, 'Data Nationalism and Its Discontents' (n 89), 2094; K Propp and P Swire, 'After *Schrems II*: A Proposal to Meet the Individual Redress Challenge' (*Lawfare Blog*, 13 August 2020), www.lawfare-blog.com/after-schrems-ii-proposal-meet-individual-redress-challenge accessed 22 February 2022.

¹⁰⁵ M Burri and R Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187, 214.

¹⁰⁶ Chander and L , 'Data Nationalism' (n 96) 729.

¹⁰⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' *COM* (2020) 825 final.

¹⁰⁸ C Barshetsky, 'EU Digital Protectionism Risks Damaging Ties with the US' (*Financial Times*, 2 August 2020), www.ft.com/content/9ede4455-5f34-4e17-89cd-9b9ba698103 accessed 24 February 2022 (former USTR).

¹⁰⁹ See K Propp, 'Data Flows across the Channel: The Emerging UK-EU Digital Trade Relationship' (*Atlantic Council*, 3 June 2020), www.atlanticcouncil.org/blogs/new-atlanticist/data-flows-across-the-channel-the-emerging-uk-eu-digital-trade-relationship accessed 24 February 2022.

rules that require a company to locate its computing facilities or network in the territory of the other party or that require data to be stored or processed there. The EU also advocates giving each party an absolute right to maintain any data privacy safeguards it deems appropriate, with no objective trade disciplines of the nature proposed by others in trade negotiations, such as the UK. The EU thus faces manifold criticisms of the *Schrems II* ruling, for the emphasis that it places upon data localisation directly or indirectly and the manner in which it appears to champion digital sovereignty.¹¹¹ Some suggest that the *Schrems II* decision is unworkable for the EU if it wishes to be a global actor.¹¹² While *Schrems II* is discussed in greater detail in Chapter 4, it is difficult to disagree with the thrust of how Chander depicts its legacy:

The end result of [...] *Schrems II* is to reduce the available channels for transferring personal information from the [EU] to the [US]: two of the principal mechanisms for transferring personal data to the United States have either been repudiated outright or made unstable. The CJEU struck down the EU-US Privacy Shield, an agreement that more than 5,300 companies (both European and American) use to transfer data across the Atlantic. And while the CJEU upheld the validity of Standard Contractual Clauses (SCCs) for transferring data outside the EU, it conditioned that transfer on a determination by the transferring parties that the transfer would not risk unwarranted surveillance by the US government. While the putative defendant in the case was Facebook, it was the U.S. government that was on trial.¹¹³

The CJEU suggested using supplementary measures to protect data under the SCCs but did not explain what these measures could be, and in effect SCCs became mini-adequacy decisions.¹¹⁴ 'Soft' data localisation is thus the likely result there.¹¹⁵ However, keeping the information in the EU does not insulate the data from the surveillance of the EU Member States' own intelligence services and there has been a wealth of recent case law to this effect, putting contours on their actions and scope. There is a further argument to the effect that even the EU itself does not really know what EU data localisation looks like or means in the post-*Schrems II* world. Ultimately, the Internet itself appears to be likely to be further

split or divided between regulatory regimes, beyond that which the EU GDPR has initiated, from the Great Firewall of China to the West of Europe, a gigantic span of regulation.¹¹⁶ The 'larger view' of data localisation is that it entrenches the protectionism allegations that the EU faces post-Brexit, as the European Council Conclusions of October 2020 unambiguously state: to be digitally sovereign, the EU must develop its own generic idea of the digital sphere that it inhabits.¹¹⁷ This must entail that it defines its own rules to make autonomous technological choices. At the international level, the EU will leverage its tools and regulatory powers to help shape global rules and standards. Moreover, it is worth making the point that trade agreements follow a complex logic for these debates, ie that these issues play out in many forums beyond data flow agreements. For example, in one of the EU's most advanced FTAs on digital trade, the EU-Japan EPA, the requesting of source code is prohibited, while the location of computing facilities is not covered. Some key elements of this digital trade chapter relate to soft law obligations.¹¹⁸

Notably, the EU introduced a significant Regulation in 2018, when it sought to ban data localisation restrictions in order to ensure the free flow of data.¹¹⁹ Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union was adopted as part of the Single Market for data storage and processing services, such as cloud computing. The Regulation was adopted with the intention of ensuring that the freedom to choose a data service provider anywhere in Europe would lead to more innovative data-driven services and more competitive prices for businesses, consumers and public administrations. Although on its face the Regulation intended to permit data to flow freely, allowing companies and public administrations to store and process non-personal data wherever they choose in the EU, important constraints on data within the territory of Europe are imposed. The Regulation removes any restrictions imposed by Member States' public authorities on the geographical location for storing or processing non-personal data, unless such restrictions are justified on grounds of public security. The Regulation defines non-personal data to include the rapidly expanding Internet of Things, artificial intelligence and machine learning. Whether it will have a more significant impact on the understanding of localisation remains to be seen. The EU's complex position on data localisation is developed further in Chapter 2 on digital trade.

Data localisation links also to the place of digital sovereignty.

¹¹¹ *Schrems II* (n 38); A Chander, 'Is Data Localization a Solution for *Schrems II*?' (2020) 23 *Journal of International Economic Law* 771.

¹¹² Propp and Swire, 'After *Schrems II*: A Proposal to Meet the Individual Redress Challenge' (n 105); C Kuner, 'The *Schrems II* Judgment of the Court of Justice and the Future of Data Transfer Regulation' (*European Law Blog*, 17 July 2020), <https://europeanlawblog.eu/2020/07/17/the-schrems-ii-judgment-of-the-court-of-justice-and-the-future-of-data-transfer-regulation/> accessed 24 February 2022; M Rotenberg, 'Schrems II, from Snowden to China: Toward a New Alignment on Transatlantic Data Protection' (2020) 26 *European Law Journal* 141.

¹¹³ Chander, 'Is Data Localization a Solution for *Schrems II*?' (n 111) 774.

¹¹⁴ Kuner, 'The *Schrems II* Judgment of the Court of Justice and the future of data transfer regulation' (n 112).

¹¹⁵ Case C-623/17, *Privacy International*, EU:C:2020:790, joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, EU:C:2020:791. See Chander, 'Is Data Localization a Solution for *Schrems II*?' (n 111).

¹¹⁶ eg, EU users of US websites found themselves blacklisted from many US sites post-GDPR introduction or have to accept a site's user values when accessing a site; 'European readers still blocked from some US news sites' (*BBC News*, 26 June 2018), www.bbc.co.uk/news/technology-44614885 accessed 24 February 2022.

¹¹⁷ European Council, 'Special Meeting of the European Council (1 and 2 October 2020) – Conclusions' (n 104).

¹¹⁸ See S Hamanaka, 'The future impact of Trans-Pacific Partnership's rule-making achievements: The case study of e-commerce' (2019) 42 *World Economy* 552.

¹¹⁹ Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303/59.

VI. The EU, the Emerging Digital Sovereign

The EU has increasingly begun to advocate a message of tech sovereignty as its future. The evolution of this concept is far from clear-cut. It appears to have a long pedigree, though its association with the era of the Trump presidency and increasingly challenging global engagement seems beyond doubt. For the optimistic, it is a natural evolution of the so-called Brussels Effect.¹²⁰ Initially, EU digital sovereignty was cast in the era of the Trump administration, generating a Sino-US tech war, with little development of multilateralism or any meaningful WTO agenda on digital trade, and the increased dominance of China in tech wars.¹²¹ It advocated developing the capability for the EU to make its own choices on its own values and own rules, predicated on an emerging regime of institutionalisation of compliance, enforcement and governance.¹²² It also aligned with the development of a new generation of the regulation of internet controls to keep information from going out of a country rather than stopping it from entering the sovereign state space *qua* informational sovereignty. Still, it appears as a new EU lexicon in recent times.¹²³ The European Council in late 2020 advocated technological sovereignty as follows:

The Covid-19 pandemic has further underlined the need to accelerate the digital transition in Europe. Seizing the opportunities of this transition is crucial to strengthening our economic base, ensuring our technological sovereignty, reinforcing our global competitiveness, facilitating the green transition, creating jobs and improving the lives of citizens. Building a truly digital Single Market will provide a home-based framework allowing European companies to grow and scale up.¹²⁴

The definitional breadth of digital sovereignty in this is vast, and is increasingly understood in EU official documents and by EU Member State actors¹²⁵ and institutions¹²⁶ to warrant a holistic formulation of regulatory capture of the digital

in an unprecedented way, albeit mostly referring to Europe's ability to act independently in the digital world.¹²⁷ There are those who criticise European digital sovereignty as a circular oxymoron, confusing human-centered autonomy – each individual citizen is personally sovereign over their data, interactions with AI, etc – with a more Westphalian understanding of sovereignty: each state has an undisputed power monopoly within its border.¹²⁸ It is also criticised for the conflicting EU bureaucracies involved in its implementation, where competition policy, one of the EU's most powerful competences and areas of strength, still pales in contrast to the gigantic regulatory tasks involved in non-competition areas. We might say that all digital matters in theory may ostensibly appear to be incapable of being adequately institutionalised despite their need for it. A seemingly conflictual agenda of regulating digital platforms, net neutrality and an EU ecosystem of values appears to constitute the 'surface' meaning thereof.¹²⁹ Ultimately, however, a significant amount of institutionalisation of digital sovereignty appears at its heart, which renders it such a rich Europeanised construct.

For many, the defensiveness at the heart of the EU digital sovereignty agenda is striking. Some understand its rhetoric to be predominantly based in the need for robust cyber sanctions and to flight information wars with Russia and China in the future.¹³⁰ It can be seen as a means to support EU tech champions. Mostly, it is understood as a defensive reaction to an increasingly hostile environment of the US-China tech wars, at least during the Trump administration, and an era of a lack of multilateralism.¹³¹ Sovereignty is an increasingly dated and provocative subject, castigated for its lack of relevance in contemporary sovereignty in

(2019), 2019/2575(RSP) – 12/03/2019, <https://oel.secure.europa.eu/oel/popup/summary.do?d=1577382&c=d&l=en> accessed 24 February 2022.

¹²⁰ T. Christakis, "European Digital Sovereignty": Successfully Navigating Between the "Brussels Effect" and Europe's Quest for Strategic Autonomy' (2020) Multidisciplinary Institute on Artificial Intelligence/ Grenoble Alpes Data Institute, <https://ssrn.com/abstract=3748098> accessed 24 February 2022.

¹²¹ Although it has older origins: V. Reding, 'Digital Sovereignty: Europe at a Crossroads' (EIB Crossroads, 2016), <https://institute.eib.org/wp-content/uploads/2016/01/Digital-Sovereignty-Europe-at-a-Crossroads.pdf> accessed 24 February 2022. See P. Grull, "Geopolitical" Europe Aims to Extend its Digital Sovereignty from China' (*Euractiv*, 9 September 2020), www.euractiv.com/section/digital/news/geopolitical-europe-aims-to-extend-its-digital-sovereignty-versus-china/ accessed 24 February 2022.

¹²² European Commission, Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future' (19 February 2020).

¹²³ Künner, 'Data Nationalism and Its Discontents' (n 89).

¹²⁴ European Council, 'Special meeting of the European Council (1 and 2 October 2020) – Conclusions' (n 104).

¹²⁵ eg Opinion of the Economic, Social and Environmental Council (France), 'Towards a European Digital Sovereignty Policy' (ESSEC, 13 March 2019), www.lecese.fr/sites/default/files/travaux_multilingue/2019_07_souverainete_europeenne_numerique_GB_redit.pdf accessed 24 February 2022.

¹²⁶ European Parliament, 'Digital Sovereignty for Europe' (2020) EPRS Ideas Paper Briefing, [www.europe1.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI\(2020\)651992_EN.pdf](http://www.europe1.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf) accessed 24 February 2022. See European Parliament resolution on security threats connected with the rising Chinese technological presence in the EU and possible action on the EU level to reduce them

¹²⁷ European Parliament, 'Digital Sovereignty for Europe' (n 126); cf European Commission, 'Europe: The Keys to Sovereignty' (News) (11 September 2020), https://ec.europa.eu/commission/communications/2019-2024/breton/announcements/europe-keys-sovereignty_en accessed 24 February 2022; FG Burwell and K. Propp, 'The European Union and the Search for Digital Sovereignty: Building "Fortress Europe" or Preparing for a New World?' (*Atlantic Council*, June 2020), www.atlanticcouncil.org/wp-content/uploads/2020/06/The-European-Union-and-the-Search-for-Digital-Sovereignty-Building-Fortress-Europe-or-Preparing-for-a-New-World.pdf accessed 24 February 2022.

¹²⁸ See T. Barker, 'Europe Can't Win the Tech War It Just Started' (*Foreign Policy*, 16 January 2020), <https://foreignpolicy.com/2020/01/16/europe-technology-sovereignty-von-der-leyen/> accessed 24 February 2022.

¹²⁹ K. Komnits, 'Europe's Pursuit of Digital Sovereignty Could Affect the Future of the Internet' (*TechEU*, 7 September 2020), <https://tech.eu/features/32780/europe-digital-sovereignty/> accessed 24 February 2022.

¹³⁰ V. Manancourt and M. Heikkilä, 'EU Eyes Tighter Grip on Data in "Tech Sovereignty" Push' (*Politico*, 29 October 2020), www.politico.eu/article/in-small-steps-europe-looks-to-tighten-grip-on-data/ accessed 24 February 2022.

¹³¹ C. Hobbs (ed), *Europe's Digital Sovereignty: From Rulemaker to Superpower in the Age of US-China Rivalry* (Essay Collection, European Council of Foreign Affairs 2020), https://ecfr.eu/wp-content/uploads/europe_digital_sovereignty_rulemaker_superpower_age_us_china_rivalry.pdf accessed 24 February 2022.

an age of globalisation and long the subject of many contentious applications to the EU.¹³² Digital sovereignty is no less controversial for the EU and is innately conceived as a language of strife, might and fight – through institutions.¹³³ This is arguably as close as the EU gets to a shared construction of digital sovereignty with the US and China in particular. At heart, digital sovereignty links closely to ideas of digital protectionism, but in itself this is quite a fluid concept and the 'free' nature of 'free flows' is not a straightforward idea.¹³⁴ Putting down demarcations of territory in the digital leads to convoluted forms of globalisation, as Chandler reminds us eloquently in the electronic Silk Road.¹³⁵ As Floridi states, '[t]he fight for digital sovereignty is an epochal struggle not only of all against all, but also of anyone allied with anyone, with variable alliances changing according to interests and opportunities'.¹³⁶ It is a clash where tech companies may try to trick or bypass states and their legislation, fight each other or become embroiled in the questions of home soil and transnationalism, disputes that Facebook, Google, Microsoft and Twitter have all been party to.¹³⁷ It cannot be forgotten that the EU has adopted sanctions against 35 countries and four thematic sanctions regimes regarding chemical weapons and terrorism and most recently cyber sanctions and human rights and has, along with the US, one of the world's largest sanction regimes.¹³⁸ It begs the question about the definition of sovereignty emerging. However, the 'holisticness' of digital sovereignty as a concept is arguably highly complex to evaluate. For instance, the robustness of some of the most institutionalised areas of EU policy, eg competition law, are increasingly under development

with respect to the regulation of Big Tech, eg the DMA or new competition tools for digital markets. Equally, the institutionalisation of data flows and data governance through far-reaching new EU instruments is at the core of the proposed Data Governance Act.¹³⁹ To a degree, the EU here appears to give itself *carte blanche* with regard to at least one the three most problematic concepts of global governance – sovereignty, territory and jurisdiction – by evolving such a defensive and offensive conceptual tool as digital sovereignty, and giving its own efforts at extra-territoriality, for example, more legitimacy and 'respectability'.¹⁴⁰

Digital sovereignty self-evidently thus gives identity and unity to EU data regulation. Arguably, however, it is a hallmark of a new era of trade and data regulation on account of its defensiveness and even its protectionism. It even appears outmoded and uncharacteristic to some extent as a development of the EU as a global actor. Digital sovereignty also has a complex relationship with strategic autonomy.¹⁴¹ The infrastructure dimension of digital sovereignty thus appears

¹³² eg D Herzog, *RIP Sovereignty* (Yale University Press, 2020); R Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 42 *Journal of Common Market Studies* 743; see SD Krastner, *Sovereignty Organised Hypocrisy* (Princeton University Press, 1999); S Saassen, *Loosing Control? Sovereignty in the Age of Globalization* (Columbia University Press, 1996); J Cohen, *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012); N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003).

¹³³ J Borrell, 'Europe Must Learn Quickly to Speak the Language of Power' (*EJILTalk*, 25 October 2020), www.ejiltalk.org/europe-must-learn-quickly-to-speak-the-language-of-power-part-i/ accessed 24 February 2022.

¹³⁴ S Aaronson, 'What Are We Talking about When We Talk about Digital Protectionism?' (2019) 18(4) *World Trade Review* 541.

¹³⁵ A Chandler, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press, 2013), Ch 8 in particular.

¹³⁶ L Floridi, 'The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU' (2020) 33 *Philosophy and Technology* 369.

¹³⁷ Apple and Facebook Trade Accusations over Data Privacy' (*Financial Times*, 20 November 2020), www.ft.com/content/54c54eb-7c80-4468-b8f6-66462b6e07 accessed 24 February 2022.

¹³⁸ C Portela, 'The Spread of Horizontal Sanctions' (CEPS, 7 March 2019), www.ceps.eu/the-spread-of-horizontal-sanctions/ accessed 24 February 2022; European Parliamentary Research Service, 'EU Sanctions: A Key Foreign and Security Policy Instrument' (2018) PE 621.870; C Eckes, 'The Law and Practice of EU Sanctions' in S Blockmans and P Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar, 2019); EU Sanctions Map (2019): <https://www.sanctionsmap.eu> accessed 24 February 2022; as to Russian sanctions see <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/>.

¹³⁹ The DGA is intended to create a standardised framework of trusted tools and techniques to encourage data reuse by setting 'secure and privacy-compliant conditions' for sharing data: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European data governance' (Data Governance Act) COM (2020) 767 final. Concerns have been expressed as to the EU Data Governance Act, on localisation and its capacity to manage the distinction between personal and non-personal data: see EDPB-EDPS, 'Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act)' (2021), https://edpb.europa.eu/system/files/2021-03/edpb_edps_joint_opinion_dga_en.pdf accessed 24 February 2022. See also EDPB, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' (2020), https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf accessed 24 February 2022. On the understandings of market power relative to architectural power through its institutional design see C Doctorow and C Schmon, 'The EU's Digital Markets Act: There is a Lot to Like, but Room for Improvement' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/eus-digital-markets-act-there-is-lot-to-look-improve-ment accessed 24 February 2022.

¹⁴⁰ See E Fahay, *Introduction to Law and Global Governance* (Edward Elgar, 2018) 91. See H Buxbaum 'Territoriality and the Resolution of Jurisdictional Conflict' (2009) 57(2) *American Journal of Comparative Law* 631.

¹⁴¹ See eg European Parliament, 'Legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Digital Europe programme for the period 2021–2027 (COM(2018)0434 – C8-0256/2018 – 2018/0227(COD))' (2019) P8_TA(2019)0403; European External Action Service, 'Why European strategic autonomy matters' (3 December 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/89865/why-european-strategic-autonomy-matters_en accessed 24 February 2022; European Council, 'Digital sovereignty is central to European strategic autonomy – Speech by President Charles Michel at "Masters of Digital 2021" online event' (3 February 2021), www.consilium.europa.eu/en/press/press-releases/2021/02/03/speech-by-president-charles-michel-at-the-digital-europe-masters-of-digital-online-event/ accessed 24 February 2022; B Lippert et al (eds), *European Strategic Autonomy: Actors, Issues, Conflicts of Interests* (2019) SWP Research Paper 2019/RP 04; G Grevi, 'Strategic Autonomy for European Choices: The Key to Path to "Strategic Autonomy"' The EU in an Evolving Geopolitical Environment (2020) European Parliamentary Research Service, PE 652.096; 10 Point-Manifesto Towards European Digital Strategic Autonomy' (*Eurosmart*, 2019), <https://www.eurosmart.com/towards-european-digital-strategic-autonomy-digital-sovereignty/> accessed 24 February 2022; P Tamma, 'Europe wants "strategic autonomy" – it just has to decide what that means' (*Politico*, 15 October 2020), www.politico.eu/article/europe-trade-wants-strategic-autonomy-decide-what-means/ accessed 24 February 2022.

all the more ambiguous post-Schrems II. Data localisation generated through the 'negative' institutionalisation of the CJEU is not easy to regulate, to govern or to implement. It ultimately appears predicated on certain barriers and obstacles and the hindering of the free flow of data, somehow in the public interest, through complex hybrid public regulation of private actors who are increasingly public and increasingly transnational.¹⁴²

VII. Global Capture of Big Tech? European Data Spaces and the DMA/DSA

A European Strategy for Data was published in February 2020, designed to develop a Single Market in Data by 2025 and a Common European Data Space. It focused on tackling, *inter alia*, fragmentation between Member States in nine areas, ranging from industrial manufacturing to health, financial, energy, and agricultural data,¹⁴³ and was accompanied by a significant White Paper on Artificial Intelligence.¹⁴⁴ This construction of regulatory spaces takes institutionalisation of data to a new level for the EU. It seeks to design a space relative to economic power on the basis of a single market therein, enabling the EU to obtain by 2030 a share of the data economy. However, it is notably predicated on voluntary cooperation by market participants, entailing a requirement to join the data space, and to assess and certify compliance. This 'law-light' 'institution-light' formulation was rolled out with a sharply contrasting vision of the reach of EU law. On 29 January 2020, the European Commission's Work Programme 2020 was published. Under the second priority – 'A Europe fit for the digital age' – the Commission proposed a new DSA and a new DMA in 2020 in order to reinforce the single market for digital services and help provide smaller businesses with the legal clarity and level playing field they need.¹⁴⁵ It develops complex means to understand gatekeepers on a company level. Arguably, as regulatory interventions (ongoing through the legislative process at the time of writing), they are mostly characterised by their restraint. The EU has sought through two key Acts – the DSA and the DMA – and to a degree through a third, the Digital Governance Act, to build on the political successes of the GDPR and the political capital it has unleashed against Big Tech but also by departing from the GDPR philosophy. The Acts constitute an architecture

of horizontal regulation applying to all processes involving personal information, whether they occur online or offline or by private, public or commercial actors.¹⁴⁶ They are controversial pieces of legislation for many reasons, principally because of their relationship to competition law and their effects on innovation through a regulatory infrastructure with unprecedented reach.

The EU's introduction of the DMA has seen it attempt to radically evolve the regulation of Big Tech. It has drawn the EU into much controversy over the reach of conventional competition law powers and regulatory powers to capture ex ante actions.¹⁴⁷ Some commentators point out that for Article 114 TFEU to be a valid legal basis for the DMA, it necessitated important adaptations to ensure harmonisation of national laws and respect for the principle of proportionality and for companies' fundamental rights, and to reduce the Commission's margin for discretion.¹⁴⁸ Others warn that the DMA would probably have a chilling effect on research, development and innovation. The framework that is proposed by the EU is of much significance for its ambit. It attempts in Article 3 to define gatekeepers as entities with a significant impact on the EU internal market that operate one or more important gateways to customers and enjoy an entrenched and durable position in their operations. The term is intended to apply to a particular dominant actor where economic significance, scope or size provide grounds for concern about control over the economy. The DMA also sets certain quantitative criteria that establish a presumption for gatekeeper status. It has ultimately started to ignite in shifts in regulation globally through its selection of subjects and objects. It proposes to set narrowly defined objective criteria by which a large online platform can qualify as a so-called gatekeeper, with the aim of tackling large systemic online platforms and institutionalising them as subjects and objects of EU law in a manner that has not previously been achievable. The draft DMA is based upon the premise that competition law principles would not limit administrative action but this raises questions as to the robustness of its institutional design.¹⁴⁹ It is stated that it is unusual for the Commission to build a regulatory regime based on autonomous legal concepts wholly from scratch. Can gatekeepers be constrained as providers of core platform services in this legislation? There is little opposition from within the EU and among its law-makers to the possibility of a European infrastructure that can engage with the scale of regulating Big Tech.

¹⁴² Burwell and Propp (n 127).

¹⁴³ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A European Strategy for Data" COM (2020) 66 final.

¹⁴⁴ European Commission, 'White Paper "On Artificial Intelligence – A European Approach to Excellence and Trust" COM (2020) 65 final.

¹⁴⁵ European Commission, 'Commission Work Programme: A Union That Strives for More' COM (2020) 37 final.

¹⁴⁶ H Lee-Makkyama, 'On New Regulation of Europe's Digital Markets' (Wilson Center, 5 April 2021), www.wilsoncenter.org/article/new-regulation-europes-digital-markets accessed 24 February 2022.

¹⁴⁷ European Commission, 'Proposal for Digital Markets Act' (n 19).

¹⁴⁸ See A Lamadrid de Pablo and N Bayón Fernández, 'Why The Proposed DMA Might be Illegal under Article 114 TFEU, and How To Fix It' (2021), <https://antitrustfairness.wordpress.com/2021/04/why-the-proposed-dma-might-be-illegal-under-article-114-tfeu-and-how-to-fix-it-3-pdf> accessed 24 February 2022.

¹⁴⁹ See P Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) SSRN Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276 accessed 24 February 2022.

For instance, the European Parliament appears to agree with the Commission that the proposal needs to include ex ante rules on systemic operators with a gate-keeper role pursuant to the internal market, with the potential to open up markets to new entrants.¹⁵⁰ The DMA has faced many accusations as to the EU's capacity to limit innovation here or whether the Act is a 'game changer' in addressing digital market distortions, including anti-market practices.¹⁵¹ Nonetheless, from a regulatory perspective, the EU's actions in the digital space are undoubtedly primarily defensive, as is evident from the framing of digital sovereignty. Given the lack of success of competition law or antitrust in engaging with tech platforms, new formulations of engagement form the core of the DMA.

The DSA provides for a so-called horizontal framework for transparency, accountability and regulatory oversight of the EU online space, not to replace but to complement the E-Commerce Directive and other legislation, eg Platform to Business regulation. It has four specifically key sets of rules on intermediary services, hosting services, online platform services and very large online platform services. It is said to be a horizontal instrument because it puts in place a framework of layered responsibilities targeted at different types of intermediary services. All online intermediaries offering their services in the EU would have to comply with the new rules, including those established outside of the EU. However, the obligations are said to be asymmetric because they would create a range of harmonised EU-wide symmetric obligations. The extent to which such terminology is over-stated or even facetious remains to be seen. On its face, it places a range of obligations on the providers of intermediary services and on online platforms and hosting service providers. The DSA is similarly poised to legislate in a far-reaching way on various issues relating to technology platforms, including competition, data sharing and content moderation. What is striking about the proposed institutionalisation of the DSA is its engagement with 33,000 stakeholders and the multiplicity of actors therein.¹⁵²

The DSA was proposed by the Commission in the form of a regulation on a single market on digital services on the basis of Article 114 TFEU to prevent

¹⁵⁰ See European Parliament, 'Digital Markets Act' (2021) European Parliamentary Research Service PE 662.641, [www.europarl.europa.eu/RegData/etudes/BRUE/2021/662641/EPRS_BRUE\(2021\)662641_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRUE/2021/662641/EPRS_BRUE(2021)662641_EN.pdf) accessed 24 February 2022 and European Commission, European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, 'Shaping Europe's digital future' COM (2020) 67 final. The European Parliament here cites the Commission statement: 'Among the key actions envisaged in the communication was a digital services act package to "further explore ... ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants".'

¹⁵¹ On the eve of the first EU-US Summit in 2021, the Biden administration even argued that the DMA was anti-American: J Espinoza and J Politi, 'US Warns EU against Anti-American Tech Policy' *Financial Times* (15 June 2021), www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259 accessed 24 February 2022.

¹⁵² Commission Staff Working Document, 'Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' SWD(2020) 348 final 1

divergences from hampering the free provision of cross-border digital services and to guarantee the uniform protection of rights and uniform obligations for business and consumers across the internal market.¹⁵³ The DSA has a complex relationship with the DMA and is said to both bolster it and synergise with it. Its key legal link appears striking, with its legal base being rooted in Article 114 TFEU. It is important to state that the EU has a longstanding history of the broadest use of Article 114 TFEU and an extensive CJEU jurisprudence exists on the parameters of its use, which is largely benevolent. There was a significant cross-institutional alignment of the EU institutions to regulate online marketplaces, eg Amazon, eBay and Alibaba, seeking more requirements for e-commerce platforms. Whatever the outcomes of these law-making negotiations, the depth of the regulatory capture is far-reaching and explicit. The EU is repeatedly criticised for its negative regulatory vision of 'reining in' Big Tech rather than creating a positive one to foster innovation.¹⁵⁴ Herein lies the dilemma: the EU has immense capacity to generate institutionalisation, but whether that is what will actually be generated here remains to be seen, particularly because of the autonomy of actors emerging and the likely stabilisation of the projects. It is hard to better the words of Schaake: '[the] EU is somewhat coasting on its reputation for introducing measures such as GDPR. Instead, it needs to embrace a positive vision and plans to grow the European tech market ... in addition to regulatory measures.'¹⁵⁵

It is asserted that the DSA will turn online platforms into judge, jury and executioner when it comes to removing online content, in line with other copyright law developments. It is also said to give vast powers to the European Commission and national governments to suppress opposing voices, particularly arising from suggestions that platforms be ordered to make legality assessments of content in the absence of public scrutiny within 24 hours if the content can, for example, harm public policy.¹⁵⁶ The DSA aims to introduce more transparency and accountability with regard to social media platforms and online speech. The DSA is not per se about content but rather the processes to ensure that digital services work to support decisions made in democracies. The institutional and procedural innovations of the DSA are manifold. It sets up mechanisms for users to complain or to seek redress if their posts or profiles are removed. The DSA also requires general risk assessments, whereby tech companies will need to ask themselves whether their platforms will invite threats to democracy and how they can mitigate those risks. The DSA

¹⁵³ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final.

¹⁵⁴ Schaake (n 19).

¹⁵⁵ Ibid.

¹⁵⁶ European Parliament Committee on the Internal Market and Consumer Protection, 'Draft Report with recommendations to the Commission on Digital Services Act: Improving the functioning of the Single Market' (2020) 2020/2018(INL). See also J Penfat, 'DSA should promote open and fair digital environment, not undermine the rule of law' (EDRI, 2020), <https://edri.org/our-works/dsa-must-promote-open-and-fair-digital-environment-not-undermine-the-rule-of-law/> accessed 24 February 2022.

is a main centrepiece of EU law-making, with much focus on disinformation.¹⁵⁷ It is significant that the DSA is accompanied by a DMA designed to address the concentration of power in digital markets, rooted in the internal market legal base of Article 114 TFEU.¹⁵⁸ Notably, other forms of EU disinformation efforts have been undertaken through soft law, through self-regulatory Codes of Practice on Disinformation in force since October 2018 yet with limited success in the face of rising tides of disinformation becoming regularised in social media. It was allegedly 'strengthened' as a co-regulatory instrument along with the DSA in 2021, yet much remains to be seen as to the capacity of the EU concretely to evolve its content.¹⁵⁹

The DSA and DMA follow atypical EU regulatory models of infrastructure, actors, agencies and regulatory structures, based upon robust intuitional design because they are single-market related. Their capacity to have external relations powers *de facto* or *de jure* remains to be seen. Nonetheless, the institutionalisation of data appears significantly 'ratcheted up' by these two core planks of the EU's digital strategy. The use here of the internal market is significant in bolstering the breadth of the Acts. Yet it also constrains them and shows an uneasy use of the intersection of internal market and competition law.

VIII. The EU's Emerging Architectural Infrastructure of AI: Global Lead on Regulatory Capture

The EU has introduced the first all-encompassing AI regulation in the world, immediately welcomed by the US and a host of civil society organisations.¹⁶⁰ The EU has

¹⁵⁷ B. Martins dos Santos and D. Morra, 'Four lessons for U.S. legislators from the EU Digital Services Act' (*Brookings*, 6 January 2021), www.brookings.edu/blog/techrank/2021/01/06/four-lessons-for-u-s-legislators-from-the-eu-digital-services-act/ accessed 24 February 2022; C. de Froment, 'Digital Services Act: New Forms of Work' (*Institut Montaigne*, 15 September 2020), www.institutmontaigne.org/en/blog/digital-services-act-new-forms-work accessed 24 February 2022; C. Schmon and K. Gullio, 'European Commissions Proposed Digital Services Act Got Several Things Right, but Improvements Are Necessary to Put Users in Control' (*Electronic Frontier Foundation*, 15 December 2020), www.eff.org/deeplinks/2020/12/european-commissions-proposed-regulations-require-platforms-let-users-appel accessed 24 February 2022; G. Babinet et al., 'Digital Services Act: Moderating Content and Protecting Minors' (*Institut Montaigne*, 18 September 2020), www.institutmontaigne.org/en/blog/digital-services-act-moderating-content-and-protecting-minors accessed 24 February 2022.

¹⁵⁸ European Parliament, 'Digital Markets Act' (n 150); European Parliament, 'Digital Services Act' (2021) European Parliamentary Research Service PE 689_357, [www.europarl.europa.eu/RegData/etudes/BRUE/2021/689357/EPRS_BRU\(2021\)689357_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRUE/2021/689357/EPRS_BRU(2021)689357_EN.pdf) accessed 24 February 2022.

¹⁵⁹ Code of Practice on Disinformation: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> accessed 24 February 2022. The Code of Practice was signed by the online platforms Facebook, Google and Twitter, Mozilla, as well as by advertisers and parts of the advertising industry in October 2018, all of whom then later presented their roadmaps to implementation. Microsoft and TikTok became signatories in 2019 and 2020.

¹⁶⁰ See European Commission, 'Communication: Shaping Europe's digital future' (n 150). See 'A Union that strives for more: My agenda for Europe – By candidate for President of the European Commission Ursula von der Leyen: Political Guidelines for the Next European Commission 2019–2024', 13, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf accessed 24 February 2022.

sought to frame AI using OECD terminology and definitions thereof as widely accepted as possible to encompass human-produced systems and to understand AI in similar terms to product safety, ie as a human product. The EU is attempting here to shift discussions beyond mere ethics to form binding rules – all-pervasive to society in all areas. The first legally binding law on AI would be no small global achievement. For the EU, institutionalising AI in this way amounts to an issue of power: regulating power to corporations over countries and people. The legislative process as to the EU's AI regulation can be described as a 'finding process', to ascertain the core thereof. During the law-making process of the GDPR, a significant amount of US lobbying sought to water down the proposals. Interestingly, the US has welcomed the EU's AI proposals, marking a significant shift from its reaction to the EU's GDPR legislation. The EU is understood in this law-making process to be following its values by putting structures, design and autonomous actors in place to support them. Under the EU's proposal, most AI systems will not be high risk (see draft titles IV and IX). One of the features of the legislation is the transparency obligations (pursuant to Article 52) to notify humans that they are interacting with an AI system. The EU has sought here to move from the ethics-probing challenges of many parties, including within the Commission and also in the Member States, to legal proposal, where a transition from talk and ethics to law is perceived as a gigantic leap. The EU's law fundamentally challenges the infamous Barlow discourse on the law-free nature of the Internet – which has now been consigned to history in the EU – and does so in Washington DC. The EU's efforts show that AI regulation is similarly neither law-free nor democracy-free. EU legislation subverts the claim that the Internet could be free from regulatory capture, 'Barlow-esque'.¹⁶¹ The EU's process of law-making has also been fundamental in procuring a design of this nature, as participation is key for the EU in law-making, including extensive stakeholder engagement, considerable involvement of civil society and the far-reaching bottom-up development of proposals. In this regard, the AI regulation is far from merely a technical debate. Thus from the DMA, DSA to AI civil liability, the EU has sought to write a new *code civil* for the Internet and digital society through its institutionalisation. It emerges as a constitution for the technical which is trying to operationalise constitutional values – previously the preserve of specialists and ethicists. Institutionalisation here is an important value encapsulating the actions taking place. It thus challenges the complexity, opacity, unpredictability and autonomy of data, and addresses directly the many reasons to not regulate in the usual way, but rather to retain AI within the preserve of ethics – thus engaging directly with safety risks, fundamental rights risks, enforcement, legal certainty, mistrust and fragmentation. The definition and scope of the regulation is provided for in Article 6. It is defined as neutrally as possible, and provides in Annex I a catalogue list of techniques and approaches that can be amended/proposed. It differentiates four risk groups in a pyramid: those permitted with no restrictions; those permitted with information obligations; those that are high risk

¹⁶¹ Barlow (n 1).

eg recruitment, medical devices permitted subject to compliance with AI requirements and ex ante Conformity assessment; unacceptable risk eg social scoring which is prohibited. In so doing, it has adopted many principles of the internal market, eg as to product conformity assessments, and applied them to AI. It has thus sought to widen the reach of its most successful internal policy field, itself highly institutionalised.

IX. Conclusions

The EU has essentially developed an approach to data protection because it is widely understood to have had extra-territorial reach and effects, both *de facto* and *de jure*. The resulting architecture is a complex system of bodies at EU and national level who are charged with responsibility for the enforcement of the rules in the GDPR. The dense institutional design and autonomy of individual actors furthered by the GDPR continue to be core hallmarks of EU regulatory capture of data. The EU now has data transfer regimes and flows with third countries, which count as some of the largest in the world, featuring significant institutional dimensions. As has been outlined above, the EU's data adequacy system is ultimately both highly politicised and institutionalised: the Court of Justice has inserted itself into the adequacy process, institutionalising global data flows like no other process, in its extraordinary interventions in its landmark decisions in *Schrems I* and *II* relating to the EU-US Privacy Shield and previous Safe Harbour Agreement. The EU's data regimes vary in scale and complexity and most of all in institutional design. A turn to institutions and deeper forms of institutional oversight, accountability and legitimations is definitively European and differs substantially from US and Asian models of looser accountability and oversight. The EU has the advantage of being the first mover, and also the first mover with the highest standards and some of the deepest institutionalisation to date, as well as ambitious extra-territorial reach to follow through on its internationalist ambitions in generating a global standard.

EU digital sovereignty has emerged as a strange lexicon, as a language of strife. As has been argued here and elsewhere, from the DMA, DSA to AI civil liability, the EU has evidently sought to write a new code for the Internet and digital society through its institutionalisation. This constitution for the technical and digital society tries to operationalise constitutional values through atypical institutional design and the rising autonomy of actors. The depth of the design, eg its agencification, and the success of the breadth of its regulatory capture, given its many subjects and objects, remains to be seen.¹⁶²

¹⁶² See G. De Gregorio and O. Pollicino, 'The European Constitutional Road to Address Platform Power' (*Verfassungsblog*, 31 August 2021) <https://verfassungsblog.de/power-dsa-dma-03/> accessed 24 February 2022; see The Digital Constitutionalist Project: <https://digi-con.org/> accessed 24 February 2022.

2

The EU as a Digital Trade Actor

I. Overview: Digital Trade – A Fragmented and De-institutionalised Landscape?

Across many disciplines and subject fields, digital trade and the digital economy are widely agreed to be key elements in the successful development of the future economy.¹ Companies and governments are encouraged to use the potential of data and to mobilise their resources appropriately so as to make the data-drive economy real. Digital trade is already one of the main driving forces behind sustained economic growth, because it helps countries to improve productivity, a key indicator for technological advancement and the chief source of future economic welfare.² However, the perils of reliance on data and Big Data with respect to the protection of privacy are also repeatedly highlighted.³ While data and digital information may have joined 'oil, tanks and money' as the key currency of international affairs,⁴ from a legal perspective the curious and complex place of data represents a challenge. However, the newly emerged framework of digital trade governance, despite increasing numbers of digital trade provisions in digital trade chapters, is increasingly fragmented, patchy and complex.⁵ While there may be some regulatory convergence on certain objectives and principles, significant

¹ World Bank 'World Development Report 2021: Data For Better Lives', www.worldbank.org/en/publication/wdr2021 accessed 24 February 2022. In the transatlantic context, see generally D. Hamilton and J. Quinlan, 'US Chamber of Commerce, *The Transatlantic Economy 2021* (2021)', www.amcham-mexico.com/sites/default/files/publications/files/transatlanticeconomy2021_fullreporthr.pdf accessed 24 February 2022.

² M.F. Ferracane et al., 'ECIPE Digital Trade Restrictiveness Survey Index' (ECIPE, 2018), https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf accessed 24 February 2022.

³ M. Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51(56) *University of California Davis Law Review* 65, 67; Council of Europe, 'Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data' (23 January 2017) T-PD(2017)01, <https://rm.coe.int/16806e6e7a> accessed 24 February 2022; Federal Trade Commission Staff Report, 'Internet of Things: Privacy and Security in a Connected World' (2015), www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2015-workshop-entitled-internet-things-privacy/150127iotrpt.pdf accessed 24 February 2022.

⁴ H. Farrell and A. Newman, *Of Privacy and Power: The Transatlantic Struggle over Freedom and Security* (Princeton University Press, 2019) 173.

⁵ M. Burri and R. Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187, 220.

differences remain with regard to the treatment of cross-border data flows, data localisation and personal data protection. Also, despite the growing importance of digital trade, little is known about its scale. New studies of digital trade restrictiveness globally are only recently beginning to emerge.⁶ Reliable and internationally comparable statistics on digital trade that are coherent with national accounting frameworks are limited.⁷ Any reasonable enquiry into the relationship between data and digital trade arguably needs also to be partly descriptive in order to attempt to map the field. With the exception of the framework developed jointly by the Organisation for Economic Co-operation and Development (OECD), World Trade Organisation (WTO) and International Monetary Fund (IMF), there have been few attempts to systematically define digital trade.⁸ Perhaps unsurprisingly, there have also been few attempts to systematically map the content of digital trade, at least until recently.⁹

There is no global or legally agreed definition for either data or digital trade in an international trade agreement.¹⁰ Data comprises a broad church of concepts and forms, from cybersecurity, intellectual property and transparency to frictionless

⁶ There are several new databases on digital trade policy measures as provided by the Global Trade Alert, the OECD Digital Services Trade Restrictiveness Index and ECIPE's Digital Trade Estimates project and the Global Data Governance Mapping Project at the Digital Trade and Data Governance Hub. See respectively, Digital Trade Alert Website: www.globaltradealert.org/digital_policy; OECD Digital Services Trade Restrictiveness Index: <https://stats.oecd.org/Index.aspx?DataSetCode=STRLDIGITAL>; Digital Trade Estimates, <https://ecipe.org/dte/> and Datablab Global Data Governance Mapping Project: <https://datablab.elliott.gwu.edu>, all accessed 24 February 2022.

⁷ Cambridge Econometrics for UK Department of International Trade and Department of Digital, Culture, Media & Sport, 'Understanding and Measuring Cross-border Digital Trade' (14 May 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885174/Understanding-and-measuring-cross-border-digital-trade.pdf accessed 24 February 2022, who state that the OECD-WTO-IMF framework is a useful starting point for understanding and measuring the different components of digital trade. The OECD-WTO-IMF framework defines digital trade as trade that is 'digitally ordered' (synonymous to e-commerce) and/or 'digitally delivered' (services transactions that are delivered remotely through computer networks).

⁸ OECD-WTO-IMF framework from the United Nations Conference on Trade and Development paper 'Information Economy Report 2017: Digitalization, Trade and Development' considers that there are broadly three levels of digital economy: (1) core digital IT/ICT sector: the ICT-producing sector comprising of both IT infrastructure and IT services; (2) narrow scope (digital economy): adds to the core definition with digital services (eg outsourced call centre services) and the platform economy (eg Facebook and Google); and (3) broad scope (digitalised economy): includes the use of various digital technologies for performing activities such as e-business, e-commerce, automation and artificial intelligence. The biggest challenges to measuring digital trade are said to relate to: transactions involving intermediaries (free) cross-border data flows that involve no monetary transactions; imports of e-services (such as digital downloads, or streaming services) by households; de minimis trade options to measure emergent innovations in the digital domain eg cloud computing, or crypto-assets). See United Nations Conference on Trade and Development, 'Information Economy Report 2017: Digitalization, Trade and Development' (2017), https://unctad.org/system/files/official-document/ier2017_en.pdf accessed 24 February 2022. See also J Loper-Gonzalez and MA Jouanjan, 'Digital Trade: Developing a Framework for Analysis' (2017) OECD Trade Policy Papers No 205.

⁹ See *ibid.* See also United States Trade Representative, 'Key Barriers to Digital Trade' (2017), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade> accessed 27 February 2022.

¹⁰ cf Datablab Global Data Governance Mapping Project (n 6).

movement of tech workers. Many activities, such as sharing information, regulation, laws and programs on data protection, domestic regimes for the protection of personal data, technical assistance in the form of exchange of information and experts, research and training activities, joint programmes, dialogues, consultations on data protection, etc, constitute activities involving cooperation relating to data.¹¹ It is a truism that every twenty-first century trade agreement wants a holistic and robust chapter on electronic commerce or digital trade – but rarely obtains it.¹² WTO law stands at an embarrassing juncture and is sorely in need of modernisation. Digital taxation remains outside of trade agreements but is a key peripheral area, affecting the scope and ambition of trade agreements in some instances. Free Trade Agreements (FTAs) are understood to have generated considerable rule fragmentation in the area of data and digital trade because of the overarching outdated state of WTO provisions on digital trade.¹³ The era of the Internet and of the wholesale digitisation of Covid-19 society has given rise to an explosion of 'data localisation' measures, which involve data about a nation's citizens or residents being collected, processed, and/or stored in that country. Data localisation is a particularly significant flashpoint in the rule-making, explored further in this chapter. Thus, states around the world have taken to trade agreements to 'fill in the gaps' of the outdated WTO framework, discussed further below.¹⁴ As a result, however, the framework that now regulates contemporary digital trade is understood to be extremely fragmented, from a legal point of view.¹⁵ Ultimately, it is far removed from being an 'institutionalised' landscape in any shape or form.

It is also worth stating that no WTO member classified as a developing country by the United Nations or as a low-income country by the World Bank has agreed a Regional Trade Agreement (RTA) that contains an e-commerce chapter.¹⁶ No WTO member in sub-Saharan Africa has ever agreed an RTA that contains an e-commerce chapter. Until very recently, even developed economies did not seek to include a chapter on e-commerce or digital trade.¹⁷ However, the most developed global economies tend to have been most active in negotiating

¹¹ M Burri, 'Should There Be New Multilateral Rules for Digital Trade?' (2013) E15 Expert Group on Trade and Innovation 15–16.

¹² R Wolfe, 'Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP' (2019) 18(S1) *World Trade Review* 63, 63–64.

¹³ Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3) 127.

¹⁴ Burri and Polanco (n 5); H Gao, 'The Regulation of Digital Trade in the TPP: Trade Rules for the Digital Age' in J Chaisse et al (eds), *Paradigm Shift in International Economic Law Rule-Making* (Springer, 2017) 345.

¹⁵ Burri and Polanco (n 5) 220.

¹⁶ M Wu, 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (2017) RTA Exchange International Centre for Trade and Sustainable Development and Inter-American Development Bank. See E Fahy, 'Digital Trade and Data Equivalency: Research Briefing for the Welsh Parliament' (Welsh Parliament, 2020).

¹⁷ Wu (n 16) 8.

agreements with e-commerce provisions.¹⁸ Certain country agreements have been uniquely consistent across their respective provisions relating to data, eg South Korea e-commerce chapters as to consumer protection, paperless trading and data protection. But mostly this inequity and practice of inconsistency prevails. Certain countries and regions are notable for their commitment to significantly *changing* their approaches over the year.¹⁹ EU trade agreements have historically merged trade in services with establishment and electronic commerce, rather than giving e-commerce a standalone chapter.²⁰ In more contemporary post-Lisbon trade agreements with developed global economies, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), initial practice saw a standalone e-commerce chapter. The EU subsequently negotiated the EU-Japan Economic Partnership Agreement (EPA), which has an e-commerce chapter covering trade in services, investment liberalisation and e-commerce. More recent negotiations with Australia, Mexico and the UK have seen the EU adopt US terminology on digital trade and tend to provide for a separate chapter on digital trade aligned with services to a degree but still standing more apart than in earlier agreements, discussed further below, with provisions for very high levels of protection for data.²¹ These developments underscore the unsettled state of digital trade globally. Yet this is where the EU has stepped in, at unilateral level, to make a significant contribution; this the focus of this chapter.

Digital trade sits within a complex broader matrix. Until recently there were no reliable measurements of data flows, and any assessment of their contribution to value-creation lacked solid methodological grounds.²² Rather, wholesale extrapolations from estimations of data flows and their value to the effect of domestic privacy regulation have resulted in a skewed picture. Internet traffic suffers from double counting because Internet protocol traffic is not linear and can be routed through several countries.²³ There is no agreed definition of digital trade or, more broadly, of digital economy. As a result, the methodology to be applied to data flows may be said to be doubly flawed. It is said that framing the protection of personal data as a barrier to trade focuses only on the cost side of things, ignoring the individual and societal benefits of stronger data protection. Ultimately, this approach generates a polarised landscape that ignores the possibility of a win-win between the protection of privacy and personal data, on the one hand, and of cross-border data flows, on the other. Digital trade is increasingly fragmented and

dependent on data flows and the broader regulatory capture of data. This chapter argues that the EU is a complex emerging actor in digital trade, leading with exceptionally high standards and a highly bureaucratized design for its regulation. The EU is generally agreed to be cautious and to have repurposed itself with modest innovations, but it largely constitutes an outlier because of its focus on rights. The EU faces many challenges in upholding this position but by subscribing to internationalisation and multilateralism it seeks to make significant inroads in global governance. Regulatory cooperation is shown in this chapter (and further in Chapter 5) to be a tool that the EU uses to develop deeper partnerships with developed economies. The 'Brussels Effect' alone does not explain the success of the EU, nor explain the EU's complexity. This chapter shows how a commitment to multilateralism in institutional design and institutional practice is important in contemporary digital trade.

Chapter 2 contains the following sections: (II) the EU's shift beyond a mid-way position on digital trade; (III) the WTO as a forum for digital trade; (IV) data localisation in trade agreements; (V) FTAs and data privacy; (VI) the EU's horizontal strategy on data internationalisation and the institutionalisation of data privacy; (VII) EU digital trade regulatory cooperation; and (VIII) Conclusions.

II. The EU Moving Beyond the 'Mid-Way' Position on Digital Trade

There is no one accepted or objective definition of 'digital trade' or 'electronic commerce'; international economic law is understood to be mired in archaic understandings of these terms because of uncertainty as to its goods or services characterisation.²⁴ Digital trade usually relates to provisions on data and consumer protection, provisions on cross-border data flows and data localisation provisions, temporary prohibition of custom duties levied on electronic transmissions, provisions on regulatory cooperation and definitions of e-commerce and digital products. Whilst this debate as to what is old or new terminology goes on, other regions of the world have moved on from digital trade terminology altogether, towards modular discussions of regional cooperation on digital economy issues, viewed in the broadest of terms.²⁵ Digital trade is still conventionally understood to have evolved in two genres – narrow and broad – with the EU traditionally falling between the two extremes of the US's more digital-focused understanding of trade, and the Chinese approach, focused on the 'trade' aspect.²⁶ Thus, historically,

¹⁸ I-A Monteiro and R. Teh, 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) WTO Working Paper ERSD-2017-11, 10.

¹⁹ *Ibid* 11.

²⁰ Fahey (n 16).

²¹ Advanced economies closely connected to the EU, such as the EEA, have historically not necessarily sought a broad e-commerce chapter either: Wu (n 16) 8.

²² See Databub Global Data Governance Mapping Project (n 6); Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3).

²³ S. Yakovleva and K. Irton, 'Pitching Trade Against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) *International Data Privacy Law* 201.

²⁴ AD Mitchell, 'Towards Compatibility: The Future of Electronic Commerce within the Global Trading System' (2001) 4 *Journal of International Economic Law* 685.

²⁵ Thereby differing from the WTO's single undertaking approach that comprehensive FTAs have replaced.

²⁶ Mitchell (n 24); H. Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade' (2017) 21 *Journal of International Economic Law* 297.

China has promoted a narrow view of digital trade, focusing on trade in goods online, while the US and others have subscribed to a more inclusive approach.

Structurally, e-commerce was elevated from a small number of articles in other chapters into a standalone chapter in trade agreements. The EU is thought to stand out amongst WTO members for having made the greatest changes in its approach to e-commerce in Preferential Trade Agreements (PTAs) over the years, although for very different economic and geopolitical factors than others such as the US and China.²⁷ It is regarded as a latecomer to many key issues in digital trade and most of its earlier efforts lack real 'normative' value and are not regarded as game-changers. These factors have seen the EU carve out cultural and audio-visual services from its Common Commercial Policy whilst reconciling the differing policy perspective of DG Trade and DG Justice towards digital governance over a relatively short period of time. The EU is said to subsequently pursue a much more activist free trade agenda as to digital content and cross-border data flows in PTAs, while China has adopted a more restrictive stance towards information and communication technologies.²⁸ E-commerce disciplines expanded from passive non-interference obligations into more positive requirements that specify what the government needs to do for e-commerce businesses. This new model of e-commerce obligations started out in the 2004 FTAs signed by the US with Australia, Chile, and Singapore, respectively, and culminated in the Trans-Pacific Partnership (TPP) that was concluded in 2016. While the Trump administration withdrew from the TPP, its e-commerce chapter was heavily influenced by the US and has been incorporated into the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that the remaining 11 TPP members signed in March 2018.²⁹ The TPP is not the first FTA to have an e-commerce chapter, and as discussed below, many FTAs signed by Australia and Singapore have substantial e-commerce chapters, which paved the way to the TPP negotiations.³⁰ The digital trade provisions in the US-Mexico-Canada Agreement (USMCA) largely follow TPP's model, promoting the so-called Silicon Valley consensus of this era. However, the USMCA deviates from TPP in its framing.

²⁷ P. Sauvé and M. Soprana, 'The Evolution of the EU Digital Trade Policy' in M. Hahn and G. Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Brill Nijhoff, 2020) 287; Wu (n 16); H. Horn et al., 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33 *The World Economy* 1565; Ferracane et al. (n 2).

²⁸ Sauvé and Soprana (n 27) 288.

²⁹ The chapter on e-commerce in CPTPP was not changed from that in TPP. However, several side letters have been added, which seem to have an implication to the bindingness of the rules. Most notably, Vietnam and the partners signed side letters on cybersecurity. It was agreed that the partners shall refrain from having recourse to dispute settlement with respect to measures adopted or maintained pursuant to the Cybersecurity Law of Vietnam or related legislation, which are alleged to be in violation of Vietnam's obligation under Art 14.11 (Cross-Border Transfer of Information by Electronic Means) and Art 14.13 (Location of Computing Facilities), for a period of five years. See S. Hananaka, 'The Future Impact of Trans-Pacific Partnership's Rule-Making Achievements: The Case Study of E-Commerce' (2019) 42 *World Economy* 552.

³⁰ Hananaka (n 29).

While TPP used 'electronic commerce' as an umbrella term, in line with WTO terminology, USMCA has shifted towards 'digital trade', which avoids some of the confusion caused by the colloquial use of the term 'e-commerce' to mean online shopping.³¹ The USMCA thus has a chapter (Chapter 19) on digital trade rather than e-commerce, unlike the CPTPP (Chapter 14), the successor to TPP. It is reasonable to expect that similar provisions will be reflected in future US FTAs. While the EU's approach to data institutionalisation has been progressive and holistic, post-Lisbon the EU has merged e-commerce with trade in services and only recently moved to separate digital trade. It has thus moved closer to the US negotiation position and lexicon but also notably merged digital trade and services in some key recent trade agreements, eg the UK-EU TCA.

Historically, many preferential trade agreements signed by the EU also contain provisions addressing issues relating to electronic commerce that are treated in other parts of the agreement. Most frequently, such provisions can be found under a different section within the trade agreement chapters dedicated to trade in services, investment and electronic commerce.³² In particular, examples relate to provisions governing access to and use of the Internet, which are typically found in PTA sections addressing electronic communication networks and services. Provisions as to digital trade and data processing have been found in sections on financial services or intellectual property other than electronic commerce. Privacy provisions or provisions as to personal data protection are typically scattered across parts of EU agreements, although with considerable variance. A question arises as to the dominance of 'Silicon Valley logic' or the so-called 'Washington Consensus' in digital trade going forward, as to pro-market liberalisation in a likely future era of Big Tech regulation. It seems clear that a certain trade policy continuity from the Obama to the Trump administration took effect through the survival of CPTPP and thus beyond ideological divisions on the nature of the future digital economy.³³ While the Obama administration maintained close contacts with Silicon Valley companies, efforts by the Trump administration to build connections to the tech sector quickly withered and the sector has toed a complex line on America First. Nevertheless, US Internet corporations remain 'first' in the world, rivalled only by their Chinese counterparts. Furthermore, US tech companies' delivery of online services abroad creates a trade surplus that counterbalances the US trade deficit generated by trade in goods – one of the key fixations of former US President Trump and some of his advisors. The collapse of the TTIP negotiations and the incarnation of TPP in CPTPP without the US, yet adopting key US principles and norms, are thus of significance in understanding the place of the EU here. This is particularly the case in relation to data standards, where US law seems

³¹ T. Streinz, 'Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy' in B. Kingsbury et al. (eds), *Megaregulation Contested* (Oxford University Press, 2019) 317.

³² Sauvé and Soprana (n 27) 294.

³³ Streinz (n 31).

to be shifting closer to EU law, largely spurred by US tech companies with world headquarters or substantial markets in the EU, as is explored in Chapter 4 and in the light of RCEP developments, discussed in Chapter 6.

While data has continued to occupy a complex place in all major global trade agreements in recent times, large trade agreements, such as the megaregionals CPTPP and USMCA, data's precise relationship to privacy has been somewhat overlooked. For example, USMCA contains a chapter (Chapter 19) on digital trade, rather than e-commerce like the CPTPP (Chapter 14) and so distinct differences between the two major agreements exist as to international privacy regimes cited, data localisation, interactive computer services etc.³⁴ They have an unclear relationship with the human right to access information or control information and privacy.³⁵ They reflect the broader trend that transnational consumer protection and cybersecurity are weak. More substantively, one might say that USMCA deviates significantly from TPP in its framing, as TPP had used electronic commerce as an umbrella term, in line with WTO terminology. As noted above, the USMCA shifted towards the term digital trade, which avoids the confusion caused by colloquial use of e-commerce for online shopping.³⁶ Similarly, the EU has notably shifted towards the US terminology. However, the economic as opposed to rights-based construction of privacy as between APEC and the General Data Protection Regulation (GDPR) constitutes a significant challenge for the future in the search for global standards or the workability of data localisation in an era of privacy.

The place of the EU as a first-mover internationally on best practice in data protection and data flows on account of the high standards of the GDPR will be unavoidably significant for many countries. The EU's Digital Strategies published in 2018 and 2020 indicated unambiguously the institutional, regulatory and international contours of the EU as a global digital player.³⁷ A European Strategy for Data was published in February 2020. The Strategy, which was accompanied by a significant White Paper on Artificial Intelligence,³⁸ was designed to develop a Single Market in data by 2025 and a Common European Data Space, focusing upon tackling, *inter alia*, fragmentation between Member States in nine areas, ranging

from industrial manufacturing to health, financial, energy, and agricultural data.³⁹ Indeed, its approach to regulating such a cutting-edge area as AI is to embed EU policies heavily in international and multilateral frameworks, from the OECD, G20, Council of Europe and UNESCO to the International Telecommunications Union and the WTO with respect to policies of third countries that limit data flows and create undue restrictions on bilateral trade negotiations, whilst establishing a High Level Expert Working Group on AI. Overall, the EU advocates a message of tech sovereignty as its future, promoting the capability the EU must have to make its own choices on its own values and own rules, predicated on an emerging regime of institutionalisation of compliance, enforcement and governance.⁴⁰ It is a highly ambitious set of objectives. However, time will tell whether its implementation is plausible, given the many delays in the roll-out of data matters; the lack of complete implementation of prior policies, eg Digital Single Market, indicate that ambition can have severe limitations in data matters.

III. The WTO as a Forum for the Future of Digital Trade?

As considered above, e-commerce is said to be no longer a marginal chapter in FTAs.⁴¹ However, there is no settled definition of electronic commerce or e-commerce. At its broadest, electronic commerce involves conducting business using most modern communication instruments: telephone, fax, television, electronic payment and money transfer systems, Electronic Data Interchange, and the Internet. Yet these developments were not reflected at the WTO until recently, as its role appeared to be ever-diminishing amongst the innovations taking place at bilateral and region level. The WTO recognises that commercial transactions can be broken into three stages: the advertising and searching stage; the ordering and payment stage; and the delivery stage. It is commonly assumed that the digital trade provisions in PTAs build upon the rules of the WTO. Although one study showed that 108 PTAs had e-commerce chapters, only 48 agreements had a reference to the applicability of WTO rules to e-commerce, and these were mainly found in agreements where the EU is a party.⁴² The *US-Gambling WTO Appellate*

³⁴ See Streinz (n 31); P Leblond, 'Digital Trade at the WTO – The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation' (2019) CIGI Papers No 227, <https://www.cigionline.org/sites/default/files/documents/no.227.pdf> accessed 27 February 2022.

³⁵ Burri and Polanco (n 5).

³⁶ Contrast USMCA ch 19 with TPP ch 14. See Streinz (n 31) 315.

³⁷ European Commission, 'Communication from the Commission: European Commission Digital Strategy: A digitally transformed, user-focused and data-driven administration by 2022' C (2018) 7118 final, European Commission, 'Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, Shaping Europe's digital future' COM (2020) 67 final.

³⁸ European Commission, White Paper 'On Artificial Intelligence – A European Approach to Excellence and Trust' COM (2020) 65 final.

³⁹ European Commission, 'Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, A European Strategy for Data' COM (2020) 66 final.

⁴⁰ European Commission, Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future (19 February 2020).

⁴¹ P Mayvroids, 'Trade Regulation, and Digital Trade' (2017) Columbia School of International and Public Affairs Working Paper; Gao (n 26); Hamanaka (n 29). It is often said that one of the major contributions of TPP was its inclusion of e-commerce although as a term it appears surpassed by digital trade as an agenda: see Gao (n 26).

⁴² Burri and Polanco (n 5) 197.

Body case saw the General Agreement on Trade in Services (GATS) commitments apply to electronically supplied services but it also clarified key notions of services regulation, such as the application of the likeness test and the scope of the 'public morals/public order' defence under the general exceptions of GATS Article XIV.⁴³ However, much WTO law – in particular GATS provisions – was designed to allow WTO members to tailor their commitments. Others relate to outdated, pre-internet classifications of goods, services and sectors, upon which these commitments were based and which have become increasingly disconnected from modern trade practices.⁴⁴

In early 2016, e-commerce gained 'renewed interest' among WTO members: seven proposals were tabled by major WTO members such as the US, the EU, Japan and Brazil. The US proposal appeared to be encouraged by its success in the Trade in Services Agreement – although that has subsequently disappeared – and TPP negotiations. Electronic commerce has wound its way into both a WTO Ministerial Decision and a Joint Ministerial Statement, but also became the subject of a joint initiative by the WTO, the World Economic Forum, and the Electronic World Trade Platform (eWTP), the first of its kind in the WTO. With these signs, e-commerce was set to become one of the first 'Doha' issues to bear fruit in the form of the Joint Statement Initiative (JSI) on e-commerce.⁴⁵ Currently, however, negotiations on a plurilateral agreement on e-commerce, which began in 2019 and cover a range of rules on digital trade, have stalled. The negotiations have been structured around six focus groups, 'enabling digital trade/e-commerce', 'openness and digital trade/e-commerce', trust, cross-cutting issues and telecommunications. Notably the EU is actively attempting to promote its model articles; thus, as a forum it has much potential but arguably less promise. There has been some concern from civil society about the manner in which this JSI is perceived to be more representative of the views of Big Tech. The EU space for policy innovation eg as to AI, high privacy protection, spam and disinformation, 'ratchets' upwards. The complex position of the EU here becomes more interesting for its rights-based focus, as examined below, and for its capacity to engage with areas that are a key focus of China, such as sovereignty and security, though these terms may have radically different meanings for different parties.

Due to the widely diverging views of WTO members, efforts to revamp the rules in the WTO have historically largely failed in this area. Given the lack of progress in the WTO, the US, as the champion of digital trade, had turned to various bilateral, plurilateral, and regional initiatives to push for the internationalisation of digital trade rules that are based on the regulatory philosophy and

approach in the US to tackle trade barriers facing the US companies. Meanwhile, although initially reluctant to engage, China has also become more willing to negotiate e-commerce rules in its recent FTAs, eg RCEP, discussed in detail in Chapter 6. A 1998 WTO moratorium on import duties on e-commerce transactions was due to lapse in 2020, with concerns from developing countries about lost government revenue where trade becomes less goods-intensive and more digital. On 10 December 2019, WTO members adopted a decision on the Work Programme on Electronic Commerce.⁴⁶ In that decision they agreed to reinvigorate the Work Programme and to renew the practice of not imposing customs duties on electronic transmissions until Ministerial Conference 12 (MC12) in Geneva in 2021. These developments have doubtless been exacerbated by Covid-19, which has put increasing pressure on states and organisations for revenue, as the EU Digital Services Tax indicates, and has hampered much multilateral progress across the board with regard to law-making and regulation, discussed below. However, from an EU perspective, the place of the transatlantic relationship in leading change on a Transatlantic Trade and Technology Council (EU-US TTC), as proposed by the EU in late 2020 and already in place by Autumn 2021, could provide an important foundation on which multilateral developments can be built – discussed further in Chapter 4.⁴⁷ Much also depends on the future of the WTO and its dispute settlement system, the traditional forum for the navigation of disputes. The WTO has not yet explored the boundaries of barriers to trade in relation to the Internet in a robustly institutionalised format.

IV. Data Localisation in Trade Agreements

Digital protectionism has been defined by some to include laws and regulations that block the flow of data across borders or impede the provision of services such as cloud computing.⁴⁸ There are limits to digital trade and there are also many broad philosophical debates about what the contours of digital protectionism might be. The EU has been accused of digital protectionism in many contexts, despite its broader organisational goals of promoting free and fair trade and protecting consumer rights. It thus remains a somewhat complex idea to frame realistically. As noted above in Chapter 1, data-related provisions are a relatively new phenomenon in trade agreements. Before the year 2000, only 19 measures had been imposed globally. However, by 2008, that number had more than doubled, and it has doubled again since then.⁴⁹ These measures are primarily found in

⁴³ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* App no WT/DS285/26 (WTO).

⁴⁴ M Burri, 'The Regulation of Data Flows Through Trade Agreements' (2017) 48 *Georgetown Journal of International Law* 407, 413.

⁴⁵ See WTO, 'Joint Statement on E-commerce News Archives', www.wto.org/english/news_e/archive_ejsec_arc_e.htm accessed 27 February 2022.

⁴⁶ WTO, 'Work Programme On Electronic Commerce: General Council Decision, Adopted on 10 December 2019' (2019) WT/L/1079.

⁴⁷ See the discussion below in Ch 4.

⁴⁸ Eg *United States Trade Representative* (n 9).

⁴⁹ Ferracane et al (n 2).

dedicated e-commerce chapters. Where they appear in agreements, they outline rules either referring to the cross-border flow of data or banning or limiting data such localisation requirements. Provisions on the cross-border flow of data can, however, also be found in chapters dealing with discrete services sectors, where data flows are key or indeed inherent to the very definition of those services, eg telecommunications and the financial services sector. As Burri and Polanco state, data localisation now constitutes in the vast majority of trade agreements a *hard* law or binding measure as opposed to the soft law locus of data-related measures in earlier agreements: almost all localisation measures are binding now.⁵⁰ Recent surveys of digital trade restrictiveness show that the majority of contemporary data localisation measures impose conditional flow regimes, ie there are certain conditions that have to be fulfilled before the data can be transferred abroad.⁵¹ In addition, many belong to the most restrictive category of bans on transfer and local processing requirements, eg requiring a company to use a local server for the main processing of the data and, in the case of a ban on transfer, not even a copy of the data can leave the implementing jurisdiction.⁵² Finally, a smaller cohort contains local storage requirements, which means that a copy of certain data has to remain within the country, although the data itself can be processed abroad.⁵³ It is important to note that recent OECD data on digital trade-related restrictions indicates a solid rise in restrictions since 2014.⁵⁴ However, the Covid-19 pandemic has witnessed a significant lessening of restrictions, eg digital signatures law globally. Internet restrictions on data flows also continue to rise.⁵⁵

The first agreement to include data localisation provisions was the 2015 Japan-Mongolia FTA, and Asia continues to be a key focus for digital trade matters. The Japan-Mongolia FTA provides that neither party 'shall require a service supplier of the other party, an investor of the other party, or an investment of an investor of the other party in the area of the former party, to use or locate computing facilities in that area as a condition for conducting its business'. The 2016 TPP included provisions on the location of computing facilities, in Article 14.13, kept without change in the CPTPP.⁵⁶ The TPP explicitly sought to restrict the use of data localisation measures. Measures restricting digital flows or localisation requirements under Article 14.13 of the TPP were permitted only if they did not amount to an arbitrary or unjustifiable discrimination or a disguised restriction on trade and did not impose restrictions on transfers of information greater than required to achieve the objective. The ban on localisation measures was softened as regards

financial services and institutions, which has some merit.⁵⁷ As Burri states, the provisions of the TPP were ultimately interesting but did not simply entail a clarification of existing bans on discrimination or set higher standards.⁵⁸ Rather, they shaped the regulatory space domestically and could actually lower certain standards. In fact, Burri contends that a commitment to lower standards on privacy and data protection was palpable, with respect for Article 14.82.1 requiring every party to the TPP to adopt or maintain a legal framework that provides for the protection of the personal information of users of electronic commerce.⁵⁹ In fact, TPP parties were invited to promote compatibility between their data protection regimes by essentially treating lower standards as equivalent.⁶⁰ After TPP/CPTPP, a hard rule on data localisation, largely following the same wording, was included in the 2016 Chile-Uruguay FTA, Article 8.11 and the 2016 updated ASAFI, Article 14.15. A variation on this is to be found in the USMCA, stipulating that no party shall require a covered person to use or locate computing facilities in that party's territory as a condition for conducting business in that territory without considering any further exception, except in the USMCA, which includes a special rule for financial services.⁶¹ Ultimately, we are at a crucial crossroads in relation to the actual meaning of data localisation. For the EU, as outlined above, recent trade agreements have increasingly provided for free flows of data and set out provisions prohibiting 'bad' data localisation.

V. FTAs and Data Privacy: Why the EU's Institutionalisation of Data Privacy Matters

The EU is a very late comer to the place of privacy within trade agreements, and for long was not considered to be innovative or cutting-edge in its approaches. The EU has, broadly speaking, at least three forms of trade agreement in this domain: (i) preferential trade agreements (PTAs) that are part of a broader framework agreement, encompassing Deep and Comprehensive FTAs, including Association Agreements (AA), eg the EU-Georgia AA 2014, the EU-Moldova AA 2014, the EU-Ukraine AA 2014, and the EU-Serbia 2013 Stabilisation and Association Agreement; (ii) standalone preferential trade agreements (such as the EU-Canada CETA 2016), EPAs, eg the EU-Cariforum EPA 2008, the EU-Japan EPA 2017, and (iii) more recent or next-generation FTAs, such as EU-South Korea FTA 2010, the EU-Colombia and Peru

⁵⁰ Burri and Polanco (n 5) 212, 214.

⁵¹ Ferracane et al (n 2) 56.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ See OECD Digital Services Trade Restrictiveness Index (n 6).

⁵⁵ Ferracane et al (n 2).

⁵⁶ See Trans-Pacific Partnership Agreement (TPP), Art 14.14 and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2016), Art 14.13. See also Japan-Mongolia Economic Partnership Agreement (7 June 2016), Art 5.36.

⁵⁷ TPP, Art 14.2.4.

⁵⁸ Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3) 115.

⁵⁹ *Ibid.*

⁶⁰ TPP, Art 14.8.5.

⁶¹ Agreement between the United States of America, the United Mexican States, and Canada (in force 1 July 2020) (USMCA), Art 19.12.

FTA 2012, the EU-Singapore FTA 2018, and the EU-Vietnam FTA 2019. Digital technology for commercial purposes is nonetheless a relatively recent phenomenon dating back to the 1990s, as is evidenced from the scant provisions in the legal texts on electronic transmissions of the WTO from 1994.⁶² Some studies indicate that just 30 per cent of all 274 FTAs notified to the WTO by 2017 featured e-commerce provisions.⁶³ Currently, approximately 80 or more FTAs include provisions on privacy.⁶⁴ Yet even in the most large-scale formulation of trade agreements, such as the CPTPP and USMCA, data is understood to be mostly overlooked in the sense that it is difficult to find evidence of a robust and precise relationship between trade and privacy.⁶⁵ Most of the earlier agreements dealing with privacy issues largely consisted of non-binding declarations of mere programmatic form, such as the 2000 Jordan-US FTA, which contained a joint statement on electronic commerce where parties could deem it necessary to ensure the effective protection of privacy in the processing of personal data on global information networks.⁶⁶ The US-Jordan FTA was the very first FTA to have an e-commerce chapter, though it does not contain any hard obligations. It even recommended the OECD Privacy Guidelines as the appropriate basis for policy developments, although even the OECD points out that this framework has been surpassed by digitisation, interconnected networks and the nature and volume of data flows.⁶⁷ However, the shortcomings of trade agreements here need to be acknowledged: they are not holistic tools, are not regulatory forums, they create limited institutions and mostly have weak global centrifugal points underpinning them. They self-evidently mean that further regulation and multilateralism is required.

There have been many schools thought on digital trade, evidencing its evolving contours, from studies on e-commerce allowing for an understanding of how to identify and classify provisions relating to digital trade based on the content and scope of application, to all disciplines and obligations impacting digital trade beyond e-commerce. As will be outlined here, a significant shift eventually took place in EU agreements, where the EU has sought to elevate the place of privacy protection in electronic communications requiring transfers of data, following the broader trends of trade agreements – generally affirmatively protecting individuals' rights.⁶⁸ This has been done, for example, by increasingly referencing the

processing and dissemination of data, introducing administrative measures, or adopting non-disciplinary practices.⁶⁹

The EU has adopted a range of perspectives as to international standards and data protection.⁷⁰ eg EU-Central America, EU-Columbia, or EU-Peru, all providing that e-commerce shall be consistent with international standards of data protection; or EU-Ukraine, which provides that e-commerce must be fully compatible with the highest international standards of data protection. EU agreements include qualifications to these standards, for example giving the parties the right to define and regulate their own levels of protection of personal data in pursuit of public policy objectives and not to be required to disclose confidential or sensitive information or data.⁷¹ The EU has subsequently pioneered special chapters on the protection of personal data including discrete principles.⁷² I argue here that the EU ultimately pioneered these developments through the institutionalisation of data.

As developed further below and above, other trade agreements reference or place the criteria or guidelines from relevant international organisations or bodies into their agreements, eg APEC Cross-Border Privacy Rules system Privacy Framework or OECD Recommendations of the Council concerning guidelines governing the protection of privacy and transborder flows of data (2013).⁷³ These references could in theory be significant for the locating of internationalisation as the centre of gravity in a world of conflicting regimes and conceptual framing. USMCA explicitly recognises the APEC as a valid mechanism to facilitate cross-border information transfers while protecting personal information. Distinct differences exist between major agreements with respect to the international privacy regimes cited, data localisation, interactive computer services and so on which some label to be a 'missed

⁶² Sauvé and Soprana (n 27) 286.

⁶³ See WTO Database on Preferential Trade Arrangements: <http://ptadb.wto.org/?lang=1> accessed 27 February 2022.

⁶⁴ Monteiro and Teh (n 18).

⁶⁵ Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3). See Monteiro and Teh (n 18).

⁶⁶ Burri and Polanco (n 5).

⁶⁷ Jordan-US Joint Statement on Electronic Commerce (7 June 2000) Art II; The OECD Privacy Framework: Supplementary explanatory memorandum to the revised recommendation of the council concerning guidelines governing the protection of privacy and transborder flows of personal data (2013); OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1990).

⁶⁸ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, Art 13.1 and Art 99(d).

⁶⁹ Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (n 3).

⁷⁰ Free Trade Agreement Between the European Union and the Republic of Singapore [2019] OJ L 294/2, Art 8.57.4; Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4, Art 197.2; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/3, Art 119.2; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ 359/3, Art 202; Monteiro and Teh (n 18) 52.

⁷¹ Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA) [2018] OJ L 330/3, Art 18.1.2.h and Art 18.16.7.

⁷² Such as purpose limitation, data quality, proportionality, transparency, security, right to access, rectification and opposition, restrictions on onwards transfers, protection of sensitive data, enforcement mechanisms, coherence with international commitments and cooperation between the parties to ensure an adequate level of protection of personal data. See Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part [2008] OJ L57/2 ch 6, Arts 61–65; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, ch 6, Arts 197–201.

⁷³ USMCA, Art 19.8.2.

opportunity.⁷⁴ The Australia-Singapore Digital Economy Agreement (DEA) is noted to be a world first – an agreement calling for ‘interoperability’ of data protection regimes, making data protection more effective and coherent internationally.⁷⁵ These developments do not change the fact that the EU’s regimes are philosophically significantly at odds with economic understandings of privacy, and that interoperability may not be as intellectually robust as its flexible terminology might suggest.⁷⁶

Data-related provisions in trade agreements are a relatively new phenomenon, found primarily in dedicated e-commerce chapters of PTAs as to cross-border flows of data or banning or limiting data localisation rules. Provisions on cross-border data flows are also found in chapters on service sectors, where data flows are inherent to the definition of the service, eg telecommunications and financial services.⁷⁷ Non-binding provisions on data flows have appeared since 2000, eg in Jordan-US FTA. In the 2006 Taiwan-Nicaragua FTA the parties affirmed the importance of working to maintain cross-border flows of information as an essential element of promoting a dynamic environment for electronic commerce.⁷⁸ An intermediate type of provision, positioned between hard and soft commitments, is found in the 2007 South Korea-US FTA, where the parties – after recognising the importance of the free flow of information in facilitating trade and acknowledging the importance of protecting personal information – declare that they shall endeavour to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.⁷⁹ The first agreement with a *binding* provision on cross-border information flows was the 2014 Mexico-Panama FTA, allowing the parties to transmit electronic information from and to their respective territories when required in accordance with the applicable legislation on the protection of personal data and taking into account international practices. The 2016 TPP text appears to have greatly influenced all subsequent agreements, with data flow provisions stipulating that each party ‘shall allow the cross-border transfer of information by electronic means, including personal information when it was for the conduct of the business of a covered person’. It would not prevent a party from ‘adopting or maintaining measures to achieve a legitimate public policy objective’ provided that the measure was not applied in a manner which

could constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade and does not impose restrictions on transfers of information greater than are required to achieve the objective. This provision and the entire e-commerce chapter of the TPP was transposed without change into the 2018 CPTPP. Thereafter, hard rules on data flows have been incorporated into a large range of agreements, maintaining exactly the same wording.⁸⁰ It is considered path-breaking that certain countries have sought to consider in future negotiations commitments relating to cross-border flows of information, such as in the 2018 EU-Japan EPA Article 8.81 or in the EU-Mexico Global Agreement under negotiation. This naturally leads to a consideration of the place of the EU.⁸¹

VI. The EU Horizontal Strategy for Data: The Impact of the Model Clauses

While overall it may be said that the EU’s approach to data institutionalisation has been progressive, it is certainly only a recent phenomenon. Similarly, post-Lisbon, the EU has merged electronic commerce with trade in services and has only recently moved to dedicated digital trade chapters, thus moving closer to the US position. The EU has developed a horizontal strategy on cross-border flows of personal data in external trade policy.⁸² This strategy was developed in the wake of the introduction of the EU’s far-reaching GDPR and the significant post-Lisbon trade agreements negotiated with many leading developed economies.⁸³ The European Parliament had argued vociferously for internal consistency of external trade policy.⁸⁴ Thereafter, the European Commission developed highly significant so-called model ‘horizontal’ provisions on cross-border data flows and personal data protection in EU trade and investment agreements.⁸⁵ The provisions are of value in so far as they purport to incorporate the complex position of the EU into model texts, placing extremely high standards and individual rights at the core thereof, whilst also committing to free data

⁷⁴ See Lablond (n 34); E Fahy and I Mancini, ‘The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations’ (2020) 26(2) *International Trade Law and Regulation* 99.

⁷⁵ Article 18.7: ‘each Party shall encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement or broader international frameworks.’

⁷⁶ S. Aaronson, ‘Could Trade Agreements Help Address the Wicked Problem of Cross Border Disinformation’ (2021) SSRN Paper, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820213 accessed 27 February 2022.

⁷⁷ Burri and Polanco (n 5) 211.

⁷⁸ *cf.* Canada-Peru FTA (2009); Peru-Korea FTA (2011); Central America-Mexico FTA (2013); Colombia-Costa Rica FTA (2013); Canada-Honduras FTA (2014); Canada-Korea FTA (2015); Japan-Mongolia EPA (2016).

⁷⁹ South Korea-US FTA (2007) Art 15.8. See Burri, ‘The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation’ (n 3).

⁸⁰ Chile-Uruguay FTA (2016) Art 8.10; Argentina-Chile FTA (2017) Art 11.6; Singapore-Sri Lanka FTA (2018) Art 9.9; Peru-Australia FTA (2018) Art 13.11; USMCA (2018); Brazil-Chile FTA (2018); Australia-Indonesia FTA (2019) Art 13.11; Japan-US FTA (2019) Art 11.

⁸¹ See EU-Mexico Agreement in Principle (under negotiation), Art XX, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833> accessed 27 February 2022.

⁸² European Commission, ‘Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)’ (2018) Trade Doc 156884, https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf accessed 27 February 2022.

⁸³ The European Commission has set out the mechanisms for international transfers of personal data and clarified the criteria to be taken into account in the adequacy mechanism when selecting third countries, in particular in Asia and Latin America: European Commission, ‘Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World’ COM(2017) 07 final.

⁸⁴ See European Parliament, ‘Resolution Towards a Digital Trade Strategy’ (2017) (2017/2065(INI)), www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.html accessed 27 February 2022.

⁸⁵ European Commission, ‘Horizontal provisions for cross-border data flows and for personal data protection’ (n 82). Article A on cross-border data flows reads:

flows and condemning 'bad' data localisation. The clauses have three main elements: so-called Articles A, B and X. Article A provides for a declaratory commitment on cross-border data flows and prohibits restrictions in four data and IT localisation requirements. Article B sets out counterbalancing provisions for national measures as to personal data. Article X on regulatory cooperation with respect to digital trade then provides a carve-out for cross-border data flows and the protection of personal data from the dialogue on regulatory issues. The Commission thereafter submitted these provisions to trade negotiations with Australia, Chile, Indonesia, Mexico, New Zealand, Tunisia and the UK – mostly successfully – and has sought to replace the EU-Japan EPA *rendezvous* clause, to a degree also in the EU-Mexico modernised FTA.⁸⁶ It has also sought to bring its complex position to WTO negotiations on electronic commerce in the Joint Statement Initiative (JSI), discussed above.⁸⁷ This particular forum is an important one, at least superficially, because of the EU's unlikely prospect of success in gaining global consensus.⁸⁸ Yet the WTO negotiations

1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by:
 - (i) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of a Party;
 - (ii) requiring the localisation of data in the Party's territory for storage or processing;
 - (iii) prohibiting storage or processing in the territory of the other Party;
 - (iv) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Parties' territory or upon localisation requirements in the Parties' territory.
2. The Parties shall keep the implementation of this provision under review and assess its functioning in 3 years following the entry into force of this Agreement. A Party may at any time propose to the other Party to review the list of restrictions listed in the preceding paragraph. Such request shall be accorded sympathetic consideration.

Article B on Protection of personal data and privacy states:

1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
2. Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.
3. For the purposes of this agreement, 'personal data' means any information relating to an identified or identifiable natural person.
4. For greater certainty, the Investment Court System does not apply to the provisions in Articles A and B.⁸⁹

⁸⁶ JA Micallef, 'Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential?' (2019) 53 *Journal of World Trade* 855, 867. See also M Burri, 'A WTO Agreement On Electronic Commerce: An Enquiry Into Its Legal Substance And Viability' (2021) Trade Law 4.0 Working Paper No 01/2021, 18; E Fahey, 'The EU as a Digital Trade Actor' in D Collins (ed) *Research Handbook on Digital Trade* (Edward Elgar, forthcoming) and Yakovleva and Irion (n 23) 214.

⁸⁷ Communication from the European Union, Joint Statement on Electronic Commerce, 'EU Proposal For WTO Disciplines and Commitments Relating to Electronic Commerce' IN/ECOM/22 (2019), https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf accessed 27 February 2022.

⁸⁸ A large coalition of civil society organisations is critical of the JSI and the proposals currently under discussion, particularly because of concerns that it would enshrine the current status quo, which favours the dominant internet companies.

provide a forum for the EU to seek further institutionalisation of its complex views and this is currently of some importance. This is because the horizontal strategy is understood to be highly ambitious and of much significance to the deeper trade era, as a counterbalance to provisions on labour standards, environmental protections and sustainable development in many trade agreements.⁸⁹ The EU confirms that parties safeguards to protect privacy need to be agreed and are not a pretext for abuse or unjustifiable data localisation. It marks an important shift in the EU's trade agreements and normative approach to the protection of data through its institutionalisation. The complex position held by the EU is not entirely without precedent in the era of FTAs: during the CETA negotiations, the EU voiced concerns about the impact on privacy of the disclosure obligations in the agreement.

Afterwards, it has been no less easy, eg the place of free flows of data and privacy were left undetermined and postponed as to the EU-Japan EPA, as noted above and as discussed in detail in Chapter 5, despite the EPA containing many notable provisions on privacy.⁹⁰ The horizontal strategy has been only partially accepted by the UK in the EU-UK TCA, where the UK has clearly made known its ambitions to join the CPTPP. In this regard, data flows and localisation bans also feature in the TCA, alongside the replication of the model clauses on the protection of data as a right. However, the word 'fundamental' has been removed from 'data as a fundamental right', and this has caused considerable discussion in analyses which followed. Still, the model clauses are understood to contain a narrower prohibition on restrictions of cross-border data flows than in the so-called US models implemented in the CPTPP, USMCA, US-Japan DTA and China's model implementation of the RCEP; they thus provide the EU with the broad autonomy to protect privacy and personal data.⁹¹ Hence, rather than making provision for an open prohibition to restrict cross-border data flows, the EU model clauses provide for an exhaustive list of the types of restrictions that may be imposed on cross border data flows. Overall, the balance achieved by the model clauses is to assert the EU position more concretely and to be explicit as to the depth of protection.⁹² Whether the EU's clauses will cause difficulty for future public policy or ultimately

⁸⁹ Yakovleva and Irion (n 23) 219–20.

⁹⁰ Eg EU-Japan EPA: Art 10.4.2 (subjecting data sharing regarding temporary entry of business persons to each party's privacy and data protection law); Art 20.5 (affirming that intellectual property related disclosure of information was not required if except under either party's privacy laws); Art 21.4.e (subjecting provision of proposed regulations to applicable privacy law) or Art 32.1 of the Protocol on rules of origin and origin procedures (affirming that furnishing or access to information was not required if contrary to either party's personal data protection and privacy law).

⁹¹ See S Yakovleva, 'EU's Policy on Cross-border Data Flows: Navigating the Thin Line between Liberalizing Digital Trade, Promoting Rules-based Multilateralism and Safeguarding Fundamental Rights and Values' in E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Whose Metrics?* (Edward Elgar, forthcoming).

⁹² Some argue that the EU's restrictions aim to protect fundamental rights in a manner which is formulated satisfactorily and meet minimum requirements for plausibility under WTO law: see Yakovleva (n 91). See also Mira Burri, 'A WTO Agreement On Electronic Commerce: An Enquiry Into Its Legal Substance And Viability' (2021) Trade Law 4.0 Working Paper No 01/2021, 18.

undermine the EU's goals regarding the liberalisation of data flows remains to be seen.

As Yakovleva argues, when comparing the EU's exception from data flows with the narrower exception in US digital trade chapters, it is clear that the US national security exception grants the US and its trading partners much broader autonomy to restrict cross-border data flows than the proposed EU exception, when those restrictions are framed as national security interests.⁹³ Although the national security exception in US-led trade agreements gives a broad leeway to the US to restrict data flows, it limits the possibilities for restricting such flows on data protection grounds for other parties to those agreements. Given that the trading partners with which the EU maintains a free flow of personal data (eg the UK, Japan and Canada) are also parties to those trade agreements with the US, the routing of personal data from the EEA through those countries may allow the circumvention of the GDPR restrictions on data flows, which perceived as unduly onerous under the US-led trade agreements. As a result, Yakovleva argues that the EU is being surrounded by free data flow areas created by US-led trade agreements, which makes it harder in practice for the EU to maintain its stance on data protection. Such a position, however, assumes little from the US as it is likely to shift towards federal protection for privacy and regulation. Such developments, examined in Chapter 4, may not emerge quickly but appear increasingly likely to occur as some stage and will change the parameters of many debates in this field, not least the accuracy of where to place the EU within the 'spaghetti-bowl' mixture of trade agreements internationally, intersecting in awkward and messy spaces.

VII. EU Digital Trade Regulatory Cooperation: Deepening the Nature of Institutionalisation

Forms of institutionalisation of digital trade in PTAs

Establishment of sub-committee/working group on e-commerce
Functions of sub-committee/working group
Coordination of information exchange
Possibility to establish a working group on e-commerce
Establishment of joint/sub-committee on paperless trading
Establishment of committee on trade in services, establishment and e-commerce
Possibility to conclude implementing arrangements

Source: J-A Monteiro and R Teh, 'Provisions on Electronic Commerce in Regional Trade Agreements' (2017) WTO Working Paper ERSD-2017-11.

⁹³ *Ibid.*

Only a very limited number of trade agreements establish specific institutional arrangements for e-commerce and it is important to emphasise that existing provisions vary enormously across agreements. Thus, the idea of an institutional infrastructure within digital trade is still highly limited and the account here draws from the work of Monteiro and Teh to typologise this. Some such institutional arrangements establish sub-committees to review and monitor the implementation and operation of the chapter. Some supervise and assess implementation of the relevant chapter (eg EU-Korea), whilst others establish a dedicated joint committee.⁹⁴ Other forms of institutional arrangements include working groups or the possibility of creating a working group in charge of certain tasks.⁹⁵ Others envisage working groups of experts. Post-Lisbon, EU trade agreements include a vast array of institutional arrangements for their implementation.⁹⁶ Historically, the most usual form of institutionalised cooperation envisioned by the EU in digital trade is regulatory cooperation overseen by joint committees. More recent chapters on digital trade, eg those in the EU-UK TCA or the EU-Australia agreements suggest that there has been a significant shift away from these structures to more lithe and sparse arrangements, which tend to be shorter, set out fewer cooperation provisions generally and contain few commitments to multilateralism, indicating a different vision for engagement.

From the OECD to the EU, regulatory cooperation has a variety of meanings and is a broad church of ideas, schemas and practices. For instance, the OECD definition of 'regulatory cooperation' is the range of institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule making and implementation, subject to the constraints of democratic values such as accountability, openness, and sovereignty.⁹⁷ Yet regulatory cooperation

⁹⁴ eg on paperless trading: see Japan-Singapore EPA, entered into force 30 November 2002, revised 2007. See Monteiro and Teh (n 18) 68, who find only 16 agreements.

⁹⁵ eg regulatory issues as to trade in services, establishment and e-commerce: Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (EU-Colombia-Peru FTA) [2012] OJ L354/3.

⁹⁶ I Mancini, 'Fundamental Rights in the EU's External Trade Relations: From Promotion "Through" Trade Agreements to Protection "In" Trade Agreements' in E Kassoti and R Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER, 2020).

⁹⁷ OECD, 'International Regulatory Co-operation - Adapting Rules to an Interconnected World' (2020), www.oecd.org/gov/regulatory-policy/irc.htm accessed 27 February 2022; B Hoekman, 'International Regulatory Cooperation and Trade Agreements' in E Brousseau et al (eds), *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (Oxford University Press, 2019); J Wouters and A Andrienne-Moylan, 'The Changing International Cooperation Network of the EU: The Inclusion of Informal (Regulatory) Bodies' in RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar, 2019); J Nakagawa, 'Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges' in J Chaisse and T Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016); AR Young, 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New Generation" Preferential Trade Agreements' (2015) 22 *Journal of European Public Policy* 1253; B Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization' (2015) 18 *Journal of International Economic Law* 609; R Quick, 'Regulatory Cooperation - A Subject of Bilateral Trade Negotiations or Even for the WTO' (2008) 42 *Journal of World Trade* 391; E Golberg, 'Regulatory Cooperation - A Reality Check

ranges from relatively informal and unstructured, occasional or ad hoc – eg sharing best practices or simply sharing information – to the more formal, such as mutual recognition agreements and wholesale harmonisation of regulatory frameworks. International regulatory cooperation is more conventionally understood to involve shaping and complying with international agreements, utilising international evidence, collaborating with international counterparts – either bilaterally or through multilateral forums when designing and enforcing regulations.⁹⁸ Recognising existing regulations and standards that achieve the same policy objective at lower costs can, to some, be seen as regulatory cooperation.⁹⁹ In the transatlantic context, some define regulatory cooperation as the process of interaction between US and EU regulators, founded on the benefits that regulators can achieve through closer partnership and greater regulatory interoperability.¹⁰⁰ Thus, irrespective of the precise definition, there is a significant dimension of institutional action to generate convergence in rule-making. Regulatory cooperation has become of immense international significance because it prevents regulatory divergences and non-tariff barriers. It is to be found dealing with the most important impediments to trade in many leading contemporary international trade agreements, eg the CPTPP and latest deep EU FTAs with South Korea, Canada, the UK, Singapore and Japan. There is no shared idea of regulatory cooperation as to digital trade in regional trade agreements but a rising prevalence of data regulation and no shortage of examples of significant regulatory cooperation. Regulatory cooperation bodies within trade agreements do not formally constitute institutions or fit within standard taxonomies of institutions. But they do form part of the architecture of bodies found within trade agreements.

Provisions calling on parties to cooperate on regulatory issues relating to e-commerce through regular dialogue and exchanges of information are found amongst the most recent PTAs signed by the EU in the last decade. The issues most frequently listed in the vast majority of EU PTAs include: recognition of certificates of electronic signatures issued to the public and facilitation of cross-border certification services; the liability of intermediary service providers with

respect to the transmission or storage of information; the protection of consumers in the ambit of e-commerce. Other issues to be found in EU FTAs signed in the early 2000s called for regulatory cooperation relating to paperless trading and the protection of personal data.¹⁰¹ The EU has sought to include regulatory cooperation in its post-Lisbon trade agreements with all major developed global economies. This is particularly so in the area of digital trade or e-commerce in all of its post-Lisbon trade agreements with all major developed global economies.¹⁰² Many such articles of the regulatory cooperation chapters are heavily embedded in multilateralism. Article 16.4 of the CETA provides for international standards of data protection for both parties into the concepts of trust and confidence in e-commerce. Arguably, articles such as CETA Article 16.6, which thus embeds internationalisation into dialogue on e-commerce to include multilateral forums constitute more far-reaching commitments to multilateralism. To similar effect is Article 8.80 of the EU–Japan EPA, which provides that:

1. The Parties shall, where appropriate, cooperate and participate actively in multilateral fora to promote the development of electronic commerce.
2. The Parties agree to maintain a dialogue on regulatory matters relating to electronic commerce with a view to sharing information and experience ... including on related laws, regulations and their implementation, and best practices with respect to electronic commerce. (...).

The span is important because it suggests a very broad relationship and many instruments to underpin that relationship. What is thus significant about regulatory cooperation provided for in Article 16.6 of CETA and Article 8.88 of the EU–Japan EPA is the extent to which internationalisation and multilateralism are embedded within the dialogue for engagement.¹⁰³ Still, regulatory cooperation becomes a key mechanism with which the EU and other leading international partners can develop economy studies and central features of the digital trade landscape. It is important to state that the dialogue that is taking place in these post-Lisbon trade agreements on digital trade or e-commerce generally has a broad reach and may be extremely ambitious. CETA enables dialogue to take place in a variety of forums and ways but in particular in multilateral forums, for example in CETA Article 16.6

(2019) M-RCBG Associate Working Paper Series No 115, www.lhks.harvard.edu/sites/default/files/centers/mrcbg/ling/115_final.pdf accessed 27 February 2022.

⁹⁸ J Wiener and A Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory' (2015) 78 *Law and Contemporary Problems* 103; R Bull et al, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' (2015) 78 *Law and Contemporary Problems* 1; W Marti and N Woods, 'In Whose Benefit? Explaining Regulatory Change in Global Politics' in W Marti and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009).

⁹⁹ UK Department for Business, Energy & Industrial Strategy, 'International Regulatory Cooperation for a Global Britain: Government Response to an OECD Review' (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913730/international-regulatory-cooperation-for-a-global-britain.pdf accessed 27 February 2022.

¹⁰⁰ US Chamber of Commerce, 'Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)', www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_chamber_paper_-_final_3-02.pdf accessed 27 February 2022.

¹⁰¹ Eg Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, Art 7.49; EU–Columbia–Peru FTA, Art 163.

¹⁰² Eg Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L111/23, Ch 16 or EU–Japan EPA, Ch 8.

¹⁰³ By contrast, in more recent EU trade agreements such as the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ST/5198/2021/INIT (EU–UK TCA) [2021] OJ L149/10, we see in the regulatory cooperation chapter there and in the entire chapter a significantly lesser interest in the internationalisation of regulatory cooperation and multilateralism. We also see this in more recent negotiations, for example between the EU and Australia, similarly outlining a slimmer component of the areas for regulatory cooperation engagement.

paragraph 3. This insertion of international cooperation within regulatory dialogues is a very new form of engagement with international partners; it is also replicated in the EU-Japan EPA, in Article 8.88.¹⁰⁴

These commitments to multilateralism in the EU's efforts at regulatory cooperation are notable and distinctive. Yet they sit uncomfortably against the backdrop of a severe lack of activity at a multilateral level, in particular at the WTO. As noted above, only in 2016, did e-commerce garner 'renewed interest' among WTO Members, where seven proposals were tabled by major WTO Members such as the US, the EU, Japan and Brazil, now the subject at the WTO of a Joint Statement Initiative (JSI) on e-commerce.¹⁰⁵ The EU has been leading technical discussions in plenary and in small group and the co-convenors include Australia, Japan and Singapore. Notably, the EU is actively attempting there to promote its model horizontal articles to embed data flows and data privacy within digital privacy – including key provisions on regulatory cooperation. Many remain unconvinced that the WTO can realistically act as a locus for the scale of law-making ahead. Such law-making has a vast array of key objectives, because it needs to modernise digital trade *and* to engage with the global split between East and West on economic or individualised privacy etc; this constitutes a lengthy shopping list.¹⁰⁶ The EU thus in its relations with third countries champions regulatory cooperation predicated on international standards and seeks regulatory cooperation in the absence of a global consensus on standards. Frequently, the EU appears to agree with partners that multilateralism, international standards and global forums are the starting point.

Returning to the broader point then, bilateral regulatory cooperation is thus a very important means by which the EU can develop its institutionalisation of data regimes. The EU has formulated many significant innovations in the field of data in its trade agreements. All in all, regulatory cooperation is a very important way of engaging with third country partners in this new era of deeper trade agreements because it demonstrates that willingness to be a global leader but also to lead with other significant global matters.

These engagements lead to important multilateral developments and participation structures. In other words, institutionalisation *appears to lead to further institutionalisation*. The international dimension of this have taken their engagement to extremely positive heights, ie the EU and Japan in the context of the WTO have made important efforts to evolve the WTO institutional AB stalemate out of its current impasse. The international dimension of this institutionalisation is thus a key springboard for the *reach* of institutionalisation.

VIII. Conclusion

Digital trade may be used as a key case study of the EU's development, along with its partners, of institutional design and the rollout of high-level binding standards for the flow of data, an area previously neglected in international economic law. The EU advocates, mostly with developed third countries, for regulatory cooperation predicated on international standards. It seeks regulatory cooperation even in the absence of a global consensus on such standards. This has formed part of the EU's key push for trade in the post-Lisbon era, striving to write the global rule-book. The EU continues to implement and propagate its complex position on digital trade at a multilateralism level and has developed important practices on how to implement best practice through institutions. Digital trade involves many actors, bottom-up, and suffers from an identity crisis as to its facets and functions in the contemporary legal order. The global legal order appears increasingly fragmented, with multiple regimes in digital trade with respect to data flows – split between the EU and many other forms of regime. The high standards of the EU represent an important counterbalance to a variety of global actors who would promote economic standards over individual rights. The WTO, for various reasons, appears unlikely to constitute the forum for significant change for now. Most of the world seems to be coming closer to the EU's position but significant gaps still remain. How to maintain high standards of privacy yet also advocate a liberal stance remains a conundrum for the EU. The EU has largely a mixed position, mid-way between key actors such as the US and China, as a middle ground actor in digital, yet this metaphor appears rapidly surpassed by practice. In Chapter 4 the future of the EU-US relationship on data flows is explored. This seems to have an outsized impact on the future of data privacy in digital trade provisions. Ultimately, it remains a challenge to see whether the EU's institutionalised vision of data can succeed in future negotiating forums.

¹⁰⁴ There are significant nuances in how the EU engages with cybersecurity, discussed in Chapter 3.

¹⁰⁵ WTO, 'Joint statement on e-commerce news archives' (n 45). The negotiations have been structured around six focus groups. Negotiations on a plurilateral agreement on e-commerce, covering a range of rules on digital trade, have yet to come to a conclusion.

¹⁰⁶ See S Aaronson and P Leblond, 'Another Digital Divide: The Rise of Data Realms and its Implications for the WTO' (2018) 21 *Journal of International Economic Law* 245.

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Chapter 13

The Role of Climate and Energy Diplomacy in Promoting Sustainability in EU External Relations Law

Tuula Honkonen

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Abstract Environmental and climate diplomacies have become key external policy agendas for the European Union (EU). Climate change policy and governance are major fields where the EU seeks to broaden its external influence. EU climate diplomacy policy can be divided into three overlapping spheres: participation in global climate negotiations; promotion of ambitious domestic climate legislation and policies beyond the EU borders; and initiatives for climate cooperation and partnerships with third countries. As a framework for these actions, the EU has developed a solid climate diplomacy policy: a series of Council Conclusions on the theme have been adopted since 2008. Interestingly, energy diplomacy was coupled with climate diplomacy in the Council Conclusions in 2021, and the linkage was further strengthened in the new set of Council Conclusions in 2023. The, by now, rather well-established EU climate and energy diplomacy policy is part of the external dimension of the European Green Deal (EGD). It also underlines the inherent nexus thinking that is

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part and parcel of the EGD. The climate and energy diplomacy policy has called for a stronger mainstreaming of climate and energy diplomacy considerations in all areas of EU external action, including its foreign and security policy and development cooperation.

Keywords EU external relations law · Sustainability · Climate governance · Climate diplomacy · Energy diplomacy · European green deal

13.1 Introduction

EU environmental policy is not confined to the Member States and the EU as an institution, but it also has a solid external dimension.¹ This does not consist of haphazard spill-over effects, although such also sometimes materialize, but is generally a result of determined policymaking with the intention of shaping environmental policies, practices and conditions in non-EU countries.² The EU is keen to profile itself as a world leader in the field of environmental policy, which translates into efforts to show a good example, spread good practices and raise the level of ambition of environmental policymaking in other countries and regions. The intended external effects may be targeted at all countries or specified EU partners in specific fields and projects.

Climate change is never only a domestic matter. There may be domestic climate policies in place, even very ambitious ones, but their effectiveness is limited if other countries or regions do not follow suit. What is needed is the art of skillful negotiation, persuasion, trust-building, showing a good example, joint projects and cooperation with mutual and global gains. In two words: climate diplomacy. Climate diplomacy comprises the means to advance climate action beyond a country's own borders.

Climate change policy and governance is a major field where the EU seeks to broaden its external influence. In concrete terms, two interrelated key areas are often distinguished in this respect: the EU's climate diplomacy within the United Nations Framework Convention on Climate Change (UNFCCC)³ and beyond, and EU support for and capacity-building in developing countries,⁴ and partnerships with other countries as well. According to another definition, EU climate diplomacy can, in its broadest sense, be divided into two separate, yet interrelated spheres: activities in multilateral settings; and bilateral cooperation with third countries.⁵ The ideas behind these are basically the same. Of course, 'bilateral' can also mean a somewhat

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larger set of countries, but it is still a distinct track from the global climate change regime.

EU external climate policy is usually largely about promoting the EU's internal climate policies beyond its borders. Overall, the tools of the EU external climate policy can be divided into those that create incentives and disincentives for external actors, and those that are founded on dialogue and persuasion.⁶ The former could be established through conditional funding schemes, for instance, whereas the latter is more about the EU leading by example and showing the way towards ambitious climate policy goals. In any case, the internal and external dimensions of the EU climate and energy policies are closely intertwined.⁷

One could always argue about the extent to which the "externalization" of a climate policy is, indeed, an intentional and strategic action by the EU or more akin to a by-product or "natural" domestic norm or policy diffusion. Either way, the observed climate diplomacy action by the EU has relied on two main components: the credibility of domestic action, and the EU regulatory and market power.⁸ This is a strong combination that gives the EU a significant advantage as an actor seeking to effectively implement climate diplomacy. The setting also works vice versa: the EU's global and regional leadership aspirations have been an important driver for ambitious domestic policy development. Consequently, it has been argued that the distinction between EU exemplary and diplomatic leadership has become blurred and the separation of EU domestic and international/external climate policy elusive.⁹ This has become evident within the global climate change negotiations where the EU has arguably shifted from a one-sided leadership strategy to a "lead-er" role, whereby it does not try to convert other countries to follow its strong climate policy actions, but it acknowledges the geopolitical changes in the negotiation setting and adopts a more nuanced and delicate strategy of coalition-building and bridge-building activities.¹⁰ It could be said that this approach is now shared in both dimensions of the EU external climate policy: that which is focused on the multilateral setting under the UNFCCC and the one focusing on bilateral activities and partnerships.

This Chapter examines the role that climate and energy diplomacy plays in EU external relations law. The Chapter builds on a broad definition of climate and energy diplomacy, comprising EU action within both global climate governance and bilateral and regional partnerships. However, emphasis will be placed on the legal and policy basis of the EU climate diplomacy, followed by an examination of how climate diplomacy has been integrated as part of different areas of EU external relations law and policies. The latter study is limited to the most traditional fields of EU

¹ Key literature on EU external environmental policy includes Morgera 2012; Adelle et al. 2018; Biedenkopf and Groen 2021; Wouters et al. 2021.

² Biedenkopf and Groen 2021, p. 33.

³ United Nations Framework Convention on Climate Change, New York 1992, 31 ILM, p. 849.

⁴ Dupont et al. 2018, p. 108.

⁵ Earsom and Delreux 2021, p. 716. See also Torney and Cross 2018; Biedenkopf and Petri 2021. Literature on EU climate diplomacy has largely focused on the EU role and action within the UNFCCC negotiations (see, e.g., van Schaik 2010; Bäckstrand and Elgström 2013; Delreux 2021;

Earsom and Delreux 2023); the partnership type of climate and energy diplomacy action by the EU has been subject to academic studies mainly more recently.

⁶ Biedenkopf and Groen 2021, pp. 38–41.

⁷ Dupont et al. 2018, pp. 119–120.

⁸ Oberthür and Dupont 2021, p. 1109.

⁹ Ibid., p. 1109.

¹⁰ Bäckstrand and Elgström 2013.

external relations, i.e. foreign and security policy; human rights policy; and development policy. Thereafter, the chapter discusses some cross-cutting themes for the EU climate and energy diplomacy policy, in particular, the ever more frequently emerging nexus thinking in the EU external relations. The Chapter ends with some concluding remarks.

13.2 EU Climate and Energy Diplomacy Policy

This section examines the general basis of the EU climate and energy diplomacy policy, its development over the years and the current status, including the relation with the European Green Deal (EGD).¹¹

13.2.1 Policy Development on EU Climate Diplomacy

Environmental and climate diplomacies have become key diplomatic agendas for the EU.¹² This stems from various sources, including the heightened ambition of the EU's domestic environmental and climate policies and legislation, the search for a leadership role in multilateral arenas dealing with key global environmental problems, and the increased recognition of linkages between environmental crises and relations between states and regions.

The starting point for the EU climate diplomacy policy, specifically labeled as such, was the first Council Conclusions¹³ on climate diplomacy that was adopted in 2011.¹⁴ The document divided the concept of climate diplomacy into three "strands": supporting UNFCCC negotiations; promoting low-emission and resilient transitions in third countries; and analyzing and reducing climate fragility risks in order

to foster peace and international security.¹⁵ The approach very well illustrates the EU stance towards climate diplomacy, then and still today.

The Council adopted the next Conclusions on climate diplomacy in 2013,¹⁶ 2015¹⁷ and 2016.¹⁸ They largely followed the approach of the 2011 document, but were gradually developing towards more coherent and ambitious policy guidelines, calling for "a more pro-active and targeted EU climate diplomacy agenda",¹⁹ recognizing "the need to further step up EU climate diplomacy efforts"²⁰ and "the importance of mainstreaming climate diplomacy into the priority agendas of the EU and Member States".²¹ The EU was keen to deploy a more strategic approach to climate diplomacy with a specific toolbox to be developed.²²

Adoption of the Paris Agreement in December 2015 clearly sparked intensified efforts within the EU to grab momentum and invest in reinforced climate diplomacy policymaking. The EEAS and Commission prepared a Climate Diplomacy Action Plan²³ that was adopted in 2015. The Plan outlined concrete actions to implement the objectives laid down in the Council Conclusions. In addition, the 2016 Council Conclusions included in an annex separate "Elements for climate diplomacy action in 2016". These were presented as action points for the EU under three strands that could be taken as developed versions from those presented in the 2011 Conclusions. The new strands were: "Continue to advocate climate change as a strategic priority in diplomatic dialogues, public diplomacy and external policy instruments"; "Support implementation of the Paris Agreement, in the context of low-emission and climate-resilient development"; and "Increase efforts to address the nexus between climate, natural resources, prosperity and stability."

Apart from the aftermath of the UNFCCC Paris Conference, no separate EU-wide action plan documents on climate diplomacy have been adopted. This is not to be interpreted as due to lack of interest by the EU, but it is more likely to be a consequence of the Council Conclusions documents having become more detailed and practice-oriented since then.

A second more active phase in the policy development of EU climate diplomacy could be said to have started around 2018. At that time, the European Parliament passed a Resolution on climate diplomacy.²⁴ In the Resolution, the Parliament

¹¹ The European Green Deal, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2019) 640 final.

¹² Minas and Ntousas 2018; Earsom and Delreux 2023. Also, ecological diplomacy has been suggested as a policy for the EU to pursue (Lazard and Youngs 2021), but it would be, in many ways, a much broader term.

¹³ Council Conclusions is a document that expresses the EU's political commitment in selected matters. General Secretariat of the Council 2020. It also sheds light on the EU's motives and aims with regard to specific policy fields. However, Conclusions does not amount to a legally binding document. The main shortcoming of Conclusions has been that it often says relatively little about the tangible methods of implementation to be used. When Conclusions are not supported by any kind of action plan, the practical significance of the document may remain rather low. However, in case of climate and energy diplomacy, the most recent Council Conclusions shows a turn in the approach.

¹⁴ Council conclusions on EU Climate Diplomacy, Foreign Affairs Council meeting, Brussels, 18 July 2011 (hereinafter 2011 Council Conclusions). See also European External Action Service (EEAS) and European Commission 2011.

¹⁵ 2011 Council Conclusions; Tänzler et al 2021, p. 3.

¹⁶ Council conclusions on EU Climate Diplomacy, Foreign Affairs Council meeting, Luxembourg, 24 June 2013 (hereinafter 2013 Council Conclusions). See also EEAS and European Commission 2013.

¹⁷ Council conclusions on EU Climate Diplomacy, Foreign Affairs Council meeting, Brussels, 20 July 2015, 11095/15.

¹⁸ Council Conclusions on European Climate Diplomacy after COP21: Foreign Affairs Council meeting, Brussels, 15 February 2016.

¹⁹ 2013 Council Conclusions, para 6.

²⁰ *Ibid.*, para 7.

²¹ *Ibid.*, para 8.

²² EEAS and European Commission 2013.

²³ European Commission and EEAS 2015, Action Plan for Climate Diplomacy, January 2015.

²⁴ European Parliament Resolution of 3 July 2018 on Climate Diplomacy, 2017/2272 (TNI).

highlighted, among other things, the importance of mainstreaming climate across different foreign policy issues and the need for strengthening the EU capacity for climate diplomacy.²⁵

The next Council Conclusions on climate diplomacy were adopted in 2018²⁶ and 2019.²⁷ They were built around several dimensions: strengthening of international climate ambition and multilateralism; the EU's long-term strategy on climate change; the peace and security aspect of climate change; and further enhancement of the EU's international climate cooperation and support. The Conclusions clearly signaled the EU's commitment to global action to deal with climate change and EU leadership. The domestic climate policy ambitions were present as well. Finally, the EU external relations were accounted for in terms of the peace and security aspect and the EU's climate cooperation and support beyond its borders. However, the Conclusions did not envision any significant new openings to the EU climate diplomacy action.

13.2.2 Integrating Energy into EU Climate Diplomacy

After 2019, there were plans to renew the Council Conclusions on Climate Diplomacy,²⁸ but, instead, the Council adopted Conclusions on Climate and Energy Diplomacy²⁹ in 2021. They were developed to explicitly deliver on the external dimension of the EGD, adopted by the Council on the same date. In this context, it was recognized that an ambitious internal climate policy of the EU will not be enough to achieve the long-term goals of the Paris Agreement. The goal of the EU climate and energy diplomacy is to pursue global transition towards climate neutrality, while ensuring the EU's own resilience and competitiveness in a shifting security and geopolitical environment.³⁰

2021 was the first time that energy diplomacy was coupled with climate diplomacy in the Council Conclusions. This can be considered to be quite a natural development, especially given the intertwined relationship between the two policy areas and the (geo)political challenges involved.³¹ The addition of the energy diplomacy element to the EU climate diplomacy policy principally brings the goal of accelerating the global energy transition to the fore in the EU external action on climate and energy. However, the 2021 Conclusions state that the implementation of the energy transition

goal should also ensure affordability, safeguarding the environment and achieving the Sustainable Development Goals (SDGs).^{32,33} Thus, energy and climate appear to be on an equal footing in this context.

Overall, the Conclusions call for further reinforcement of the external dimension of the EGD.³⁴ From a practical diplomacy action perspective, the Conclusions state that the EU will continue to place climate action and the energy transition at the top of the agenda in its bilateral engagement with third countries.³⁵

It is also interesting that the 2021 Conclusions place some emphasis on climate and energy security aspects as part of the related diplomacy efforts. The Council states the already previously recognized need to "strengthen and mainstream work on the climate and security nexus".³⁶ In addition, the EU and Member States' foreign and security policy "will systematically consider climate and environmental factors and risks, and will work with partners, including the UN, to develop conflict prevention measures" in this respect.³⁷ Hence, it could be argued that the 2021 Conclusions did not only integrate the energy dimension to the EU climate diplomacy policy but also strengthened the security and conflict prevention elements therein.

The Council adopted yet another Conclusions on EU climate diplomacy in February 2022.³⁸ They were published in the aftermath of the 26th UNFCCC Conference of the Parties (COP) and specifically tailored for "accelerating the implementation of Glasgow outcomes". From the EU external relations perspective, the Conclusions do not offer much new: the Council reaffirmed the high level of ambition of the EU's climate diplomacy and called for concrete actions.³⁹

A new set of Council Conclusions on climate and energy diplomacy were adopted in March 2023.⁴⁰ With the title "Bolstering EU climate and energy diplomacy in a critical decade", the Conclusions was prepared in response to the Russian invasion of Ukraine and the resultant multidimensional crisis that had hit Europe and the world as large. The tone and approach differ somewhat from the previously adopted Conclusions. The document begins by stressing the EU's determination to engage and work with partners worldwide through its climate and energy diplomacy.⁴¹ It then continues by highlighting the EU's commitment to implement the Paris Agreement,

²⁵ *Ibid.*, paras 16–33 and 38.

²⁶ Council Conclusions on Climate Diplomacy, Foreign Affairs Council meeting, Brussels, 26 February 2018, 6125/18, Annex.

²⁷ Council Conclusions on Climate Diplomacy, Foreign Affairs Council meeting, Brussels, 18 February 2019, 6153/19, Annex.

²⁸ See Draft Council Conclusions on Climate Diplomacy, 20 January 2020, 5033/20, Annex.

²⁹ Council Conclusions on Climate and Energy Diplomacy—Delivering on the external dimension of the European Green Deal, 25 January 2021, 5263/21, Annex.

³⁰ *Ibid.*, para 1.

³¹ On the development of EU energy diplomacy and its external dimensions as well as its linkage with EU climate diplomacy, see, e.g., Barra and Svec 2018.

³² Transforming our world: The 2030 Agenda for Sustainable Development, UNGA Res. 70/1 of 25 September 2015.

³³ 2021 Council Conclusions, para 9.

³⁴ *Ibid.*, para 20.

³⁵ *Ibid.*, para 19.

³⁶ *Ibid.*, para 4.

³⁷ *Ibid.*

³⁸ Council conclusions on EU Climate Diplomacy: accelerating the implementation of Glasgow outcomes, 21 February 2022, 6120/22 (hereinafter 2022 Council Conclusions).

³⁹ *Ibid.*, para 1.

⁴⁰ Council conclusions on Climate and Energy Diplomacy "Bolstering EU climate and energy diplomacy in a critical decade", 9 March 2023, 7248/23, Annex (hereinafter 2023 Council Conclusions).

⁴¹ *Ibid.*, para 1.

provide support to the most vulnerable and increase collective climate finance.⁴² In the field of energy, the Conclusions stresses increased cooperation with countries that rely heavily on fossil fuels⁴³ and the need to forge new energy partnerships, while safeguarding the EU's own resilience and competitiveness and domestic resources.⁴⁴ Finally, the conflict-aggravating nature of environmental problems is recognized by the Council, which highlights increasing risks to human, state and regional security and the risk of intensified dimensions of fragility.⁴⁵

What is new and remarkable with the 2023 Conclusions as a whole, is the level of determination of the envisioned EU action and the steps to ensure a regular follow-up. The Council invites the High Representative of the Union for Foreign Affairs and Security Policy, the Commission and all Member States to strengthen EU climate and energy diplomacy "as a political priority".⁴⁶ This is to take place through intensified coordination, information exchange and strengthening of the EU Delegations and Member States' embassies, and relevant EU and international networks and working groups. In addition, the Council encourages EU and Member States' climate outreach missions and regional initiatives, including joint ones.⁴⁷ These are much-needed concrete action points for implementing the goals enshrined in the Conclusions. In addition, the Council takes up the task of regular follow-up on the joint work to coordinate and enhance the EU's climate and energy diplomatic impact. Finally, the Council invites the High Representative and the Commission to strengthen their capacity dedicated to EU climate and energy diplomacy.⁴⁸ With these actions, it becomes clear that climate and energy diplomacy, indeed, becomes elevated to a priority position in the EU agenda. It also appears that the Council has been determined to ensure that the Conclusions document will not remain a collection of dead letters but that its objectives will be effectively implemented by the different EU actors and institutions.

In addition to specific Council Conclusions, climate and energy diplomacy is being advanced in the EU also through other means. The Green Diplomacy Network, created in the early 2000s, has served to coordinate climate diplomacy initiatives across the EU and Member States. The Network collects together the EHAS, EU delegations and Member State embassies around the world. These actors coordinate the implementation of EU priorities in the area of green diplomacy. The Network is a vehicle for bilateral outreach, partnerships with third countries and information-gathering.⁴⁹

13.2.3 Implementing the EGD

The EU has had climate-related legislation for a long time.⁵⁰ Until relatively recently, however, the legislation did not have any explicit link to the EU's climate diplomacy policy. A turn came when the EGD was introduced in 2019. Political agreement on it was reached in 2021. The EGD is a comprehensive climate change legislation package for the EU. In practice, it is a strategy and roadmap on how the EU will reach its climate targets, most importantly climate neutrality in 2050.

While the EGD is majorly a domestic strategy and legislative package, it has important explicit and implicit effects on EU policies beyond its borders. "The EU as a global leader", part three of the EGD document, testifies the key external element of the EGD. It envisions the EU as a global leader in climate policy and names EU priorities related to, inter alia, the Paris Agreement and continued and strengthened engagement with international partners bilaterally and in regional contexts. This is also necessary for reaching the goals of the EGD, as it is recognized that "[t]he environmental ambition of the Green Deal will not be achieved by Europe acting alone".⁵¹

Climate and energy diplomacy is part of the external dimension of the EGD. The EGD calls for intensified efforts "to mobilize all diplomatic channels both bilateral and multilateral",⁵² for forging "green alliances" through "diplomatic and financial tools" with Africa, Latin America, the Caribbean, Asia and the Pacific,⁵³ and for more integrated thinking about climate and interrelated policies such as environmental, security and defense issues.⁵⁴ Nevertheless, neither climate nor energy diplomacy is specifically mentioned in the EGD document.

Implementation of the external dimension of the EGD can be said to largely amount to another diplomacy policy for the EU: the "green deal diplomacy" as called for in the EGD document.⁵⁵ Accordingly, green deal diplomacy is implemented through the EU and the Member States setting a credible example and convincing and supporting actors and countries outside the EU to take up their share of promoting more sustainable development.⁵⁶ The EU is to integrate climate diplomacy with other external policy areas and bring EGD into all EU and Member States diplomatic channels as well as bilateral partnerships with third countries.⁵⁷ Furthermore, it has been recognized that EU foreign and security policy plays a key role in the efforts of green deal diplomacy, given the geopolitical dimension of climate change.⁵⁸ So far,

⁴² Ibid.

⁴³ Para 20.

⁴⁴ Para 26.

⁴⁵ Para 21.

⁴⁶ Para 43.

⁴⁷ Ibid.

⁴⁸ Ibid. Initiation of a process for regular reporting on the EU's climate diplomacy activities and its achievements, as well as its shortcomings was proposed already by the EP in its Resolution in 2018 (para 26).

⁴⁹ See also, e.g., Biedenkopf and Petri 2021; Eansom and Delreux 2023, pp. 201–202.

⁵⁰ See, e.g., Woerdman et al. 2021.

⁵¹ COM(2019) 640 final, p. 1.

⁵² Ibid., p. 20.

⁵³ Ibid., p. 21.

⁵⁴ Ibid.

⁵⁵ P. 20.

⁵⁶ Ibid.

⁵⁷ Ibid., and Teevan et al. 2021, p. 8.

⁵⁸ See Borrell 2019.

the EU has not developed any additional strategy for the realization of green deal diplomacy, although a need for such has been recognized in the literature.⁵⁹

13.3 Climate and Energy Diplomacy in EU External Relations Law

13.3.1 The Legal and Policy Basis

The EU climate and energy diplomacy policy reflects the aims defined in the Treaty of the European Union.⁶⁰ These general aims include peace, the sustainable development of Europe and a high level of protection and improvement of the quality of the environment, among other things.⁶¹ Furthermore, in its external action, the EU must “preserve peace, prevent conflicts and strengthen international security”, “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development” and “promote an international system based on stronger multilateral cooperation and good global governance”.⁶² Regarding the EU’s environmental policy, one of its goals is to contribute to “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change”.⁶³ Taken together, environmental protection and sustainable development strongly feature as key objectives of the EU. In the same vein, EU external action is based on conflict prevention and developing international measures to ensure environmental protection and sustainable development. The EU’s environmental policy also has objectives that cross the Union borders, and climate change has been named as a priority area in this respect. The idea and practices of climate and energy diplomacy, therefore, fit very well into the general frameworks for the EU and the goals of its external and environmental policies.

The word “diplomacy” binds climate diplomacy closely to foreign and security policy. Illustratively, the main purpose of diplomacy has been defined in literature as “to enable states to secure the objectives of their foreign policies without resort to force”.⁶⁴ This also applies to climate and energy diplomacy, which can be classified as an indirect objective of the EU’s external policy and which the EU seeks to advance through amicable measures. In this study, climate and energy diplomacy is

considered to have a broader field of application than being merely part of the EU’s foreign policy.

The EU has not formally addressed the role of climate in its external action, other than what has been specified in the series of Council Conclusions concerning climate, and later also energy diplomacy. Specific Council Conclusions on climate in the EU’s external action have not been adopted, contrary to what has been done in the area of water diplomacy, for instance.⁶⁵ However, Council conclusions on strengthening the external dimension of the EU energy policy⁶⁶ exist, but they were adopted in 2011. An initial impetus for combining climate and energy diplomacy was provided in 2015 when the Commission stated that the external dimension of the new Energy Union includes coordinating energy and climate diplomacy.⁶⁷

In the following, brief overviews are provided on the role of climate and energy diplomacy in some of the key policy fields of EU external action.

13.3.2 Foreign and Security Policy

The EU founding treaties specify that in its external actions, 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”.⁶⁸ Furthermore, it shall contribute to peace, security and sustainable development of the Earth, and it shall uphold and promote its values and interests in its external relations.⁶⁹ These principles and objectives of its external action also provide the framework for the EU’s Common Foreign and Security Policy (CFSP).⁷⁰

While the EU does not possess a specific strategy for its environmental foreign policy, a trend towards strategic thinking in that field can be discerned.⁷¹ Climate does not explicitly feature in the founding treaties’ provisions on the EU’s external action, nor concerning its foreign and security policy.

The Global Strategy for the European Union’s Foreign and Security Policy (EUGS),⁷² adopted in 2016, provides more information on the EU’s shared interests and principles and jointly agreed upon priorities in its external action. The document was designed to be thematically global and so it encompasses not only the traditional

⁵⁹ Petri 2020.

⁶⁰ Consolidated version of the Treaty on European Union (TEU), O.J. C 326/13, 26.10.2012.

⁶¹ Ibid. Article 3.

⁶² Ibid. Article 21.

⁶³ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), O.J. C326/47, 26.10.2012, Article 191(1), fourth indent.

⁶⁴ Berridge 2005, p. 1.

⁶⁵ Council Conclusions on Water in the EU’s External Action, 19 November 2021, 14108/21.

⁶⁶ Council conclusions on strengthening the external dimension of the EU energy policy, Transport, telecommunications and Energy Council meeting, 24 November 2011.

⁶⁷ A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 80 final.

⁶⁸ Article 21.2 TEU.

⁶⁹ Articles 3 and 21 TEU.

⁷⁰ Article 24.2 TEU.

⁷¹ Schunz 2019.

⁷² Shared Vision, Common Action—A Stronger Europe: A Global Strategy for the European Union’s Foreign and Security Policy, 2 June 2016.

domains of foreign policy but also the external dimensions of literally all EU policies.⁷³ As regards to the theme of the present chapter, two main observations can be made from the EUGS: (1) climate considerations have been effectively mainstreamed into the Strategy; and (2) energy and climate are entangled in the Strategy.

Concerning the first point, the word 'climate' features 24 times in the EUGS text. As part of strategic action for global governance, it is stated that the EU will lead by example, by implementing its commitments on sustainable development and climate change. Furthermore, the EU will increase climate financing, promote climate mainstreaming in multilateral fora, and work for clean energy cost reductions.⁷⁴ As regards looking at energy and climate issues together, the Strategy acknowledges that energy and environmental sector reform policies can assist partner countries along a path of energy transition and climate action. Through such efforts, the EU encourages positive developments in both the energy sector and climate change mitigation and adaptation.⁷⁵ At the same time, however, the EU also envisions risks that climate change and energy insecurity may endanger the security of the EU.⁷⁶

A later assessment of the EUGS has brought the climate security dimension more firmly to the fore, seeing the EU place more emphasis on the climate-security nexus in the future. Full utilization of the relevant EU toolbox could arguably contribute to conflict prevention and peace-building in the context where climate change, environmental degradation and food and water insecurity have severe conflict multiplying effects.⁷⁷ The approach fits well with the traditional view of the EU's common foreign and security policy.

The EEAS produced a working document "The EU Concept for an Integrated Approach on Climate Change and Security"⁷⁸ in 2021, with the aim of establishing a framework to address the climate, peace and security nexus in the EU external action. Consequently, the impact of the relevant EU action should be increased, and the climate and security nexus be addressed in all relevant EU instruments and policies underpinning its peace and security approach.⁷⁹ The Concept is set to complement the external dimension of the EGD, particularly in the field of crisis and conflict management.⁸⁰

The 2022 Council Conclusions on EU climate diplomacy affirmed that climate diplomacy remains a core component of EU foreign and security policy. The document also highlighted that climate diplomacy is an increasingly important, joint priority in the dialogues and cooperation of the EU and its Member States with third countries and regions.⁸¹

⁷³ Tocci 2020, p. 178.

⁷⁴ EUGS, p. 40.

⁷⁵ *Ibid.*, p. 27.

⁷⁶ *Ibid.*, p. 9.

⁷⁷ EEAS 2019, p. 26.

⁷⁸ Concept for an Integrated Approach on Climate Change and Security, EEAS(2021)770.

⁷⁹ *Ibid.*, p. 3.

⁸⁰ *Ibid.*

⁸¹ 2022 Council Conclusions.

Moreover, it is notable that climate change is recognized as a security risk and source of instability by the EU, in the EGD document, for instance.⁸² Consequently, the EU has stated that climate policy implications should become an integral part of the EU's thinking and action on external issues, also in the context of the common security and defense policy.⁸³ The Green Deal is an excellent vehicle for mainstreaming climate and energy diplomacy into the core policy areas of the EU. According to recent literature, the broader implications of climate change and climate policy for the EU's external relations and foreign policy at large have been slow to move into political focus.⁸⁴ The Green Deal package, and the subsequent geopolitical developments with their considerable ramifications, have certainly increased the leverage of climate and energy diplomacy as a security matter for the EU.

An interesting recent development within the EU Member States is the establishment of an inclusive "Group of Friends for an Ambitious EU Climate Diplomacy" in October 2022, ahead of UNFCCC COP-27. It is a group of, originally, 11 EU Member States⁸⁵ which aims to promote the placement of climate at the heart of the EU's foreign and security policy. More precisely, the group is committed to advance all of the previously identified elements of climate diplomacy as part of the EU foreign and security policy: enhance the nexus between climate, peace and security within the EU foreign policy; to accelerate a Paris-aligned global energy transition by actively supporting the implementation of the external dimension of the Green Deal and by showing leadership; and to ensure the effective mainstreaming of climate action across all areas of EU foreign and security policy.⁸⁶

In the light of the above, it is apparent that climate figures strongly in the EU's foreign and security policy.⁸⁷ It has been reported that foreign services have been increasingly involved and coordinated across the EU for enhanced climate diplomacy.⁸⁸ This is very well in line with the idea that climate diplomacy includes a peace and security aspect. Through the EUGS, the EU has launched a shift from a traditional approach to foreign and security policy towards one that is characterized by greater diversity in which climate and climate diplomacy have a recognized and more prominent role.

⁸² *Ibid.*, p. 5.

⁸³ COM(2019) 640 final, p. 21.

⁸⁴ Oberthür et al. 2022, p. 5.

⁸⁵ Denmark, Finland, France, Germany, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Spain, Sweden. The Group is open to all EU Member States who want to foster a more ambitious EU Climate Diplomacy.

⁸⁶ Statement by the Group of Friends for Ambitious EU Climate Diplomacy in connection with the publishing of the synthesis report of the United Nations Intergovernmental Panel on Climate Change (IPCC). www.auswaertiges-amt.de/en/newsroom/news/-/2588800, accessed 13 July 2023.

⁸⁷ See also EEAS 2019, p. 40.

⁸⁸ Oberthür and Dupont 2021, p. 1108.

13.3.3 Human Rights Policy

The EU shall promote human rights as one of its general aims⁸⁹ and as a central objective of its external action.⁹⁰ The EU is, thus, strongly committed to protecting and advancing human rights both internally and in its policies towards third countries.

The current EU priorities in human rights policy making, in relation to its external relations, are recorded in the EU Action Plan on Human Rights and Democracy 2020–2024.⁹¹ Accordingly, the EU supports measures to address the high risk and serious impacts of climate change, environmental degradation and biodiversity loss on the exercise of human rights, such as rights to life, health, safe drinking water and sanitation, food, adequate housing and standard of living, including for climate-induced displaced people.⁹² The EU is also committed to strengthening the linkage between human rights and the environment, including climate change in its external action. In practical terms, the EU provides support to activities to raise awareness of the human rights impact and implications of climate change and environmental degradation.⁹³ Moreover, the EU will continue to strengthen the links between human rights, security, environmental degradation and climate in policy dialogues, conflict prevention, development and humanitarian actions, as well as in disaster risk reduction strategies.⁹⁴

Despite the numerous stated commitments and recognized policy linkages to promote the climate—human rights nexus in its external relations, the EU does not have specific human rights guidelines related to climate. Such guidelines have been created for other types of human rights, such as safe drinking water and sanitation and rights of the child.⁹⁵ However, it could be argued that those are established human rights, whereas climate change does not have an associated human right of its own.

The 2021 Council Conclusions on Climate and Energy Diplomacy recognize the need for human rights to be systematically integrated into EU climate action and energy diplomacy.⁹⁶ The 2022 Conclusions repeat the same, while also emphasizing gender equality and participatory rights of women and the youth.⁹⁷ The 2023 Conclusions also express the EU's commitment to respect and promote numerous human rights when taking action to address climate change.⁹⁸ The statement in the 2021

Conclusions is particularly significant in that it does not speak in abstract about the recognition of or respect for human rights, but it stresses the need to systematically integrate human rights into EU climate and energy diplomacy action.

13.3.4 Development Policy

As defined in the founding treaties, the primary objective of EU development cooperation is the reduction and, in the long term, the eradication of poverty.⁹⁹ This goal has to be pursued through all EU development policy action.¹⁰⁰ The goal could, in theory, be considered to be a mismatch with climate diplomacy objectives because a reduction of poverty is often likely to lead to increased greenhouse gas emissions due to an increased consumption of goods and services. However, an increased wealth of people and societies can also help them move towards using new and more sustainable energy sources, for instance, which results in fewer emissions. The conflict potential of climate change is also likely diminished by reduced poverty because people can then afford to be better prepared for the negative effects of climate change, for instance. Consequently, it can be said that poverty eradication is generally in line with the broad goals of climate, and, especially, energy, diplomacy. The issue of energy poverty was specifically addressed in the 2021 Council Conclusions on climate and energy diplomacy.¹⁰¹

Besides a reduction and eradication of poverty, the goals of the EU development policy include promotion of security and stability and fostering sustainable development in accordance with the European consensus on development,¹⁰² adopted in 2017. The document contains the EU's vision and action framework for development cooperation and explicitly addresses climate change, committing the EU to integrate environment and climate change throughout its development cooperation strategies.¹⁰³

The Council Conclusions on climate and energy diplomacy do not address the EU's development policy to a significant extent. This could be considered to be a missed opportunity, given the potential of directly employing climate and energy diplomacy in the EU development policy activities. Nevertheless, a gradual mainstreaming of climate and energy cooperation into the EU's development policy has taken place.

⁸⁹ Article 2 TEU.

⁹⁰ Articles 3(5) and 21 TEU.

⁹¹ EU Action Plan on Human Rights and Democracy 2020–2024, Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication, JOIN(2020) 5 final.

⁹² *Ibid.*, p. 13.

⁹³ *Ibid.*, p. 15.

⁹⁴ *Ibid.*, p. 21.

⁹⁵ EEAS, EU Human Rights guidelines, www.eeas.europa.eu/eeas/eu-human-rights-guidelines_en, accessed 13 July 2023.

⁹⁶ 2021 Council Conclusions, para 19.

⁹⁷ 2022 Council Conclusions, para 10.

⁹⁸ 2023 Council Conclusions, paras 41–42.

⁹⁹ Article 208 TFEU; Article 3(5) TEU.

¹⁰⁰ In a strict sense, development policy is part of the EU's Common Foreign and Security Policy. However, here those two are treated separately.

¹⁰¹ 2021 Council Conclusions, p. 12.

¹⁰² The new European consensus on development—our World, our Dignity, our Future, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, OJ C210/1, 27.6.2017.

¹⁰³ *Ibid.*, section 2.2.

EU policy in the field of development cooperation must also be conducted within the framework of the principles and objectives of the EU's external action.¹⁰⁴ As described earlier, the EU's objectives in this field include the prevention of conflicts and contribution to the preservation of peace and sustainable development on a global scale, which reflect elements of climate diplomacy. Yet, action and instruments for development cooperation are generally driven by the priorities of partner countries, which, it has been argued, provide limited opportunities for the EU to put forward its own policy priorities.¹⁰⁵ However, climate change and energy are issues that can be expected to appear on the agendas of basically all developing countries nowadays.

Overall, development policy offers one of the most tangible ways to advance the climate and energy diplomacy agenda in relations between the EU and third countries. At the same time, it also offers a means for the EU to promote sustainable development beyond its borders.

13.3.5 EU and Climate Diplomacy Under the UNFCCC

Global climate negotiations and policymaking under the UNFCCC are an integral element of the EU's climate diplomacy. Work under the global climate agreements has been in a key position in all of the Council Conclusions on climate and energy diplomacy adopted so far.

The EU is, together with the Member States, a party to the international climate agreements. The EU speaks with one voice throughout the negotiations. This requires a great deal of internal coordination, time and effort. Nevertheless, it is a great opportunity to bring forward the EU climate and energy diplomacy agenda in global climate policymaking.

Over the years, the EU has acted as a leader in the global climate negotiations, and it aspires to continue in that role.¹⁰⁶ Besides pursuing an ambitious and forward-looking stance in the negotiations, the EU seeks to also lead by example. This is what is stressed in the EU's climate diplomacy policy as well.¹⁰⁷

Showing a good example, the exercise of persuasion and provision of support are the cornerstones of the EU's climate diplomatic action under the global climate negotiations. This has led to a situation where the EU is seen as exercising both exemplary and diplomatic leadership under the UNFCCC.¹⁰⁸ Ambitious domestic climate legislation and policy is a key element to the EU's climate diplomacy efforts at the level of the global negotiations. In a way, the EU attempts there to externalize

its existing regulatory framework to the rest of the world.¹⁰⁹ In the EGD, the issue has been formulated in somewhat softer terms so that the EU mobilizes, through its influence, expertise and financial resources, its neighbors and partners to "join it on a sustainable path".¹¹⁰

13.4 EU Action on Climate and Energy Diplomacy in Practice

The EU's institutional and administrative structure principally provides sectoral support to climate and energy diplomacy action.¹¹¹ Climate issues have a Directorate-General (DG) of their own under the European Commission, DG Climate Action, and the EU's energy policy lies under the mandate of DG for Energy. The Conclusions on climate (and energy) diplomacy have been prepared under and adopted by the Foreign Affairs Council. Climate diplomacy, as an issue, belongs to the mandate of the BEAS which is also responsible for the implementation of the EU's development policy (together with the DG for International Partnerships) and the EU's external human rights policy. The EU's Common Foreign and Security Policy is led by the High Representative of the Union for Foreign Affairs and Security Policy, assisted by the BEAS and EU Special Representatives (EUSRs), nine of them in total at the time of writing. The EGD, for its part, is such a multi-faceted package that its implementation is distributed to a large number of EU institutions, their tasks depending on the themes at hand.

Whether in the name of climate (and energy) diplomacy or without the explicitly expressed linkage, the EU has initiated numerous partnerships, policy initiatives and development projects that have had a focus on climate and energy cooperation in third countries and/or on strengthening regional stability through climate action. Partnership-based cooperation on climate and energy diplomacy has a benefit over pure investment projects or development assistance that it is flexible and engages the partners on a more equal basis. It, therefore, fits very well with the idea of diplomatic action.

The number and level of intensity of partnership-based climate initiatives is likely to only increase, given the felt urgency of the need to tackle the climate and energy crises. Recent EU policy and legislative developments also point in the same direction; for instance, the EGD called for continued and strengthened engagement with international partners bilaterally and in regional contexts, with an emphasis on, among others, Africa and the EU neighborhood.¹¹² Furthermore, the High Representative of the European Union for Foreign Affairs and Security Policy,

¹⁰⁴ Article 208 TFEU.

¹⁰⁵ Kettunen et al. 2019, p. 15.

¹⁰⁶ All Council Conclusions on climate (and energy) diplomacy adopted so far speak for that. See also, e.g., Wurzel et al. 2017.

¹⁰⁷ See, e.g., para 1 of the 2021 Council Conclusions.

¹⁰⁸ Oberthür and Dupont 2021, pp. 1099–1101.

¹⁰⁹ Schunz 2019; Delreux 2021, p. 270; Çelik 2022, p. 1021.

¹¹⁰ COM(2019) 640 final, p. 2.

¹¹¹ As has been stated by Bremberg and Bunse: "Silod approaches remain the norm." Bremberg and Bunse 2023, p. 4.

¹¹² COM(2019) 640 final, pp. 20–21.

Josep Borrell, has stated that “[s]trengthening climate diplomacy means working in partnership.”¹¹³ Partnerships are also at the center of the recently introduced “Team Europe” approach¹¹⁴ in the EU’s external development policy action. Its current portfolio largely focuses on green deal diplomacy related projects.

Below, an example is provided on the current framework of EU external action in Africa which bears very close relevance to climate and energy diplomacy.

The EU—Africa partnership forms a very good example of how the EU seeks to carry out coordinated climate and energy diplomacy action with third countries at the regional level. The EU has implemented climate-related projects in Africa for a rather long time; in recent years, the energy element has come more strongly to the forefront.¹¹⁵ In addition to development projects focusing on energy access and infrastructure, for instance, the climate and energy diplomacy related EU—African cooperation includes trade arrangements, technical and technological cooperation, research and innovation projects etc.

Already, the 2016 EUGS recognized the need to mobilize investments in Africa to support sustainable development by linking policies and blending development efforts with energy and climate, among others.¹¹⁶ The 2021 Council Conclusions on climate and energy diplomacy set a priority for the EU to “develop a strategic and coordinated approach on the energy partnership with Africa.”¹¹⁷ Furthermore, the document foresaw the launching of an African Union—EU Green Energy Initiative,¹¹⁸ which should support universal sustainable energy access ambition for Africa.¹¹⁹ While the energy partnership will benefit African countries in terms of strengthening energy institutions and frameworks and contribute to climate change mitigation, it will also assist the EU in transitioning away from carbon dependency.¹²⁰ Ideally, the cooperation initiatives would also align with the objectives of the EU’s development and human rights policy as well as contribute to peace, security and sustainable development as per the Union’s foreign and security policy objectives.

¹¹³ Borrell 2019.

¹¹⁴ Team Europe consists of the EU, its Member States as well as the European Investment Bank and the European Bank for Reconstruction and Development. The idea is to pool resources and expertise to make development projects more impactful.

¹¹⁵ For instance, the Africa-EU Energy Partnership was created in 2000 to improve access to secure, affordable and sustainable energy for both continents. The partnership was renewed in 2022. “A partnership for green transition and energy access” is one of the key areas of the EU strategy with Africa. See Towards a Comprehensive Strategy with Africa, High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, JOIN(2020) 4 final.

¹¹⁶ EUGS, p. 36.

¹¹⁷ 2021 Council Conclusions, p. 12.

¹¹⁸ For more information, see EU–Africa: Global Gateway Investment Package—Green Energy Initiative. ec.europa.eu/commission/presscorner/api/files/attachment/874173/EGG_Africa_Green_and_Sustainable_Energy.pdf, accessed 13 July 2023. The Initiative was formally proposed by the EU in 2022.

¹¹⁹ Ibid.

¹²⁰ Dennison and Engström 2023, p. 3.

The EU’s climate and energy related projects in and partnerships with African countries and regions are not, as a rule, explicitly labeled as tools to promote climate and energy diplomacy. This is sensible, given the many (geo)political sensitivities involved and the practice-oriented flavor of the cooperative projects.

The Just Energy Transition Partnership with South Africa, launched at the UNFCCC COP-26 in 2021, is a prime example of a new kind of climate diplomacy initiative in which the EU is involved. The initiative is a partnership between South Africa and the EU, France, Germany, the United Kingdom and the United States. The aim is to accelerate the decarbonization of Africa’s highest emitter of greenhouse gasses. In practice, the Partnership mobilizes a significant amount of financing to support South Africa in its transition to a low emission economy and to support South African workers and affected communities during the transition.

The Partnership can be regarded as one of the first larger deliverables of the call made in the EGD to develop a stronger green deal diplomacy and to build green alliances.¹²¹ The Partnership has been described as “a good illustration of what we would label the ‘coming of age’ of Europe’s climate diplomacy.”¹²² The statement appears to be justified, given that the Partnership has adopted a just transition perspective that is more comprehensive than traditional development assistance or climate finance. In addition, the Partnership involves a large donor group, promoting a global approach to climate diplomacy partnerships.

13.5 Perspectives on Sustainability, Energy Diplomacy and Nexus Thinking

The EU does not have an official policy document on sustainability or sustainable development of its external policies. The EU Strategy for Sustainable Development¹²³ was adopted in 2001. Much later, the EU action and policymaking on sustainability was connected with the implementation of the globally agreed SDGs. Their implementation is to be integrated into all EU policymaking, both internal and external.¹²⁴ The EGD is also highly relevant for EU policy-making on sustainable development: it is an integral part of the Commission’s strategy to implement the United Nations 2030 Agenda and the SDGs.¹²⁵

Mention of the SDGs has been included in all Council Conclusions on climate (and energy) diplomacy adopted since 2015. However, it was not until 2023 that

¹²¹ Petricione and Van Kemseke 2022. <https://www.friendsofeurope.org/insights/the-coming-of-age-of-europes-climate-diplomacy/>, accessed 13 July 2023.

¹²² Ibid.

¹²³ A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, Communication from the Commission, COM(2001)/0264 final.

¹²⁴ Delivering on the UN’s Sustainable Development Goals—A comprehensive approach, Commission staff working document SWD(2020) 400 final.

¹²⁵ COM(2019) 640 final, p. 2.

the SDG connection was given a bit more elaborate treatment in the Conclusions document: reference was made to the urgent need to deliver on energy poverty and universal energy access in line with the SDG 7.¹²⁶ Given that the SDGs were agreed on already in 2015 and that they should, as a rule, be integrated into all EU policy-making, explicit mainstreaming has been rather slow in coming in the area of the EU's climate and energy diplomacy policy.

As regards the EU energy policy and its external dimension, it has been explicitly at the fore since 2011 when the first Council conclusions on strengthening the external dimension of the EU energy policy were adopted.¹²⁷ Relevant Conclusions were adopted also in 2013,¹²⁸ which sought to respond to the challenge of diversifying the EU's energy supply and reducing external energy dependency.¹²⁹

Earlier, the EU objectives for energy diplomacy were not very clear and the actions focused on internal coordination and building on the format of energy partnerships and dialogues.¹³⁰ However, more recently, the EU has adopted a strategic approach to multilateral energy governance.¹³¹

The energy diplomacy element was formally added to the EU approach to climate diplomacy in 2021 when the joint Council Conclusions were adopted. This natural policy turn can be said to have followed the objective on synergies and joint priorities presented in the 2016 EUGS document. Moreover, the Strategic Approach to Resilience in the EU's external action, adopted in 2017, underlines the link between global energy security and the EU's climate change policy, and the need to accelerate the global energy transition towards carbon neutrality. It was concluded that EU energy and climate diplomacy aims at promoting this approach.¹³² In a way, it is interesting that the common goals of the EU energy and climate diplomacies were recognized in the context of defining the EU approach to resilience in its external action, well before formally combining the two policy areas in the EU external policy.

Climate and energy represent, perhaps, even the most obvious theme for a nexus approach for the EU. Overall, nexus thinking has become prominent in EU policy-making in recent years, especially concerning external relations.¹³³ It can be considered to result from attempts to abandon a silo approach in the EU policy-making and to address linkages more effectively between issues.

The 2023 Conclusions on climate and energy diplomacy specifically adopts a nexus approach. The document underlines "the importance of integrating the climate,

peace and security nexus in EU's external policy and actions" including, *inter alia*, in "conflict prevention, development cooperation, climate finance and climate diplomacy including dedicated water diplomacy".¹³⁴ The Council further invited the High Representative to "mainstream the climate, peace and security nexus, and issue a timely warning and analysis on climate related risks."¹³⁵ So far, the Council Conclusions and the EU action on climate and energy diplomacy have focused on the peace and security nexus, but there has also been action, through trade agreements, in relation to the climate-energy-trade nexus,¹³⁶ on the climate-energy-development nexus¹³⁷ and on the climate-energy-water nexus,¹³⁸ among others, in EU external relations in recent years. In this light, it is fair to say that, at the same time, that the climate and energy diplomacy is becoming an ever more prominent guideline in the EU external relations, it is also gaining more ground as a result of a broadening of its scope and "entering new waters",¹³⁹ mainly through the nexus approach.

13.6 Conclusion

The EU likes to profile itself as a world leader in ambitious climate policymaking. This has translated into action to externalize its climate and energy policy and legislation, by both showing a good example and action to spread good practices and raise the level of ambition of climate and energy policymaking in other countries and regions.

Climate and energy diplomacy is a way to carry out the external dimension of EU climate and energy policy and legislation. At the same time, it provides the framework and means for mainstreaming climate considerations into EU external action in other fields. In addition, climate and energy diplomacy is a defining factor in the EU action under international climate negotiations. Consequently, it can be said that the EU climate and energy diplomacy works in different spheres: in a global setting through climate negotiations; through an application and promotion of EU domestic legislation and policies beyond the Union borders; and through specific cooperation and partnerships with third countries.

Climate and energy diplomacy has become a prominent element, and even a key priority during the last few years, of the EU external policy agenda. The Council

¹²⁶ 2023 Council Conclusions, para 38.

¹²⁷ Council of the EU, Council conclusions on strengthening the external dimension of the EU energy policy, 3127th Council meeting (Energy items), 2011.

¹²⁸ Conclusions of the European Council, 22 May 2013, EUCCO 75/1/13.

¹²⁹ *Ibid.*, para 6.

¹³⁰ Petri 2020, p. 3.

¹³¹ See, e.g., Siddi and Kustova 2021.

¹³² A Strategic Approach to Resilience in the EU's external action, High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, JOIN(2017) 21 final, p. 13.

¹³³ See, e.g., Leal-Arcas and Alvarez Armas 2018.

¹³⁴ 2023 Council Conclusions, para 21.

¹³⁵ *Ibid.*, para 21.

¹³⁶ Leal-Arcas and Alvarez Armas 2018.

¹³⁷ See Council Conclusions on Energy and Development 2018, 8954/18.

¹³⁸ See, e.g., the Team Europe Initiative on Water-Energy-Climate Change in Central Asia, which was launched in 2022. The EU has a rather long history in water-related cooperation in Central Asia, and the water-energy-climate nexus has now been made explicit there. This is certainly beneficial, from diplomatic and conflict prevention perspectives, for EU action in the region. The need to coordinate with energy and water diplomacy policies was recognized by the European Parliament in its 2018 Resolution on climate diplomacy. Para 23.

¹³⁹ Petriccione and Van Kemseke 2022.

has adopted a series of Conclusions on climate, and more recently on climate and energy diplomacy. A clear development trend can be discerned in the documents over the years: the Conclusions have gradually developed towards more coherent and ambitious policy guidelines, calling for stronger mainstreaming of climate and energy diplomacy considerations in all areas of EU external action and increasingly addressing the peace and security aspect of climate and energy diplomacy.

The formal integration of energy into the EU climate diplomacy policy since 2021 has brought the goal of accelerating the global energy transition to the fore in the EU external action on climate and energy. It has also strengthened the security and conflict prevention elements therein. These elements are clearly visible in the latest set of Council Conclusions on climate and energy diplomacy, adopted in 2023, where the EU showed determination to continue strong climate action and cooperation and forge new energy partnerships.

The energy aspect also strongly features in the “green deal diplomacy”, as called for in the context of the EGD. Climate and energy diplomacy are, indeed, tools to implement the external element of the EGD. In addition, aspects of climate and energy diplomacy are nowadays present in the key policy fields of EU external action. For instance, climate security and strong linkages between climate and energy issues are important ingredients of the current EU foreign and security policy, not least due to the recent (geo)political developments and energy crisis. A gradual mainstreaming of climate and energy cooperation into the EU’s development policy has also taken place.

Nexus-thinking has become increasingly prominent in EU policy making in recent years, especially concerning external relations. This trend has become highly visible in the climate and energy diplomacy area, and it seems clear that the EU will put more emphasis on the climate-security nexus in the future. The 2023 Council Conclusions took the nexus approach quite far, not only underlining the peace and security nexus vis-à-vis climate and energy diplomacy, but also other combinations such as those related to development, trade and water.

The Russian aggression against Ukraine, which started in early 2022, has reinforced the close link between climate and energy diplomatic action in the EU agenda. Consequently, energy security has become a topical issue, which has ramifications, on one hand, on the EGD and all the related climate and energy legislation and policies within the EU, and on the key external policies with third countries, on the other hand. EU diplomatic action in the multilateral setting within the UNFCCC negotiations has not seen big changes in recent years. In contrast, the externalization of domestic climate and energy policies has intensified, and smaller setting or bilateral partnerships and initiatives in third countries have increasingly adopted climate and energy diplomatic elements. The approach is in line with the key goals of EU external action, namely conflict prevention and development of international measures to ensure environmental protection and sustainable development.

References

- Adelle C et al (eds) (2018) *European Union External Environmental Policy. Rules, Regulation and Governance Beyond Borders*. Palgrave Macmillan, Cham
- Barrá M and Svec M (2018) Reinforcing Energy Governance under the EU Energy Diplomacy: A Proposal for Strengthening Energy Frameworks in Africa, *European Journal of Risk Regulation* 9: 245–267
- Berthage G (2005) *Diplomacy: Theory and Practice*. Palgrave Macmillan, Basingstoke
- Biedenkopf K and Groen L (2021) External EU environmental policy. In: Jordan A and Gravey V (eds), *Environmental Policy in the EU. Actors, Institutions and Processes*. Routledge, London, pp. 33–50
- Biedenkopf K and Petri F (2021) The European External Action Service and EU Climate Diplomacy: Coordinator and Supporter in Brussels and Beyond, *European Foreign Affairs Review* 26: 71–86
- Bottel J (2019) The EU Green Deal—A Global Perspective, a blog post. ec.europa.eu/eeas/eu-green-deal-%E2%80%93-global-perspective_en, accessed 11 July 2023
- Bremberg N and Bunse S (2023) Climate, Peace and Security in a Changing Geopolitical Context: Next Steps for the European Union, SIPRI policy brief. www.sipri.org/publications/2023/sipri-policy-briefs/climate-peace-and-security-changing-geopolitical-context-next-steps-european-union, accessed 13 July 2023
- Bäckstrand K and Elgström O (2013) The EU’s role in climate change negotiations: from leader to ‘leader’, *Journal of European Public Policy* 20: 1369–1386
- Çelik F B (2022) The EU’s different faces in climate diplomacy: leadership, interests, and responsibilities, *Journal of European Integration* 44: 1019–1039
- Deleux T (2021) The EU in international environmental negotiations. In: Jordan A and Gravey V (eds), *Environmental Policy in the EU. Actors, Institutions and Processes*. Routledge, London, pp. 259–275
- Demission S and Engström M (2023) Decarbonization Nations: How EU Climate Diplomacy Can Save the World, *European Council on Foreign Relations policy brief*. ecfr.eu/wp-content/uploads/2023/05/Decarbonisation-nations-How-EU-climate-diplomacy-can-save-the-world.pdf, accessed 13 July 2023
- Dupont C et al (2018) Climate Change: Adapting to Evolving Internal and External Dynamics. In: Adelle C et al (eds) (2018) *European Union External Environmental Policy. Rules, Regulation and Governance Beyond Borders*. Palgrave Macmillan, Cham, pp. 105–124
- Farom J and Deleux T (2021) Evaluating EU responsiveness to the evolution of the international regime complex on climate change, *International Environmental Agreements: Politics, Law and Economics* 21: 711–728
- Farom J and Deleux T (2023) One Big Conversation: The EU’s Climate Diplomacy across the International Regime Complex on the Paris Agreement Negotiations, *Journal of Common Market Studies* 61: 198–214
- EEAS (2019) EUGS three years on, looking forward. www.eeas.europa.eu/sites/default/files/eu-global_strategy_2019.pdf, accessed 11 July 2023
- EEAS and European Commission (2011) Joint Reflection Paper. Towards a Renewed and Strengthened EU Climate Diplomacy, Brussels, Belgium, 9 July 2011
- EEAS and European Commission (2013) EU Climate Diplomacy for 2015 and Beyond. Reflection Paper, Brussels, 26 June 2013
- General Secretariat of the Council (2020) Council conclusions and resolutions. www.constitium.europa.eu/en/council-eu/conclusions-resolutions/#, Accessed 9 November 2022
- Kuitunen M et al (2019) Reinforcing Environmental Dimensions of European Foreign and Security Policy. ieep.eu/uploads/articles/attachments/9219f70d-8d00-4635-ad7e-a5430a40070b/think2030_-_environmental_security_-_dec_2018_-_final.pdf?v=63717390338, Accessed 9 November 2022
- Lazard O and Youngs R (eds) (2021), *The EU and Climate Security: Toward Ecological Diplomacy*, Carnegie Endowment for International Peace, Washington

- Leal-Arcas R and Alvarez Armas E (2018) The climate–energy–trade nexus in EU external relations. In: Minas S and Ntousas V (eds) (2018) *EU Climate Diplomacy. Politics, Law and Negotiations*, Routledge, Abingdon, pp. 153–168
- Minas S and Ntousas V (eds) (2018) *EU Climate Diplomacy. Politics, Law and Negotiations*, Routledge, Abingdon
- Oberthür S and Dupont C (2021) The European Union's international climate leadership: towards a grand climate strategy?, *Journal of European Public Policy* 28: 1095–1114
- Oberthür S et al (2022) *European Foreign Policy in a Decarbonising World. Challenges and Opportunities*, Routledge, Abingdon
- Petri F (2020) Revisiting EU Climate and Energy Diplomacy: A Starting Point for Green Deal Diplomacy?, Egmont European policy brief No. 65. aei.pitt.edu/103670/1/EPB65%2Dfinal.pdf, accessed 11 July 2023
- Petriccione M and Van Kemseke P (2022) The coming of age of Europe's climate diplomacy, a Friends of Europe insight. www.friendsofeurope.org/insights/the-coming-of-age-of-europes-climate-diplomacy/, accessed 13 July 2023
- Schunz S (2019) The European Union's environmental foreign policy: from planning to a strategy?, *International Politics* 56: 339–358
- Siddi M and Kustova I (2021) From a liberal to a strategic actor: the evolution of the EU's approach to international energy governance, *Journal of European Public Policy*, 28: 1076–1094
- Teevan C et al (2021) *The Green Deal in EU foreign and development policy*, European Centre for Development Policy Management briefing note No. 131. ecdpm.org/work/the-green-deal-in-eu-foreign-and-development-policy, accessed 11 July 2023
- Tocci N (2020) Resilience and the role of the European Union in the world, *Contemporary Security Policy*, 41: 76–194S
- Torney D and Davis Cross MK (2018) Environmental and Climate Diplomacy: Building Coalitions Through Persuasion. In: Adelle C et al (eds), *European Union External Environmental Policy. Rules, Regulation and Governance Beyond Borders*, Palgrave Macmillan, Cham, pp. 39–58
- Tänzler D et al (2021) EU climate change diplomacy in a post-Covid-19 world. European Union, Brussels. [www.europarl.europa.eu/RegData/etudes/STUD/2021/653643/EXPO_STU\(2021\)653643_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653643/EXPO_STU(2021)653643_EN.pdf), accessed 11 July 2023
- van Schaik L (2010) The Sustainability of the EU's Model for Climate Diplomacy. In: Oberthür S and Pallemarts M (eds), *New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy*, ASP VUBPress, Brussels, pp. 251–280
- Woerdman E et al. (eds) (2021), *Essential EU Climate Law*, Edward Elgar, Cheltenham
- Wouters J et al (2021) External Environmental Policy. In: Wouters J et al (eds), *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford University Press, Oxford, pp. 316–358
- Wurzel R K W et al (eds) (2017) *The European Union in international climate change politics: Still taking a lead?*, Routledge Abingdon

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3. External competences in energy and climate change

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1. INTRODUCTION

One of the cornerstones of Europe's modern society is energy. Without energy the day-to-day needs of lighting, heating and transport would become impossible, leading to the serious malfunctioning of its businesses. The European Union (EU) and its Member States are (partly) dependent on *external* energy sources. The way that – and the pace at which – the old continent is consuming its energy sources is unsustainable, as is its high level of energy imports. In parallel, the EU and Member States need to keep track of their climate mitigation pledges to make their 'emission pathways consistent with holding the increase in the global average temperature to well below 2°C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels', as stipulated in the recent Paris Agreement.¹ Without proper European regional cooperation and harmonization in the strategic fields of energy and climate change policies, many European households will be left in the dark and cold, and universal climate agreements may be trampled on by the EU and Member States.

Energy security and climate change are therefore 'hot topics' in the external relations of the EU and its individual Member States. The Paris Climate Change Agreement of 2015 has firmly and urgently established the reduction of greenhouse gas emissions and, hence, the 'decarbonization'² of the world economy as a global policy objective to be achieved in the next few decades. The EU has been very active in setting a (global) climate agenda and the Paris Agreement has been hailed as a success of EU climate diplomacy.³ At the same time, the EU is currently to a large degree dependent on (fossil) energy imports and faces related challenges in achieving energy security (security of supply) and ensuring affordability of energy in the shorter and longer term. The EU is the biggest energy customer in the world, depending on 'a very sparse number of energy suppliers' who could use this situation as a 'political weap-

¹ Paris Agreement [2015], https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (accessed 13 December 2016).

² While the word 'decarbonization' does not feature in the official text of the Paris Agreement, many authors believe this strategy is necessary in view of the implementation of Nationally Determined Contributions (NDCs). See e.g. Jeffrey Sachs, 'Implementing the Paris Climate Agreement – Achieving Deep Decarbonization in the Next Half Century' [2016], <http://www.cirsd.org/en/horizons/horizons-winter-2016--issue-no-6/implementing-the-paris-climate-agreement--achieving-deep-decarbonization-in-the-next-half-century> (accessed December 2016).

³ Sebastian Oberthür, 'Where to Go from Paris? The European Union in Climate Geopolitics' [2016] *Global Affairs*, pp. 1–12.

on'.⁴ Both climate and energy policy are areas of 'shared competences' between the EU and its Member States.⁵ As a result, both the relevant European institutions and the Member States engage in energy diplomacy and policy-making externally, that is, on the international stage.

Where the global forum of the United Nations Framework Convention on Climate Change (UNFCCC) and its annual Conference of the Parties (COP) render external multilateral action crucial in the area of climate change, the multilateral forums on energy are much less influential. Energy security is therefore still primarily framed as a topic within the realm of national sovereignty. Many EU Member States conclude their own bilateral deals. Some energy experts, however, favour rendering it a Union task to formulate energy security policy,⁶ while others emphasize this should be at the discretion of national governments and/or a 'smaller coalitions' of Member States.⁷ Some are even of the opinion that the practice of describing energy as a shared competence under Lisbon Treaty rules in terms of the Community method, contrasting with intergovernmentalist practices, should be abandoned.⁸ Instead, as suggested by German Chancellor Angela Merkel in 2010, we could explain EU energy policy in terms of a new 'Union method', that is, a combination of the Community method and the intergovernmental method. In the words of the Federal Chancellor, this would resemble 'coordinated action in a spirit of solidarity'.⁹

These external representation and autonomy questions of the EU and its Member States point to the crucial importance of the institutional context in the EU's external relations. The link between the division of competences between the EU and its Member States have been part of the (legal) research agenda, especially in the phase of the constitutional review preceding the Lisbon Treaty.¹⁰ This research agenda, however, may need to be reviewed after assessing the functioning of the respective provisions of the Lisbon Treaty in the first years after its entry into force, and especially now that the Paris Agreement and energy security considerations in the EU have moved the agenda of climate change and energy security to the forefront.

Our chapter is focused on the institutional context of the EU and its Member States and its external functioning and effects for the most important EU priorities in energy and climate policy, namely energy security and climate change mitigation. Conversely, we do not focus on the technical aspects related to these policies. The chapter starts with the substance of the

⁴ Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 24.

⁵ Art 4 TFEU, Consolidated Version of the Treaty on European Union [2010] OJ C 83/01, see also Chapter 2 of this handbook.

⁶ Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' [2015] *European Energy Journal* 5(3), p. 24.

⁷ Simone Tagliapietra, 'Building Tomorrow's Europe: The Role of an "EU Energy Union"' [2014] *Review of Environment, Energy and Economics* (Re3), pp. 1–10.

⁸ Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' [2011] EPIN Working Paper no. 31, p. 8.

⁹ Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010, <https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20englisch.pdf> (accessed 29 November 2016).

¹⁰ Sanam S. Haghighi, 'Energy Security and the Division of Competences between the European Community and its Member States' [2008] *European Law Journal* 14(4), pp. 461–82.

most important European energy and climate priorities and action plans. This is followed by a section on the shared (external) competences, based on the Treaty and on case-law. Thereafter, the most important institutional actors in EU external action on climate and energy are introduced. This EU institutional and legal context co-determines external action, which is analysed in section 5. Some challenges and opportunities of the practical workings of shared external competences will be dealt with in the following section. In the concluding section, a future research agenda on shared external competences in energy and climate will be sketched.

2. EU PRIORITIES AND ACTION PLANS IN THE AREA OF ENERGY SECURITY AND MITIGATION OF CLIMATE CHANGE

Ever since its nascence, European integration has been characterized by continuous efforts among Member States to ensure a secure, stable and affordable supply of energy on the European continent. During the 1950s, the European Atomic Energy Community was created, and since then, various energy-related policies and institutions have followed. Since Spring 2007, when the EU adopted the so-called ‘Energy/Climate package’, European leaders have also committed to common EU energy (supranational) governance.¹¹ In doing so, European leaders have responded to the requests from EU citizens who, as a Eurobarometer Survey (2011) has shown, believe that greater solidarity between EU Member States in an energy crisis and intensified energy policy coordination are needed.¹² In 2015, the EU launched the ‘Energy Union’, stating that ‘Our vision is of an Energy Union where Member States see that they depend on each other to deliver secure energy to their citizens, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs’.¹³ The overall aim of this new ambitious initiative was to create ‘a resilient Energy Union with an ambitious climate policy at its core, to provide EU consumers – households and businesses – with secure, sustainable, competitive and affordable energy’.¹⁴ By doing so, the EU has initiated a series of working programmes and policies to address the two most important challenges that its external energy policy faces today: energy security and climate change mitigation.

¹¹ Daan Rutten, ‘CIEP Briefing Paper on the Energy Union’ [2016] *Clingendael International Energy Programme*, p. 1.

¹² European Parliament, ‘The European Union and Energy’ (*Eurobarometer*, June 2011), http://www.europarl.europa.eu/pdf/eurobarometre/2011/2011_01_74.3/ReportEB743PARLenergy_EN.pdf (accessed 16 December 2016).

¹³ Commission, ‘Towards an Energy Union: a Resilient Energy Union with a Forward-looking Climate Change Policy’ COM (2015) 80 final. See also Chapter 5 in this handbook, ‘The European Energy Union’ by Thomas Pellerin-Carlin.

¹⁴ *Ibid.*

Table 3.1 *EU energy imports (2016)*

Commodity	Percentage of total energy usage	Mostly from
Energy (overall)	53%	Russia, Norway, Libya, Qatar, Saudi Arabia
Natural gas	90%	Russia, Norway, Algeria, Qatar
Crude oil	66%	Saudi Arabia, Norway, Libya, Nigeria
Coal and other solid fuels	42%	Russia, Colombia, US, Australia
Uranium and other nuclear fuels	40%	Kazakhstan, Canada, Russia, Niger

Source: Authors' own calculations based on Eurostat data.

2.1 Energy Security

In 2016 the EU imported around 50% of its energy needs.¹⁵ Whereas oil, natural gas and coal account for 80% of the energy consumed in the EU, the variation in terms of origins and sources is limited. Regarding crude oil, the OPEC countries and Russia, in 2015, accounted together for almost 70% of all EU imports, and Russia was by far the biggest partner for natural gas imports, accounting for no less than one-third of all EU gas imports (see Table 3.1). As has become clear over the last couple of years, various problems arise with such a high dependency on energy imports. In addition to the well-known supply cut-offs due to geopolitical and geo-economic issues, terrorist groups have also targeted pipelines and production facilities throughout the Middle East and Iran has threatened several times to cut back oil production if forced to abandon its nuclear power programme.¹⁶

Importing energy from abroad comes at a high price, as it is estimated that the European states spend over €350 billion every year on importing most notably gas and (crude) oil from different continents.¹⁷ Next to uncertainty regarding a stable and assured supply, questions are also raised regarding the future availability of global oil and gas reserves for Europe. According to the International Energy Agency (IEA), global energy demand will rise by more than one-third by 2035, especially in the Middle East, China and India.¹⁸ This will have repercussions on the energy availability for Europe, as well as on the price that will be charged.

2.2 Climate Change Mitigation

Another key priority of the EU's external energy policy is related to the environment and more specifically, focused on limiting climate change. With a current global average temperature that is 0.85 degrees higher than it was in the late 19th century, rising sea-levels, extreme

¹⁵ Barring significant changes, the European Commission expects this figure to rise to 65% by 2030. See also <http://www.fas.org/sfp/crs/row/RL33636.pdf> (accessed 11 December 2016).

¹⁶ Paul Belkin and Vince L. Morelli, 'The European Union's Energy Security Challenges' [2007] *Congressional Research Service, RL 33636*, Washington DC, <http://www.dtic.mil/dtic/tr/fulltext/u2/a473788.pdf> (accessed November 2016).

¹⁷ 'Energy Strategy' (*European Commission Energy*) <https://ec.europa.eu/energy/en/topics/energy-strategy> (accessed 15 December 2016).

¹⁸ 'World Energy Outlook 2013' (*International Energy Agency*, 2013) <https://www.iea.org/Textbase/npsum/WEO2013SUM.pdf> (accessed 16 December 2016).

weather patterns, food insecurity and other serious challenges also loom large for Europe in the near future. The recent emissions of greenhouse gases were the largest in history; the atmosphere and oceans have warmed; the amounts of snow and ice have diminished; and the sea level has risen.¹⁹ Since CO₂ is the greenhouse gas which is most commonly produced by human activities and is responsible for 64% of man-made global warming, the EU – together with other actors – will have to *decarbonize* its economy and way of living drastically and urgently. As (the use of) energy accounts for almost 80% of all greenhouse gas emissions worldwide,²⁰ ‘The energy sector has a direct link to the climate change challenge’.²¹ It is a key sector in which climate mitigation efforts are required. As has been demonstrated in more technical contributions, the link between energy security and climate change is ‘rather tenuous’ as there are ‘many trade-offs’ involved.²²

Climate change has been regarded as a ‘saviour issue’ for the EU integration project more generally.²³ The EU has been able to ‘shape global environmental governance’.²⁴ At the heart of the EU’s *internal* strategy for limiting climate change – the so-called 20-20-20 strategy and the 2030 and 2050 energy roadmaps – is the objective of reducing greenhouse gas emissions by at least 20% by 2020, 40% by 2030 and 80% by 2050.²⁵ To limit its greenhouse gases, the EU has to use less energy, but also embark on using cleaner energy. The latter involves a shift towards more renewable energies such as wind power, solar and photovoltaic energy, biomass and biofuels, geothermal energy and heat-pump systems. Increasing the amount of renewable energy within the EU, however, not only serves the climate; it also helps the EU to become less dependent on (sometimes unstable) energy imports and reduces the costs associated with it. Nonetheless, as the EU countries together ‘only’ account for 10% of global greenhouse gas emissions, it is also in this area that it might be beneficial for them to collectively develop and implement a shared stance on global climate change mitigation initiatives, in order to have a meaningful impact. Action and new stimulus by the EU (in coordination with national, regional and local governments) is therefore needed, be it through public investment, support plans or any other measures.

¹⁹ Rajendra K. Pachauri (ed.), *Climate Change 2014 Synthesis Report* (The Intergovernmental Panel on Climate Change 2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (accessed 16 December 2016).

²⁰ ‘CO₂ Emissions from Fuel Combustion: Highlights’ (*International Energy Agency*, 2015), <https://www.iea.org/publications/freepublications/publication/CO2EmissionsFromFuelCombustionHighlights2015.pdf> (accessed 16 December 2016).

²¹ Commission, ‘Staff Working Document Accompanying the Communication on Next Steps for a Sustainable European Future: European Union Action for Sustainability’ SWD (2016) 390 final.

²² Gal Luft, Anne Korin and Eshita Gupta, ‘Energy Security and Climate Change: A Tenuous Link’ in Benjamin K. Savocool (ed.), *The Routledge Handbook of Energy Security* (Routledge 2010).

²³ Louise van Schaik and Simon Schunz, ‘Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm- or Interest-Driven Actor?’ [2012] *Journal of Common Market Studies* 50(1), p. 169.

²⁴ Tom Delreux, ‘EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs’ [2014] *Journal of European Public Policy* 21(7), p. 1017.

²⁵ ‘Energy Strategy’ (*European Commission Energy*), <https://ec.europa.eu/energy/en/topics/energy-strategy> (accessed 15 December 2016).

Focusing on the most recent policy strategies and action plans, these two overarching themes have been at the centre of the EU's energy/climate change response over the last decade. In total, more than 400 legal acts have been signed on a European level regarding energy-related issues.²⁶ With the 2030 Energy and Climate package, targets were created in three key areas in order to realize the above-mentioned ambitions: (1) a 40% cut in greenhouse gas emissions compared to 1990 levels; (2) at least a 27% share of renewable energy consumption; and (3) at least 27% energy savings compared with the business-as-usual scenario.²⁷ With the Paris Agreement, the European Commission has upgraded its targets. The recently adopted Energy Winter Package (December 2016) consists of more than 40 legislative proposals, with accompanying documents, aimed at further completing the internal market for electricity and implementing the Energy Union, further reducing the EU's carbon footprint. The Energy Winter Package complements the Energy Security Package of February 2016 which essentially focused on security of (gas) supply.²⁸ Also in the EU Global Strategy (2016) energy and climate change feature in all kinds of external priorities.²⁹

3. SHARED (EXTERNAL) COMPETENCES ON ENERGY AND CLIMATE CHANGE POLICY

While climate does not feature literally as an area of 'shared competence' in the Treaty, it is widely considered that the shared competence in 'environment' culminates in a shared competence in 'climate', seeing the explicit recognition to 'combat climate change' in the specific environment Treaty article.³⁰ Even when this is questioned, shared competences are seen as the 'default category of competences' into which climate as a policy area would then

²⁶ According to the EURLEX website (<http://eur-lex.europa.eu/nl/index.htm>), there are currently five legal acts on statistics, 98 on general principles and programmes, 81 on coal, 23 regarding electricity; no fewer than 187 have nuclear energy as a subject; 14 are on oil and gas and 10 are on other energy sources.

²⁷ European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030' (Communication) COM (2014) 15 final.

²⁸ 'Commission Proposes New Rules for Consumer Centred Clean Energy Transition' (*European Commission Energy*), <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition> (accessed 15 December 2016). 'Towards Energy Union: The Commission Presents Sustainable Energy Security Package' (European Commission Press Release Database) http://europa.eu/rapid/press-release_IP-16-307_en.htm (accessed 15 December 2016).

²⁹ 'Energy' is mentioned 43 times and 'climate' 26 times in the EU Global Strategy. European External Action Service, 'Shared Vision, Common Action: A Stronger Europe, a Global Strategy on the European Union's Foreign and Security Policy' [2016], http://europa.eu/globalstrategy/sites/globalstrategy/files/pages/files/eugs_review_web_13.pdf (accessed 16 August 2017).

³⁰ 'Union policy on the environment shall contribute to pursuit of the following objectives [...] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change', Art 191 TFEU.

automatically fall.³¹ However, how do these shared competences on energy and climate work externally, both in theory and practice?

3.1 Shared External Competences

While the EU internal division of competences is delineated in the Treaty, the *external* (*shared*) competences are not clearly demarcated by the Lisbon Treaty. As a consequence, many academics see the external relations arrangements of the Lisbon Treaty as ‘rather unsatisfactory’³² or ‘fuzzy’.³³ Accordingly, decades of pre-Lisbon case-law of the Court of Justice of the European Union define whether the competences are ‘pre-empted’ by the Union. The fluidity of competences in external relations has ‘provided a fertile field for ingenious legal argument’ over the interpretation of the Treaties before and after the Lisbon Treaty.³⁴ One of these ingenious legal inventions is the concept of ‘shared external competences’ coined by Van Vooren and Wessel (2014).³⁵ Although this concept is not part of the Treaty, it was already mentioned as applicable to policy domains such as environment in the run-up to the (failed) European Constitution.³⁶ Other terms include, *inter alia*, ‘joint responsibility’³⁷ or, as used in the area of energy, ‘coordinated action’.³⁸

The arbitrator of the use of competences in the EU is the Court of Justice of the European Union. With an absence of the concept of shared *external* competences in the Treaty, it is all the more important to see which case-law exists on this topic. The Court has been a significant, but often disregarded, actor in EU external relations. The Court of Justice favours the participation of the EU in international organizations as a way to exercise its competence. Academic authors are even of the opinion that the Court of Justice could ‘accelerate the process’ of the

³¹ Paul Craig, ‘EU Competences’ in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2015) p. 88.

³² Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014) p. 110.

³³ Christophe Hillion and Ramses A. Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’ [2009] *Common Market Law Review* 46(2), p. 586.

³⁴ Jan Wouters, Jed Odermatt and Thomas Ramopoulos, ‘The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities’ [2013] Leuven Centre of Global Governance Studies Working Paper no. 121, p. 4.

³⁵ Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014).

³⁶ Angelika Hable, ‘The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension’ [2005] EI Working Papers/Europainstitut, 67, WU Vienna University of Economics and Business, Vienna.

³⁷ Andre Nollkaemper, ‘Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements. The External Environmental Policy of the European Union’ [2011] Amsterdam Law School Research Paper No. 2011-47, Amsterdam Center for International Law No. 2011-14.

³⁸ Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010, <https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20englisch.pdf> (accessed 29 November 2016).

EU becoming a respected actor in international organizations.³⁹ Especially noteworthy is the ERTA effect of ‘implied powers’: EU external competences exist because there are internal rules which form the basis for implying external competence.⁴⁰ Therefore, when legislation is internally (within the EU) negotiated, it has external repercussions and the EU can enter into negotiations and agreements. Thus, these implied powers find their sources in the general competences the Union enjoys in the different policy areas, as well as in legislation. Even when Member States are not excluded from acting on their own in international organizations based on ‘implied powers’, they are not entirely free to act, as they still have obligations stemming from EU law, such as the principle of loyal cooperation.⁴¹ The Court of Justice seems to see this principle of loyalty as very important, not only in terms of results, but also in terms of the conduct of international negotiations.⁴²

3.2 Application to Energy and Climate External Action

How did this shared (external) competence historically grow in external climate and energy action by EU and Member State actors? Environmental policy received a basis in European governance relatively late, with the Single European Act in 1987. It has, however, ‘quickly developed an external dimension’.⁴³ Even stronger, some argue that the EU established itself as an international leader on climate change in the mid-1980s and that it has ‘considerably improved its leadership record’ since then.⁴⁴ Seeing the nature of shared competences, Member States are represented in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) separately alongside the European Commission, but they ‘largely act jointly’ and are ‘recognized as one unitary actor’.⁴⁵

This is different in the area of energy. While the EU has its origins in cooperation on energy policies such as those focused on coal, the actual external cooperation of EU institutions and Member States has proven to be weak, partly due to the lack of respective competences. Energy is even considered to perhaps constitute ‘the only field’ in which the EU has shifted its common drive towards a lesser extent of integration, never being able to regain the shared

³⁹ Frank Hoffmeister, ‘Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies’ [2007] *Common Market Law Review* 44(1), p. 68.

⁴⁰ See Case 22/70, *Commission v. Council* [1971] ECR 263 (‘ERTA’) and Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), p. 105. Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Marise Cremona, ‘Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010’ [2011] *Common Market Law Review* 48(5), pp. 1639–65.

⁴¹ Art 4(3) TEU.

⁴² Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Marise Cremona, ‘Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010’ [2011] *Common Market Law Review* 48(5), pp. 1639–65.

⁴³ Sandra Lavenex, ‘EU External Governance in “Wider Europe”’ [2004] *Journal of European Public Policy*, 11(4), p. 691.

⁴⁴ Sebastian Oberthür and Claire Roche Kelly, ‘EU Leadership in International Climate Policy: Achievements and Challenges’ [2008] *The International Spectator* 43(3), pp. 35–50.

⁴⁵ *Ibid.*

vision of the 1950s.⁴⁶ In its 2001 Green Paper on energy security, the Commission therefore regrets that the ‘Union suffers from having no competence and no community cohesion in energy matters’.⁴⁷ As compared to the more unified EU climate policies, the external energy policies mostly refer to creating more solidarity between the Member States.⁴⁸

At the external stage, the EU and Member States ‘shall cooperate with third countries and with the competent international organizations’, ‘within their relative spheres of competence’ on climate change and energy.⁴⁹ Seeing that the EU is neither a state nor a typical international organization, however, the EU’s role in international affairs has often been seen as ‘confusing’ for third countries, since the Union is not always perceived as a unified actor, even on climate policies.⁵⁰ The external action of the EU in both climate and energy has historically been Member State-led.⁵¹ Therefore, while the initiative has been mainly with the European Commission, national policies also exist and clearly matter. Some argue that the shared energy competences can become exclusive competences at the external stage, as a legal development seen earlier in trade issues.⁵² This gradual acquisition of competences is a necessity to some authors, because the shared competences are often perceived as an ‘obstacle’ to effective external action.⁵³

4. INSTITUTIONAL ACTORS IN EU ENERGY AND CLIMATE DIPLOMACY AS WELL AS DECISION-MAKING

The creation of external EU energy and climate policy is a complex issue involving many actors. In addition to formal EU institutions, a wide variety of other key stakeholders is involved in EU decision-making and external diplomacy. For example, private sector organ-

⁴⁶ Rafael Leal-Arcas and Juan Alemany Rios, ‘The Creation of a European Energy Union’ [2015] *European Energy Journal* 5(3), p. 27 and Sami Andoura, Leigh Hancher and Marc Van der Woude, ‘Towards a European Energy Community: A Policy Proposal by Jacques Delors’ [2010] *Notre Europe*, p. 7.

⁴⁷ See also Sandra Lavenex, ‘EU External Governance in “Wider Europe”’ [2004] *Journal of European Public Policy* 11(4), p. 692.

⁴⁸ European Commission press release – Towards Energy Union: The Commission presents sustainable energy security package, 16 February 2016, http://europa.eu/rapid/press-release_IP-16-307_en.htm (accessed 10 December 2016).

⁴⁹ Art 211 TFEU.

⁵⁰ Chad Damro, ‘EU-UN Environmental Relations: Shared Competence and Effective Multilateralism’ in Katie Verlin Laatikainen and Karen E. Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave, 2006).

⁵¹ Maurizio Carbone, ‘Mission Impossible: The European Union and Policy Coherence for Development’ [2008] *European Integration* 30(3), p. 328, citing also Christian Egenhofer (ed.), *Policy Coherence for Development in the EU Council: Strategies for the Way Forward* (Centre for European Policy Studies, Brussels, 2006).

⁵² Rafael Leal-Arcas and Juan Alemany Rios, ‘The Creation of a European Energy Union’ [2015] *European Energy Journal* 5(3), pp. 24–60.

⁵³ Chad Damro, ‘EU-UN Environmental Relations: Shared Competence and Effective Multilateralism’ in Katie Verlin Laatikainen and Karen E. Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave, 2006).

izations and companies,⁵⁴ Civil Society Organizations (CSOs), utility providers, consumer (protection) organizations, local authorities,⁵⁵ academics, other international organizations (e.g. the International Atomic Energy Agency (IAEA)) and third countries (e.g. Russia) influence European policymaking in the domain of energy (security) and climate change. Given the complexity of policymaking in view of the variety of actors involved, the present chapter will constrain itself to an analysis of the role of different EU institutions and of individual Member States.

The division of responsibilities between the EU and the Member States is primarily defined by the Treaty of the European Union. Article 17(1) ensures that the European Commission is responsible for external representation, with the exception of Common Foreign and Security Policy (CFSP). As stipulated in this article, the Council of the European Union and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy ‘shall ensure the consistency’ of the EU’s foreign policies and ‘shall cooperate to that effect’.⁵⁶ The HR/VP also has the possibility to engage the European External Action Service (EEAS) and its EU delegations.⁵⁷ Furthermore, the European Council ‘identifies strategic interests and objectives of the Union’, including external policies.⁵⁸ As regards energy and climate policies, the ‘increased institutional and political stature’ should however not be overestimated as it ‘relies primarily on the “unmatched” expertise within the Commission and Council bureaucracy’.⁵⁹ Apart from these actors, the European Parliament and the Court of Justice of the European Union play a role as EU institutions in external (climate and energy) policies. Moreover, various EU agencies such as the EURATOM Supply Agency play a role in decision-making on EU external policies. The European Investment Bank may be involved in financing or executing various energy related projects and programmes, for example in developing countries.

The Treaty also contains specific titles on shared external action on energy and climate policy. The ‘energy’ article – Article 194 TFEU – primarily has an *internal* focus, with the main aim to ensure energy policy supports functioning energy markets, promoting energy efficiency and strengthening the interconnection of energy networks. However, ‘ensuring the security of supply’ in the Union clearly is related to EU external affairs. Some hold that Article 194 TFEU provides ‘fertile legal ground’ for the development of a fully-fledged European external energy policy’.⁶⁰ Nevertheless, the separate energy title since the Lisbon

⁵⁴ José Célio Silveira Andrade and José Antônio Puppim de Oliveira, ‘The Role of the Private Sector in Global Climate and Energy Governance’ [2015] *Journal of Business Ethics* 130(2), pp. 375–87.

⁵⁵ Kristine Kern and Harriet Bulkeley, ‘Cities, Europeanization and Multi-level Governance: Governing Climate Change through Transnational Municipal Networks’ [2009] *Journal of Common Market Studies* 47(2), pp. 309–32.

⁵⁶ Art 21(3) TEU.

⁵⁷ Art 221 TFEU.

⁵⁸ Art 15(1) TEU and Art 22(1) TEU.

⁵⁹ Jan Frederik Braun, ‘EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual’ [2011] EPIN Working Paper, no. 31.

⁶⁰ Rafael Leal-Arcas and Juan Alemany Rios, ‘The Creation of a European Energy Union’ [2015] *European Energy Journal* 5(3), p. 28. See also Bart van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014).

Treaty has also been coined a ‘double edged-sword’ by officials of the European Parliament, seeing its respective opportunities and limitations.⁶¹ According to the Treaties (Articles 4 and 191 TFEU), the EU and Member States share competences in the environmental (and climate change) fields and therefore also in climate change negotiations.

Finally, and not of the least importance, national governments and parliaments continue to play a paramount role as the EU can only act in those areas in which it has received the competence from the Member States; large parts of energy policy are still governed on the basis of coordinated action by the Member States. The EU Member States by themselves have ‘some 124 energy-related intergovernmental agreements’ with other countries of which ‘around one-third’ are not EU-compliant.⁶² Despite this, the European Commission has contributed to a shift in political norms, successfully framing import dependency as a problem requiring an EU-level solution. Whilst Member States retain a significant extent of sovereignty in this area, since 2006 the Commission has achieved more competences in the internal and, to a lesser extent, external dimensions of EU energy policy.⁶³ Furthermore, while there are specific titles in the Treaty, both energy and climate ‘constitute a horizontal issue’ and are linked with many other external policy areas, such as development cooperation and trade.⁶⁴ To enable coherent and consistent external action on energy and climate, recent initiatives include the successful Climate Diplomacy Action Plan⁶⁵ and the Energy Diplomacy Action Plan.⁶⁶

5. ARE THE EU AND MEMBER STATES SHAPING GLOBAL CLIMATE AND ENERGY GOVERNANCE?

The EU has had a major stake in developing ‘effective multilateralism’⁶⁷ and international commitments, certainly on climate change, and to a lesser extent on energy. With the Paris Agreement, the success of a universal multilateral agreement on climate change mitigation

⁶¹ Jan Frederik Braun, ‘EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual’ [2011] EPIN Working Paper 31, p. 7.

⁶² EU Observer (2016) ‘EU Commission to Oversee National Energy Deals’, 8 December 2016, via <https://euobserver.com/tickers/136189> (accessed 17 November 2016).

⁶³ Tomas Maltby, ‘European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism’ [2013] *Energy Policy* 55, p. 435.

⁶⁴ Jan Frederik Braun, ‘EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual’ [2011] EPIN Working Paper 31, p. 3. See for a critical overview of energy and climate policies compared to other EU policies, Robert Falkner, ‘The Political Economy of “Normative Power” Europe: EU Environmental Leadership in International Biotechnology Regulation’ [2007] *Journal of European Public Policy* 14(4), pp. 507–26 and Stavros Afionis and Lindsay C. Stringer, ‘European Union Leadership in Biofuels Regulation: Europe as a Normative Power?’ [2012] *Journal of Cleaner Production* 32, pp. 114–23.

⁶⁵ ‘Foreign Affairs Council calls for continuing European climate diplomacy following landmark Paris deal’, http://ec.europa.eu/clima/news/articles/news_2016021601_en (accessed December 2016).

⁶⁶ ‘Energy Diplomacy’, https://eeas.europa.eu/topics/energy-diplomacy_en (accessed December 2016).

⁶⁷ Edith Drieskens and Louise G. Van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge, 2014).

can be claimed. The development of multilateral energy governance, however, has been more difficult. Daniel Yergin and others emphasize the fact that energy sectors and markets are posited to closely match the national interests of states, so that energy security becomes part of national security schemes.⁶⁸ Decreasing GHG emissions globally has become a challenge in a debate where self-interest and collective goods are contradictory in terms of Member States' goals. The main stumbling block, also in climate negotiations, has been the notion that the richest, most developed economic actors need to bear the heaviest economic burden to reduce GHG emissions, as they (have) contribute(d) the biggest share in worldwide energy consumption and pollution.⁶⁹ This 'common but differentiated responsibilities' approach has, at least until the 2015 Paris Agreement, clashed with the agenda of some economic superpowers, notably the US under the Bush Administration.⁷⁰

Accordingly, for import-dependent blocs and states such as the EU the objective has long been to prevent energy from endangering national interests and objectives.⁷¹ Other notable geopolitical catalysts during the last 30 years have prompted the EU (and the US), as with many other states, to safeguard security of supply for themselves, rather than relying on consultations and international institutions that would determine matters for them. How did the EU and the Member States nevertheless help shape the global energy and climate change agenda? Illustrations on this will be provided in the following sections.

5.1 EU Involvement in Global Climate Frameworks

5.1.1 UNFCCC and the Paris Agreement

Since the early 1990s, the EU has been a leading actor in constructing international climate policy frameworks and creating leading discussions.⁷² In doing so, it has been deeply committed to creating a multilateral response to combat climate change. The 1992 United Nations Framework Convention on Climate Change (UNFCCC), adopted during the 1992 United Nations Conference on Environment and Development (the Rio Conference), can be considered the principal framework instigating the discussion on global climate efforts under the umbrella of the UN. Although non-binding in nature, the Convention listed climate change as a salient matter on the global agenda, while the parties committed to meeting during the yearly Conference of Parties (COP) to discuss, and if possible act upon, climate change challenges. The EU, although having a relatively new institutional structure after the Treaty of Maastricht,

⁶⁸ Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (Free Press, 2008); Robert Gilpin, *Global Political Economy – Understanding the International Economic Order* (Princeton University Press, 2001), p. 38.

⁶⁹ Bruce Podobnik, 'Global Energy Inequalities: Exploring the Long-Term Implications' [2002] *Journal of World-Systems Research*, p. 252.

⁷⁰ Jeffrey McGee and Jens Steffek, 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' [2016] *Journal of Environmental Law*, p. 37; Guri Bang, 'The United States: Obama's Push for Climate Policy Change' in Guri Bang et al. (eds), *The Domestic Politics of Climate Change: Key Actors in International Climate Cooperation* (Edward Elgar, 2015), pp. 160–81.

⁷¹ Daniel Yergin, 'Energy Security in the 1990s' [1988] *Foreign Affairs*, pp. 110–32.

⁷² Jürgen Lefevere, Artur Runge-Metzger and Jake Werksman, 'The EU and international climate change policy' in Jos Delbeke and Peter Vis (eds), *EU Climate Policy Explained* (Routledge, 2015), p. 109.

was deeply involved in negotiating the basis for the convention that was adopted in the 1992 Earth Summit in Rio.⁷³ COP is the supreme decision-making body of the UNFCCC and all of its 195 members are invited to participate in these meetings. The EU is a Party to the UNFCCC as are all EU Member States in their own right.⁷⁴

After various rounds of failed negotiations to define a universal climate framework,⁷⁵ a series of subsequent COPs led to the successful COP21 in Paris in 2015. During this Conference, the European delegation of EU and Member States built a robust coalition of both developed and developing nations, which added to the successful international climate agreement.⁷⁶

5.2 EU Involvement in Global Energy Frameworks

5.2.1 United Nations 2030 Agenda for Sustainable Development

In the absence of a universal binding energy treaty, the UN 2030 Agenda for Sustainable Development, a more action-oriented framework falling under the auspices of the UN, remains the closest thing to a universal energy ‘commitment’ there is.⁷⁷ As regards the creation of this agenda, the European Commission maintained that:

[...] the EU has played an important role in shaping the 2030 Agenda, through public consultations, dialogue with our partners and in-depth research [...] the EU will continue to play a leading role as we move into the implementation of this ambitious, transformative and universal Agenda that delivers poverty eradication and sustainable development for all.⁷⁸

5.2.2 International Energy Agency

Various researchers in the energy area consider the International Energy Agency (IEA) to be the core institution in the splintered field of global energy governance.⁷⁹ The organization was created shortly after the 1973 oil crisis, to form an adequate response to physical oil supply

⁷³ Alexandra Lindenthal, *Leadership im Klimaschutz: Die Rolle der Europäischen Union in der Internationalen Umweltpolitik* (Campus-Verl., 2009), p. 132.

⁷⁴ https://ec.europa.eu/clima/policies/international/negotiations_en (accessed 8 August 2017).

⁷⁵ Probably the most outspoken failure in this regard, also for the EU, was the Copenhagen conference in 2009. See, e.g. Stavros Afionis, ‘The European Union as a Negotiator in the International Climate Change Regime’ [2011] *International Environmental Agreements: Politics, Law and Economics* 11(4), pp. 341–60.

⁷⁶ Sebastian Oberthür, ‘Where to Go from Paris? The European Union in Climate Geopolitics’ [2016] *Global Affairs*, pp. 1–12 and ‘How the EU Helped Build the Ambition Coalition’ (EUClimateAction Storify, January 2016), <https://storify.com/EUClimateAction/how-the-eu-helped-build-the-coalition-ambition> (accessed 30 November 2016).

⁷⁷ United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ [2015], <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed November 2016).

⁷⁸ Commission, ‘The 2030 Agenda for Sustainable Development’, http://ec.europa.eu/europeaid/policies/european-development-policy/2030-agenda-sustainable-development_en (accessed 1 December 2016).

⁷⁹ See, e.g., Flynt Leverett, ‘Consuming Energy: Rising Powers, the International Energy Agency, and the Global Energy Architecture’ in Alan S. Alexandroff and Andrew F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance* (Brookings Institution Press, 2010), pp. 240–65. See also Thijs van der Graaf, ‘Obsolete or Resurgent? The International Energy Agency in a Changing Global Landscape’ [2012] *Energy Policy*, p. 233.

disruptions, while providing information and data about the international oil market and other energy sectors. The IEA falls within the framework of the Organization for Economic Cooperation and Development (OECD).

Membership of the IEA is limited: the mandate of the organization stipulates that only OECD Members are eligible to join the IEA. With 20 out of the total of 29 IEA members, the EU provides the largest number of members of this organization. The EU holds a collective seat in the IEA as well, thereby having its own external representation in the primary organization dealing with international energy matters. The EU has been applauded by the IEA as a global leader considering its ‘unprecedented renewable energy boom, its action on energy efficiency and [...] drop in greenhouse gas emissions’, giving it an exemplary role in the IEA.⁸⁰

5.2.3 The energy charter, the energy community and IRENA

The Energy Charter Treaty is a multilateral energy agreement in which the EU has a separate voice. Thus, the EU, having a membership role, provides it with collective external representation in another main global energy framework.⁸¹ The Energy Community, by comparison, is an international organization focusing on international energy policy. The Energy Community’s foremost goal is to enhance energy infrastructure between the EU and South East Europe, and the Black Sea region. Since the Energy Community only operates in Europe, the role of the EU in this framework is important, necessitating the EU to provide its own representation. Effectively, the European Commission represents the EU in this respect.

The International Renewable Energy Agency (IRENA) is based in Dubai. This multilateral organization promotes the transition from conventional fossil forms of energy to renewable ones. The Agency has the important function of supporting countries in their transition to renewable forms of energy. The EU (next to its Member States) is also represented in IRENA.

6. EU EXTERNAL ACTION ON CLIMATE AND ENERGY: INSTITUTIONAL CHALLENGES AND OPPORTUNITIES

While the EU often proclaims that ‘sustainability is a European brand’,⁸² a closer look reveals a ‘dual agenda’ of both (normative) climate change mitigation as well as a defensive energy security agenda. The combination of ‘benevolent civilian milieu goals’ and strategic ‘possession goals’ in the EU’s and Member State’s common agenda is certainly not new, but has become more problematic over time.⁸³ Activities in equally important policy areas where the EU and Member States also share competences, for example development cooperation, seem

⁸⁰ International Energy Agency, ‘Energy Policies of IEA Countries’ (2014) European Union 2014 Review, <https://www.iea.org/publications/freepublications/publication/energy-policies-of-iea-countries---the-european-union-2014-review.html> (accessed 1 December 2016).

⁸¹ For more information about the International Energy Charter, see Chapter 10 of this handbook by Sijbren de Jong.

⁸² Commission, ‘Next Steps for a Sustainable European Future: European Action for Sustainability’ SWD(2016) 390 final, p. 17.

⁸³ Karen E. Smith, ‘Still “Civilian Power EU”?’ [2005] *European Foreign Policy Unit Working Paper Series*, p. 1.

to be conducted in ‘silos’ and are not coherent.⁸⁴ In this regard, the somewhat ‘double-standard action’ by the EU in its external climate and energy policies is not really helpful: while countries such as Colombia work together closely with the EU on climate change affairs, Colombia remains the single largest exporter of coal to the EU as a whole.⁸⁵ This raises questions as to the EU’s full commitment to being a global leader in climate affairs.

Concurrently, the EU may be faced with the problem that it is unable to deliver on the international energy and climate promises it makes. The capabilities-expectations gap, introduced by Christopher Hill in 1993, provides a possible concept to describe this issue.⁸⁶ Hill’s concept draws on the assumption that the European Communities in 1993 were unable to pursue the actions they promised to deliver due to a lack of capabilities. Similarly, today there are those who claim that in the post-Lisbon era, the EU’s foreign policy is still characterized by a ‘capability-expectations gap’.⁸⁷ To close its ‘foreign policy gap’, especially in the area of energy, ‘[...] the EU’s capabilities would either need to be increased, or expectations decreased’.⁸⁸

Additionally, among the Member States there is a clear variation in the understanding of how to achieve, for example, a secure energy of supply status.⁸⁹ This is related to the ‘east vs. west paradox’ of underdeveloped, vulnerable energy markets and developed, less vulnerable ones, as the extent of market ‘maturity’ differs in the East and West. In this respect, Eastern European states seem more willing to integrate the EU internal market and develop the external energy policy, in comparison to the Western, more developed nations, which are less vulnerable to fluctuations in import-fluxes.⁹⁰ The Energy Union is not always met with similar enthusiasm by the EU Member States that remain keen on deciding energy market-related policies for themselves.⁹¹ Tariffs, for example, have remained a strategic domestic affair for some EU energy transit countries.⁹² Transit tariffs provide the country with revenue and economic gain, making it unattractive to alleviate them. At the same time, however, tariffs are a key impediment to the development of a single harmonized market. In this way, EU

⁸⁴ Maurizio Carbone, ‘Mission Impossible: The European Union and Policy Coherence for Development’ [2008] *Journal of European Integration*, p. 323.

⁸⁵ Eva Maas, Louise van Schaik and Ries Kamphof, ‘EU and Colombia: Climate Partnership Beyond Aid and Trade’ [2015] *Clingendael Policy Brief*, p. 1.

⁸⁶ Christopher Hill, ‘The Capability-Expectations Gap, or Conceptualizing Europe’s International Role’ [1993] *Journal of Common Market Studies* 31(3), p. 305.

⁸⁷ Niklas Helwig, ‘EU Foreign Policy and the High Representative’s Capability-Expectations Gap: A Question of Political Will’ [2013] *European Foreign Affairs Review* (18), p. 235.

⁸⁸ Christopher Hill, ‘The Capability-Expectations Gap, or Conceptualizing Europe’s International Role’ [1993] *Journal of Common Market Studies* 31(3), p. 305.

⁸⁹ Ole Gunnar Austvik, ‘The Energy-Union and Security-of-gas Supply’ [2016] *Energy Policy*, p. 372.

⁹⁰ Ibid.

⁹¹ Daan Rutten, ‘CIEP Briefing Paper on the Energy Union’ [2016] *Clingendael International Energy Programme*, p. 4.

⁹² Stefan Bouzarovski and Sergio Tirado Herrero, ‘The Energy Divide: Integrating Energy Transitions, Regional Inequalities and Poverty Trends in the European Union’ [2015] *European Urban and Regional Studies*, p. 8; ‘Bringing Gas to the Market: Gas Transit and Transmission Tariffs in Energy Charter Treaty Countries’, Energy Charter Secretariat [2012], http://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Gas_Tariffs_2012_en.pdf.

Member States have to choose between a common EU voice on energy (trade) policy and own revenues, which constitutes another trade off.

Of course, there also are opportunities for more cohesive external action in the area of energy policy. The EU energy diplomacy action plan ‘needs to be backed by a coherent set of tools to ensure coordination of efforts between EU Member States and European institutions’.⁹³ In this way, the energy diplomacy action plan could benefit from experience based on the more successful examples of climate diplomacy. Nevertheless, common external EU and Member State action on energy security is complicated by the fact that there is a general lack of international fora operating in this domain. This is all the more visible when compared with climate change mitigation, where a general and universal Conference of the Parties (COP) takes place every year.

To close the ‘capabilities-expectations gap’, the EU could pursue less ambitious energy goals, that is, lowering the international expectation that it is truly able to speak with one voice in energy-related areas. Alternatively, notably in the energy policy domain, the EU could aim to enhance its ability to agree on external policies, augment the resources it has available for this and aim to establish more adequate instruments to implement its commitments. Hence, there are both institutional challenges and opportunities as regards the development of coherent and cohesive EU external climate and energy policies, but hurdles in view of energy policy seem to be more extensive and would need more efforts and adaptations to close the ‘capabilities-expectations gap’ in this area.

7. CONCLUSION AND FUTURE RESEARCH AGENDA

The lack of a clear guidance in the Treaties on who represents the EU externally in the case of shared competences has caused tensions between EU institutions such as the European Commission, the Council and the European External Action Service. These tensions have become more visible since the entry into force of the Lisbon Treaty, in general terms, but more specifically also in the areas of climate and energy policies. Our chapter shows that the institutional framework, both within the EU and in terms of international institutions, affects the EU’s capacity to act cohesively. As Tom Delreux stated in 2006, the EU’s external actions are to a large extent ‘determined by its internal interactions between the different actors’.⁹⁴ Accordingly, this chapter can be seen as complementing the preceding one in this book.⁹⁵

The ‘shared (external) competences’ make it difficult for the EU to establish coherent external policies. Climate change and energy security policies are increasingly tied together in the ways they are referred to, creating the impression that there is a direct, inextricable link between the two areas. As Luft et al. (2011) stated, however, this link ‘is more tenuous’ than

⁹³ Thomas Raines and Shane Tomlinson, ‘Europe’s Energy Union: Foreign Policy Implications for Energy Security, Climate and Competitiveness’ [2016] *Chatham House Research Paper*, March 2016, p. 24.

⁹⁴ Tom Delreux, ‘The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-Making Process’ [2006] *International Environmental Agreements* (6), p. 232.

⁹⁵ See Chapter 2 by Kim Talus and Pami Aalto, ‘Competences in EU energy policy’.

it seems, as there are ‘many trade-offs’ between the two areas, also in substantive terms.⁹⁶ Furthermore, in terms of power and competence distribution, ‘energy security’ is a core area of national sovereignty, while to achieve climate change mitigation, there needs to be global partnerships to attain countries’ respective aims, demanding a different strategy related to the provision of ‘global public goods’.⁹⁷ In this sense, the EU being more eager to ‘speak with one common voice’ in external relations on climate change issues than in those related to energy security makes sense. The absence of clear-cut global multilateral fora on energy makes it even more difficult for the EU to align its own policies and those of its Member States on this issue.

A new research agenda could be beneficial in which shared external competences in terms of both energy security and climate change mitigation are being addressed in a combined way. Lessons from the more successful climate diplomacy could then possibly be transferred to the energy diplomacy domain. Future research could also address ways in which challenges to the coordination of EU external policies in the climate and energy areas can be overcome, for example by potential institutional or organizational adaptations, or increased coordination between Member States and EU institutions in such areas. Next to this, a potential focus could be on the extent to which the ‘securitization’ of energy and climate change may have an effect on the ‘pendulum’ swinging either towards the wish to maintain sovereignty or to enhance the EU’s common external representation. Recently there has been increasing attention on the ‘climate security’ agenda where military and climate threats are combined.⁹⁸ However, this ‘securitization’ of the climate agenda is not automatically linked with energy security.

Another issue worth addressing might be the rise of populism, which has fed the ongoing ‘existential crisis’ of the EU, which is characterized by, for example, Brexit. Although little research has been conducted measuring the effect of populism on EU foreign policymaking, a recently published report by the European Policy Centre provides an early comprehensive account of this topic. The findings are relatively moderate, as the report argues that ‘[...] contemporary European populists on both the left and right have so far shown limited transformative power in terms of their ability to determine actual policy choices’.⁹⁹ Nevertheless, a future research agenda on this issue is both meaningful and essential, as the unfolding of [parliamentary] elections across the European continent may provide right-wing parties with more transformative power. Finally, there could be a special focus on how EU populist parties’ support for Russia might affect the EU’s position as Russia’s largest importer of conventional energy sources.

⁹⁶ Gal Luft, Anne Korin and Eshita Gupta, ‘Energy Security and Climate Change: A Tenuous Link’ in Benjamin K. Savocool (ed.), *The Routledge Handbook of Energy Security* (Routledge, 2010).

⁹⁷ Michèle B. Bättig and Thomas Bernauer, ‘National Institutions and Global Public Goods: Are Democracies More Cooperative in Climate Change Policy?’ [2009] *International Organization* 63(2), pp. 281–308.

⁹⁸ See e.g. the ‘Planetary Security Initiative’, https://www.clingendael.nl/sites/default/files/PSI_flyer_A5_web_0.pdf (accessed 7 December 2016). Climate change is considered a ‘threat multiplier that catalyzes water and food scarcity, pandemics and displacement’ according to the EU Global Strategy.

⁹⁹ Rosa Balfour et al., ‘Europe’s Troublemakers: The Populist Challenge to Foreign Policy’ [2016] *European Policy Centre*, p. 49.

Another promising research avenue would be to see how the EU could link agendas and strategic partnerships. More detailed accounts on the intersection between the EU's climate change policy and development programmes could, for example, offer a more comprehensive understanding of this topic. In what way, for instance, do the negotiations on a 'post-Cotonou agreement' with African, Caribbean and Pacific countries work in conjunction with the EU goals in terms of energy security and climate change mitigation? How could this be structured externally to create more efficient, problem-driven diplomacy in this domain? How can researchers, for example with political-institutional background research, help to demonstrate how contradictions in the EU's external policy could be prevented? Another challenge is the relative strength of the carbon-intensive industry as a major deterrent to the adoption of climate change mitigation policies.¹⁰⁰ This nexus could also be addressed.

It would also be worthwhile to come up with a research agenda that explicitly incorporates the positions and interests of other global actors, including large energy-producing countries such as Russia, Nigeria and Algeria and explore how the private sector, which is increasingly involved in 'de-risking' the political process, and local authorities could play a role in terms of finding innovative climate and energy solutions from which the EU's external policies could also benefit. Science diplomacy may, especially in the areas of climate and energy, prove effective in depoliticizing issues that are, for example, closely intertwined with national interests. Such knowledge exchange might again decrease the 'information deficit' the EU has as compared to the energy security schemes of its Member States, which would probably make it easier to 'speak with one voice' externally. More institutional issues could be part of this research agenda. All in all, a clearer description of the role of the competences of the EU and its Member States would not only be 'highly pertinent towards understanding energy within the EU context',¹⁰¹ but also in the *external* institutional context. Studying the activities of EU actors in conjunction with those of external (third) parties is therefore of crucial importance.

¹⁰⁰ Franklin Steves and Alexander Teytelboym, 'Political Economy of Climate Change Policy' [2013] *Smith School Working Paper Series, Working Paper 13/06*, p. 25.

¹⁰¹ Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security through a Constitutional Law Perspective' [2013] *Fordham International Law Journal* (36), p. 1225.



The Member States of the European Union, Contracting Parties to the Energy Charter Treaty: Plurilateralism in the Light of EU Law

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Abstract

This paper analyses the role of the European Union Member States as Contracting Parties to the Energy Charter Treaty (ECT) from an EU law perspective. It does not address the motivations behind the withdrawal of the Union and some Member States, the compatibility of the ECT with climate goals, nor the conformity of the EU's position with the international law of treaties. Instead, the study centers on the unique form of plurilateralism represented by the Member States' and the Union's joint participation. The collective engagement of the EU and its Member States created a single group within the ECT framework, giving rise to legal challenges. Despite the Union and Member States being jointly engaged, no obligation existed for a coordinated withdrawal. Following the EU's exit, some Member States continued as independent parties. Nonetheless, their binding obligations under EU law preserve the group effect fostering a novel plurilateral configuration.

Keywords

Autonomy – Competences – Disconnection – Energy Charter Treaty – Investment Protection – ISDS – Mixed Agreements – Mixity – Sincere Cooperation – Sunset Clause – Voting rights – Withdrawal

1 Introduction

The Energy Charter Treaty (ECT), and its Protocol on Energy Efficiency and Related Environmental Aspects ('PEEREA') were approved by the European Union and its Member States as mixed agreements.¹ This is an example of a specific case of plurilateralism in international investment law.² While the contracting parties are autonomous from an international law perspective, from an EU law perspective, the joint participation of the EU and its Member States expressed a group engagement. This implied incompatibility with EU law obligations regarding the application of the investor-state dispute settlement mechanism (ISDS) in disputes between EU Member States. Indeed, the application of Article 26 of the ECT, concerning the settlement of disputes between an investor and a contracting party through arbitration, to disputes within the Union, was judged incompatible with the autonomy of the EU legal order.³ Furthermore, as contracting parties to the ECT, the EU and its Member States had to balance EU environmental policy objectives with investment protection obligations. The ECT was heavily criticised for its incompatibility with the objective of phasing out fossil fuels and making a rapid transition to renewable energies, as it established a framework for energy cooperation and promoted energy security and the protection of foreign investments in the energy sector.⁴ Furthermore, preserving regulatory autonomy within the EU is a prerequisite for concluding an international agreement on investment protection.⁵

Criticism of the ECT presented the EU with an opportunity to promote its environmental standards and reform international investment law in line with its green transition objectives. This was particularly pertinent given the EU's interest in regulating the neighbourhood market through the ECT as a means

1 Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the Conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, OJ L 69 (9 March 1998).

2 See the Introduction of this Special Issue: Joana Lam, Stefan Voigt, 'International Investment Law and Pluralism- Concept, Prospects and Limitations' (2025) 26 JWIT 809.

3 CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655, paras 41–66.

4 Natasha Georgiou, 'A Modernised ECT Reflecting EU Values and Objectives: A Multilateral Framework Promoting Energy Investment in a Sustainable Way?' (2023) 7(1):2 *Europe and the World: A Law Review* 15 <<https://doi.org/10.14324/111.444.ewlj.2023.02>> accessed 23 July 2025.

5 CJEU, Opinion 1/17 *EU-Canada CETA* [2019] ECLI:EU:C:2019:341, paras 137–61.

of ensuring security of supply.⁶ The ECT became a framework of promotion of the EU climate diplomacy. The EU participated in the process launched in 2018⁷ to modernise the ECT and submitted a proposal.⁸ After four years of negotiations, the Agreement in Principle of the Modernisation of the ECT (AIP),⁹ which was adopted in June 2022, largely reflected the content of the EU proposal.¹⁰ The main changes included a flexibility mechanism allowing parties to exclude fossil fuels from the energies whose investments are protected and to phase out existing fossil fuel investments after 10 years (instead of the 20 years sunset clause),¹¹ a reference to the International Energy Charter, the application of the United Nations Commission on International Trade Law (UNCITRAL) rules on transparency in investor-state dispute settlement, and recognition of the need to respect the rights and duties of Parties under the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.¹² With regard to the application of the ISDS within the EU, the proposed modernised text included a clause that would put an end to arbitration cases between investors and states located within the EU.

The modernised ECT should have been adopted by the Energy Charter Conference (“Conference”) in November 2022. However, Member States representing more than 70% of the EU population considered that the modernisation proposal did not meet their environmental ambitions. Consequently, the

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- 6 Eva Nullens and Mateusz Rys, ‘The Participation of the European Union in Treaties: A Focus on the Energy Sector’ in Rafael Leal-Arcas (ed), *EU Energy Law and Policy, The External Dimension* (Eliva 2020) 29, 34 et seq.
 - 7 Council of the European Union, Negotiating Directives for the Modernisation of the Energy Charter Treaty 10745/19 (15 July 2019) <<https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1-COR-1/en/pdf>> accessed 23 July 2025.
 - 8 European Union, ‘Text Proposal for the Modernisation of the Energy Charter Treaty’ (May 2020) <https://energy.ec.europa.eu/system/files/2021-02/eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector_o.pdf> accessed 23 July 2025.
 - 9 Energy Charter Secretariat, Decision of the Energy Charter, CCDEC 2022 10 GEN (24 June 2024) <<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>> and Council of the European Union General Secretariat, Note for the Attention of the Trade Policy Committee (Services & Investment), Trade/B3/JGW/cg/5097621 (27 June 2022) <https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf> both accessed 23 July 2025.
 - 10 Johannes Traper and Kilian Wagner, ‘The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?’ (2022) 23 JWIT 813, 823–48.
 - 11 Under Article 47 of the ECT, in the event of withdrawal by a contracting party, previously agreed investments continue to benefit from the protection of the treaty for 20 years.
 - 12 Energy Charter Secretariat (n 9).

modernized text was not adopted until 3 December 2024. That was followed by a series of withdrawals which led to the withdrawal of the Union, and of Euratom, as a distinct legal entity.¹³

Interestingly, despite the EU's obligation to unity, group engagement did not result in a collective and coordinated withdrawal from the ECT following the EU's rejection of the modernised ECT. While some EU Member States did not follow the EU's lead in withdrawing, they are still bound by their EU legal obligations. Consequently, the ECT is not a classic plurilateral agreement.

This specificity was expressed in the Council of the EU's decisions in May 2024 regarding the position to be adopted on behalf of the Union at the Energy Charter Conference.¹⁴ Through these decisions, the Council ensured that the modernised ECT could be adopted as an EU obligation for Member States that are still contracting parties. The modernised ECT was indeed approved following the Council's decisions on 2 December 2024,¹⁵ which stated that the Member States would jointly exercise the Union's voting rights and not prevent its adoption.

Therefore, the Union's withdrawal from the ECT raises a number of questions regarding the status of the remaining EU Member States and the specific plurilateral framework created by the EU and its Member States' joint participation.

This paper will analyse the status of EU Member States as contracting parties in the ECT before and after EU withdrawal to highlight a case of plurilateralism due to the EU legal order's constitutional requirements. First, it will examine the limits of EU competence that made Member States' participation in the ECT mandatory. It will then analyse the specific status of the EU and its Member States in the ECT as an expression of joint participation (3). It will then recall the context that led to the withdrawal of the EU and eleven of its Member States, as well as the absence of an obligation to withdraw in a coordinated manner (4). Finally, it will explain why the EU Member States are

13 Council Decision (EU) 2024/1638 of 30 May 2024 on the Withdrawal of the Union from the Energy Charter Treaty [5 June 2024] OJ L 2024/1638.

14 Council Decision (EU) 2024/1644 of 30 May 2024 on the Position to Be Taken on Behalf of the European Union in the Energy Charter Conference [6 June 2024] OJ L 2024/1644; Council Decision (Euratom) 2024/1645 of 30 May 2024 on the Position to Be Taken on Behalf of Euratom in the Energy Charter Conference [6 June 2024] OJ L 2024/1645.

15 Council Decision (EU) 2024/3086 of 2 December 2024 on the Position to Be Taken on Behalf of the European Union in the Energy Charter Conference [11 December 2024] OJ L 2024/3086; Council Decision (Euratom) 2024/3030 of 2 December 2024 Approving the Position to Be Taken on behalf of Euratom in the Energy Charter Conference [9 December 2024] OJ L 2024/3030.

autonomous parties to the ECT, yet still bound by EU legal obligations, making the ECT a specific plurilateral agreement despite the Union's withdrawal.

2 The Limits of the EU Competence: The Necessary Participation of the EU Member States in the ECT

2.1 *The Evolution of the EU Competence*

The ECT was adopted jointly by the EU and its Member States as a mixed agreement according to the principle of conferral. Prior to the entry into force of the Lisbon Treaty, in the absence of a specific legal basis relating to energy policy, the Council's decision to conclude the ECT was based on several legal bases, namely the provisions relating to the freedom of establishment, the free movement of capital, the internal market and the approximation of national laws, the common commercial policy and the environmental policy.¹⁶ In addition, because of the impact of the ECT on internal acts adopted on the basis of the flexibility clause, Article 352 of the Treaty on the Functioning of the European Union (TFEU) was one of the legal bases for the concluding decision. The lack of exclusive competence of the Union in the areas concerned made necessary the Member States' participation and led to the conclusion of the ECT in the form of a mixed agreement.

However, since the entry into force of the Lisbon Treaty, investment protection is covered by the exclusive EU competence in the field of common commercial policy, under Article 207 TFEU.¹⁷ In addition, the Union's energy policy has a specific legal basis, Article 194 TFEU, which is a shared competence that can be exercised by the Union alone. As the ECT concerns investment protection and energy policy, the question arises whether mixity of the ECT was still mandatory under the Lisbon Treaty or whether the EU only could participate in the modernized ECT.

Given the development of the scope of the common commercial policy according to Article 207 TFEU, the ECT could fall to a large extent under the EU trade and investment competence, an exclusive EU competence in the field of which the Member States must refrain from being contracting parties. As confirmed by the Court of Justice, the Union's exclusive competence in the field of international trade and investment protection encompasses provisions on sustainable development, which now form an integral part of

¹⁶ See (n 1).

¹⁷ CJEU, Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376, para 109.

the common commercial policy, because of a global approach of the Union's external action objectives.¹⁸ Green transition provisions in the modernised ECT would therefore not affect the Union's exclusive competence. However, the ECT provisions on investment protection are not limited to direct foreign investments; they also cover portfolio investments, which are not part of the Union's trade competence but fall under the Union's shared competence in the field of the internal market.¹⁹ Moreover, the ECT provisions also concern the Union's competence in the field of energy, which is a shared competence.²⁰ The question is therefore whether the EU shared competence could be exercised in the external field by the Union alone.

First of all, a shared competence may become exclusive in the external field if the conditions of Article 3(2) TFEU are met, especially if the *ERTA* principle applies.²¹ According to this provision, the Union has an exclusive external competence where an international agreement provides for the application, to the international relations covered by that agreement, of rules that overlap to a large extent with the common EU rules applicable to intra-EU situations. In such a case, that agreement must be regarded as capable of affecting or altering the scope of those common rules.²² As a consequence, the EU competence is exclusive despite the fact that the agreement does not fall under the field of a provision conferring an exclusive competence to the Union. However, the *ERTA* effect does not apply to the ECT. Concerning the indirect investment protection provisions that are not covered by Article 207 TFEU, the Court of Justice has acknowledged that they are not covered by the *ERTA* effect. As for the shared competence in the field of energy, it has not become exclusive either. Beyond the fact that the existing EU internal rules in the field of energy do have a preemptive effect and are not to be affected by the ECT, the Commission, in its proposal for a Council decision on the position to be taken on behalf of the European Union in the Energy Charter Conference, considered that "the

18 *ibid*, paras 139–47. The global approach of the Union's external action objectives is based on Articles 21 (3) TEU and 205 TFEU.

19 *ibid*, paras 225–43. In paragraph 227 the Court of Justice recalls that 'non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU'.

20 Article 4(2)(i) TFEU.

21 CJEU, Case 22/70 *Commission v Council* [1971] ECLI:EU:C:1971:32.

22 The Court of Justice recalls that 'despite there being no contradiction with those common rules, the meaning, scope and effectiveness of the latter may be affected'. CJEU, Opinion 2/15 (n 17) para 201.

areas covered by the Energy Charter Treaty fall largely under the exclusive Union competence”.²³

Given that the Union's shared external competence -concerning the ECT rules that do not fall under the common commercial policy- has not become exclusive on the basis of Article 3(2) TEU, the question then arises as to whether the Union's shared competence could be exercised by the Union alone. That would mean that mixity is not mandatory but facultative.²⁴ Facultative mixity implies either that the most important part of an international agreement, falling under the Union's exclusive competence, absorbs provisions falling under shared competence that are of limited scope;²⁵ or that, according to Article 216 (1) TFEU,²⁶ the Union exercises its shared competence directly in the external field, if this is necessary to achieve its objectives.²⁷ In both cases, the political will to enable the Union to exercise its external competence alone needs to be established, via the Council's decision on the conclusion of the international agreement. Given that the objective of the ECT is to create an enlarged integrated energy market and taking into account the lack of mixity in the Energy Community Treaty,²⁸ it can be argued that, although the Union's competence by virtue of Article 194 TFEU is not exclusive, it can be exercised directly in the external field via the Union's membership to the ECT.²⁹ It can

23 European Commission, Council Decision on the Position to Be Taken on Behalf of the European Union in the Energy Charter Conference, COM (2024) 104 final (1 March 2024). In addition, in the ECT modernisation process, the negotiating directives of the Council addressed to the Commission were “without prejudice to the division of competences between the Union and the Member States as laid down in the Treaties”, Council of the European Union (n 7). It results that exclusivity of the EU's competence does not stem from the *ERTA* principle.

24 Merijn Chamon, ‘Constitutional Limits to the Political Choice of Mixity’, in Eleftheria Neframi and Mauro Gatti (eds) *Constitutional Issues of EU External Relations Law* (Nomos 2018) 137–65; Inge Govaere, ‘Facultative and Functional Mixity Consonant with the Principle of Partial and Imperfect Conferral’ in Merijn Chamon and Inge Govaere (eds) *EU External Relations Post-Lisbon* (Brill 2020) 22–47.

25 Opinion 2/15 (n 17) paras 213–17.

26 Article 216(1) TFEU, ‘The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’.

27 CJEU, Case C-600/14 *Germany v Council* [2017] ECLI:EU:C:2017:935, para 52.

28 2006/500/EC: Council Decision of 29 May 2006 on the Conclusion by the European Community of the Energy Community Treaty [13 December 2008] OJ L 335M, 374–82.

29 Yuliya Kaspiarovich and Ramses Wessel, ‘Unmixing Mixed Agreements- Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements’ in Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous and Ramses Wessel

also be argued that the Union's exclusive competence covers the largest part of the ECT, thereby absorbing provisions of shared competence such as those related to the indirect investment protection. It can thus be argued that mixity of the ECT was no longer mandatory under the Lisbon Treaty as far as the substantive EU competence is concerned. However, the participation of the Member States in the ECT is mandatory because of the ISDS mechanism and the ECT institutional framework.

2.2 *The ISDS Mechanism as a Reserved Member State Competence*

In Opinion 2/15 the Court of Justice clarified the importance of provisions related to ISDS from a competence perspective, irrespective of their compatibility with the autonomy of the EU legal order.³⁰ According to the Court, recourse to arbitration removes disputes from the jurisdiction of the domestic courts and, consequently, ISDS provisions cannot be regarded as ancillary, but fall within the sphere of Member States' competence.³¹ They are related to the Member States' systemic obligation to ensure that domestic courts participate in the judicial system of the Union, by implementing EU law, providing

(eds), *The EU and its Member States's Joint Participation in International Agreements* (Hart Publishing 2022) 287, 291. It should be noted that the exercise of the Union's competence is not deducted by the conclusion of a mixed agreement. In Opinion 1/19, the Court of Justice found that 'the conclusion of a mixed agreement by the European Union and its Member States in no way implies that its Member States exercise, in that event, competences of the European Union or that the European Union exercises competences of those States; rather, each of those parties acts exclusively within its sphere of competence.' CJEU, Opinion 1/19 *Istanbul Convention* [2021] ECLI: EU:C:2021:198, paras 240, 258, 259. However, the Union's shared competence can be exercised directly in the external field through the adoption of a decision in the body established by the mixed agreement. See Case C-600/14 (n 30) paras 49–51. It could therefore be argued that the adoption of the Union's position in the ECT would be the expression of the exercise of its shared competence. Although such an exercise can be limited in time in the sense that the Member States will be able to exercise again their competence in the future (see Council Decision (EU) 2022/1158 of 27 June 2022 on the Signing, on Behalf of the Union, and Provisional Application of the Agreement between the European Union and Ukraine on the Carriage of Freight by Road [06 June 2022] OJ L 179, 1–3), in the case of the ECT the exercise of the Union's competence through the adoption of the decision on the modernised ECT could be considered as an argument in favour of ending mixity. See also *infra* Sections 3.1 and 4.

³⁰ See *infra*.

³¹ Opinion 2/15 (n 17) para 292. See Gesa Kübek and Isabelle Van Damme, 'Facultative Mixity and the European Union's Trade and Investment Agreements' in Chamon and Govaere (n 24) 148; Gesa Kübek, *EU Trade and Investment Treaty-Making Post Lisbon* (Hart Publishing 2024) 72.

effective remedies and cooperating with the Court of Justice.³² In addition, when the Court of Justice referred to the political will to exercise shared competences in the areas covered by Opinion 2/15, it did not include ISDS provisions.³³ Consequently, the existence of provisions allowing recourse to arbitration makes the participation of the Member States a constitutional requirement and mixity of the modernised ECT mandatory.³⁴ In other words, the Union cannot participate in the ECT without its Member States.

2.3 *The Member States' Participation in the Modernized ECT as a Result of the ECT's Structure*

The end of mixity was not envisaged in the ECT modernisation process.³⁵ Apart from the fact that the ISDS provisions fall under the reserved competence of the Member States, the participation of the Member States in the modernised ECT was mandated by its structure. Indeed, the modernised ECT was negotiated in the Energy Charter Conference, an intergovernmental organization where the Member States of the Union were already parties. In this context, the Union's participation in the modernisation process was based on Article 218 (9) TFEU and the adoption of the modernised ECT by the Energy Charter Conference was subject to the Union's approval.³⁶ But following Article 42(3) of the ECT, the adopted amendments were to be communicated

32 This obligation derives from Article 19 TEU, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Laurens Ankersmit, 'Withdrawal from Mixed Agreements under EU Law: The Case of the Energy Charter Treaty' (2023) *Europe and the World: A Law Review* 4–5 <<https://doi.org/10.14324/111.444.ewlj.2023.01>> accessed 23 July 2025.

33 Opinion 2/15 (n 17) para 293; Case C-600/14 (n 27) paras 67–68.

34 Chamon (n 24) 140 et seq; Luca Prete, 'Facultative Mixity after the Singapore Opinion: Clarity or Fresh Doubts?' in Chamon and Govaere (n 24) 216–21. It could be argued that the Court of Justice has qualified the competence of the Member States relating to ISDS provisions as shared, which makes it possible to consider its exercise by the Union alone. However, mixity could be considered to be necessary due to the fact that only States may participate in the ICSID Convention or the UNCITRAL. See the position of the Court in the *Antarctic MPA* judgment, CJEU, Joined Cases C-626/15 and C-659/16 *Commission v Council* [2018] ECLI:EU:2018:925 and Gesa Kübek and Isabelle Van Damme (n 31) 148.

35 The Council's decision authorizing the opening of negotiations explicitly concerned the extent to which the ECT fell within the competence of the Union (Council Decision of 15 July 2019, 10745/19). Moreover, although the EU, Euratom and the Member States acted as a single entity during the negotiating process, the negotiating directives of the Council clearly indicated that this was "without prejudice to the division of competences between the Union and the Member States as laid down in the Treaties".

36 The decision on whether the Union or the Member States will exercise the participation and voting rights falls under the management of mixity; see *infra*, under Section 3.

by the Energy Charter Conference Secretariat to the Depositary, which would submit them to all Contracting Parties for ratification, acceptance or approval. In other words, to “unmix” the ECT would require the withdrawal of the Member States from the Treaty. Although unmixing a mixed agreement is in theory possible, as the Union can succeed the Member States in their international commitments, such succession concerns a field of exclusive EU competence,³⁷ which is not the case of the ECT.³⁸

In addition, the participation of the EU Member States in the ECT was required by Article 36 (7) of the ECT, which states that the number of votes of a Regional Economic Integration Organisation must be equal to the number of its member states, Contracting Parties to the ECT.³⁹

As a consequence, the participation of the EU Member States in the ECT is unavoidable, both because the ISDS fall, from an EU law perspective, under their reserved field of competence and because of the institutional provisions of the ECT. However, the necessary participation of the EU Member States does not prevent the Union from withdrawing from the ECT. As discussed in section 5, after its withdrawal, the Union can authorise the Member States to participate in the ECT without the Union, because of the distinction between substantive provisions, which fall under the Union’s competence, and ISDS provisions, which fall under the Member States’ competence. Consequently, from the perspective of EU law, the mixed nature of the ECT is a constitutional requirement as long as the Union is a party to the ECT. However, to understand the specific status of EU Member States as contracting parties after the Union’s withdrawal, it is necessary to discuss their status as contracting parties while the ECT was a mixed agreement.

37 The Court of Justice acknowledged that since the judgment of 12 December 1972, CJEU, Joint Cases 21/72 to 24/72 *International Fruit Company and Other* [1972] ECLI:EU:C:1972:115, paras 10–18, concerning the position of the European Community in the GATT, the Union “can succeed the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences” (CJEU, Opinion 2/15 (n 17) para 248).

38 Inge Govaere argues that ‘equating exclusive competence with a quasi-automatic application of the principle of substitution disregards the International Fruit Company conditions’. Govaere (n 24) 45.

39 This could be an example of functional mixity. See Govaere (n 24) 40.

3 Mixity of the ECT: The Consequences of the Joint Participation of the EU and Its Member States

The EU and its Member States' joint participation in the ECT was the result of constitutional requirements under EU law concerning the division of competences between the EU and its Member States. From an EU perspective, this means that the ECT does not have an *inter se* effect. It also means that the EU and its Member States must present a united front in their international representation, and apply the principle of sincere cooperation.

3.1 *The Absence of an inter se Effect of the ECT*

From the perspective of the EU and its Member States, the exercise of voting rights in the ECT was alternative, as it is in all mixed agreements. This means that the Union 'shall not exercise its right to vote if its Member States exercise theirs, and vice versa'. Furthermore, when voting, the Union had a number of votes equal to the number of its Member States that were contracting parties. This alternative exercise of voting rights shows that the EU and its Member States form one group. This 'group' approach is inherent in all mixed agreements, and may also be explicitly expressed in the agreement's provisions.⁴⁰ Joint participation in the ECT was imposed by the division of competences, an internal matter of EU law, rather than by an intention to create conventional links within the EU among the Member States. The plurilateral nature of the ECT was established through the relationship between the EU and its Member States, and third contracting parties, as the Union's objective in concluding the ECT was to establish an energy market beyond the EU.

Therefore, investment protection provisions and the related dispute settlement provisions of the ECT, as in Art 26 of the ECT, do not apply within the EU. In *Komstroy*,⁴¹ along the lines set out in *Achmea*⁴² and confirmed by the *PL Holdings* judgment,⁴³ the Court of Justice ruled that applying Article 26 of the ECT to disputes within the EU would lead to a disregard for the jurisdiction of national courts. This would consequently undermine the principle of mutual trust and the autonomy of the EU's legal order. The autonomy of the EU legal order may also be undermined by the interpretation of EU law by the

40 Sabrina Schaeffer and Jed Odermatt, 'Nomen est Omen? The Relevance of "EU Party" in International Law' in Levrat and others (n 29) 131, 138.

41 CJEU, C-741/19 (n 3).

42 CJEU, Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158.

43 CJEU, Case C-109/20 *PL Holdings* [2021] ECLI:EU:C:2021:875.

arbitral tribunals,⁴⁴ or by the enforcement of arbitral awards.⁴⁵ However, the requirement not to apply Article 26 of the ECT between Member States relates to the Member States' systemic obligation to preserve the jurisdiction of domestic courts in disputes within the Union, and thus to mutual trust, which forms the basis of the EU legal order. This obligation goes beyond the duty of sincere cooperation to uphold the Court of Justice's exclusive jurisdiction and ensure the implementation of EU law. Mutual trust forms the basis of the EU legal order, within which sincere cooperation applies. The obligation of Member States not to jeopardise this trust by resorting to arbitration in their mutual relations is an inherent part of their membership of the Union. Consequently, the non-application of the ISDS mechanism between EU Member States is not limited to mixed agreements, but also applies to investment agreements concluded by the EU, whether they are bilateral or plurilateral. In mixed agreements, third states object to this EU law requirement.⁴⁶

Indeed, from the perspective of third States, the non-application of Article 26 ECT between the Member States of the Union affects their status as contracting parties, and this must be reflected in the text of the ECT.⁴⁷ Most arbitral tribunals have ruled that the Court's position has limited application and cannot be applied to the ECT.⁴⁸ An implicit disconnection clause cannot be considered to result from the joint participation of the Union and its Member States, unless the agreement is bilateral, given that the absence of

44 In Opinion 1/17 the Court of Justice held that respect of the autonomy of the EU legal order implies that arbitral tribunals must treat EU law as a matter of fact. CJEU, Opinion 1/17 (n 5) paras 120–36. Mustafa Karayigit, 'The Compatibility of the ISDS Mechanism under the Energy Charter Treaty with the Autonomy of the EU Legal Order' (2024) 29 *European Foreign Affairs Review* 85, 96 et seq.

45 CJEU, Case C-638/19 P, *Commission v European Food and Others* [2022] ECLI:EU:C:2022:50.

46 David Ingle and Jeffrey Sullivan KC, 'Arbitration under the Energy Charter Treaty: The Impact of EU Law' in Nikos Lavranos, Stefano Castagna (eds) *International Arbitration and EU Law* (Edward Elgar 2024) 272.

47 Alan Dashwood argues against the expansive reading of the *Achmea* judgement because arbitral tribunals in the context of the ECT do not apply EU law, and because the dispute settlement mechanism in Article 26 ECT ensures equality of treatment and respect between the Member States and third country parties to the ECT and is created by the collective will of the parties to the ECT. Alan Dashwood, 'Article 26 ECT and Intra-EU Disputes – The Case against an Expansive Reading of *Achmea*' (2021) 46 *E L Rev* 415–34. See also Venetia Argyropoulou, '*Vattenfall* in the Aftermath of *Achmea*: Between a Rock and a Hard Place?' (2019) 4 *EILA Rev* 203; Mustafa Karayigit (n 44), 92.

48 For example, *Vattenfall v Germany (II)*, ICSID Case No ARB/12/12; *Masdar Solar v. Spain*, ICSID Case No ARB/14/1; *Greentech v Italy*, SCC Case No V2015/095; *Eskosol v Italy*, ICSID Case No ARB/15/50.

conventional links between EU Member States is an inherent feature of such an agreement.

Disconnection clauses in mixed agreements⁴⁹ preserve the autonomy of EU law, implying that the Member States will apply EU law in their mutual relations rather than the provisions of the agreement. However, such a clause does not affect third parties' expectation that the mixed agreement will be fully respected, since the relevant provisions of the agreement apply in substance between Member States via EU law. This is not the case with Article 26 of the ECT, because the requirement stemming from the autonomy of the EU legal order is the non-application of a treaty provision between some of the contracting parties. This exclusion must be explicitly stated in the ECT as a reservation to the enforcement mechanism of an international agreement,⁵⁰ as it does not derive from the definition of the contracting parties.⁵¹

Prior to the adoption of the modernised ECT, the Commission proposed an agreement between the Union and its Member States that would effectively constitute a disconnection clause. Although the compatibility of such an *inter se* agreement with Article 16 of the ECT was debated,⁵² it was argued that it

49 Disconnection clauses usually concern substantive provisions of mixed agreements, to a large extent covered by the Union's competence and are followed by the affirmation of compliance with the obligations stemming from the agreement. Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010) 160, 164.

50 It should be noted that in order to prevent investors from using shell companies in order to qualify for non-EU home state status and thus benefit from the application of Article 26 of the ECT, the Commission has proposed to limit the definition of investors to those engaged in substantial commercial activities in the home state. In addition, in its proposal to modernise the ECT, the Commission has attempted to exclude from its scope the settlement of disputes concerning the cessation of state aid and subsidies. The aim is for the contracting parties not to undertake not to modify the legal and regulatory framework in the name of investor protection. <https://energy.ec.europa.eu/document/download/43b875c5-7b10-491a-99a5-4ea05af41199_en?filename=eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector.pdf> accessed 23 July 2025.

51 The ECT does not stipulate that the EU and its Member States form a single contracting party.

52 Article 16 of the ECT provided that any subsequent agreement by parties to the ECT concerning the subject matter of investment protection and dispute settlement cannot derogate from the provisions of the ECT, consequently, the ECT regime prevails over other treaty obligations. Agata Daszko, 'The Energy Charter Treaty at a Critical Juncture: of Knowns, Unknowns, and Lasting Significance' (2023) JIEL 720, 731; Michael De Boeck, *EU Law and International Investment Arbitration. The Compatibility of ISDS in Bilateral Treaties (BITs) and the Energy Charter Treaty (ECT)* (Brill 2022) 101 et seq; Johannes Troller, 'An inter se Modification of the ECT to Exclude Intra-EU Arbitration -How Can it Work?' (Kluwer Arbitration Blog, 2023) <<https://arbitrationblog.kluwerarbitration.com>

was in line with international law of treaties.⁵³ On 26 June 2024, 26 Member States and the European Union, with the exception of Hungary, signed an *inter se* declaration with immediate effect the text of which was identical to that of the *inter se* agreement, thereby launching the agreement's approval process.⁵⁴ On 2 July 2024, the European Commission indeed presented a proposal for a Council decision on the accession of the Union and Euratom to an agreement that qualifies the non-application of Article 26 of the ECT within the EU as a common understanding, and this agreement has received the approval of the European Parliament and the Council.⁵⁵ Although Article 24 (3) of the modernised ECT provides for a disconnection clause,⁵⁶ and Article 16 has been deleted from the modernised ECT, the *inter se* agreement is still relevant in order to neutralise the intra-EU application of the sunset clause. Interestingly,

/2023/06/19/an-inter-se-modification-of-the-ect-to-exclude-intra-eu-arbitration-how-can-it-work/> accessed 23 July 2025.

- 53 Article 16 concerns the relationship between coexisting treaties within the meaning of Article 30 of Vienna Convention on the Law of Treaties. Pursuant to paragraph 5 of this Article, rules on the precedence between coexisting treaties are without prejudice to modification. Cécile Rapoport, 'Moderniser ou quitter le Traité sur la Charte de l'énergie: quels enjeux pour l'Union européenne et son ordre juridique ?' (2023) 1 RAE 145, 149–50.
- 54 Kingdom of Belgium, Press Release, 'Energy Charter Treaty: Member States Sign Declaration and Initial Inter Se Agreement Clarifying Non-applicability of ECT Arbitration Provisions Intra-EU' (24 June 2024) <<https://diplomatie.belgium.be/en/news/energy-charter-treaty-member-states-sign-declaration-and-initial-inter-se-agreement-clarifying-non-applicability-ect-arbitration-provisions-intra-eu>> accessed 23 July 2025. As an obligation arising from the principle of sincere cooperation to ensure effective implementation of EU law, the Member States had therefore the obligation to eliminate incompatibilities of international agreements with the EU legal order. The obligation to eliminate incompatibilities concerns international agreements concluded by the Member States before their accession to the EU (Art 351 TFEU) as well as incompatibilities occurring after the entry into force of an international agreement concluded by the Union or as mixed agreement. Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2015) 321 et seq.
- 55 European Commission, Proposal for a Decision of the European Parliament and the Council, on the Adoption by the Union of the Agreement on the Interpretation and Application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States, COM(2024) 257 final (2 July 2024) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52024PC0257>> accessed 23 July 2025; Decision (EU) 2025/1904 of the European Parliament and of the Council [10 September 2025] OJ L 19.09.2025.
- 56 During the negotiation process, as the reform of Article 26 ECT was not included in the list of areas for negotiation, the Court of Justice, in its Opinion 1/20, rejected as inadmissible Belgium's request concerning the interpretation of the compatibility of Article 26 TEC with the autonomy of the EU. CJEU, Opinion 1/20 *Draft Modernised Energy Charter Treaty* [2022] ECLI:EU:C:2022:485. Alan Dashwood, 'Komstroy and Opinion 1/20 – Curious and Curiouser' (2022) 59 CMLR 51, 57.

the *Green Power* arbitral tribunal dismissed a case on the basis of the Member States' declaration.⁵⁷ However, this position has been criticised on the basis that the Member States' declaration cannot be considered a subsequent agreement under Article 31(3)(a) of the Vienna Convention on the Law of Treaties. Therefore, it cannot be considered an interpretation of Article 26 ECT with a disconnection effect.⁵⁸ The question is made even more complex by the withdrawal of Member States from the ECT. For the Commission, the inter-se agreement would apply to those Member States that withdrew. However, this is not the position of the ECT Secretariat.⁵⁹

3.2 *The Obligation of Sincere Cooperation to Ensure Unity in the External Representation of the EU and its Member States*

The modernisation process took place within the institutional framework established by the ECT. The amendments to the ECT and its annexes resulting from the negotiations, as well as the provisional application of these amendments took the form of a decision of the Energy Charter Conference, which had to be approved by the contracting parties.

In the ECT, as a mixed agreement, the principle of sincere cooperation applied at two levels. First, on the question of whether the decision of the Energy Charter Conference on the modernised ECT should be approved by the Council, on behalf of the Union, or by the Member States. In general, the answer to such a question depends on the area of competence to which the matter under discussion belongs. In the case of shared competence, it has to be decided whether the participation and voting rights should be exercised by the Union, through a Council decision on the procedural legal basis of Article 218 (9) TFEU, or by the Member States. Second, if the participation and voting rights are to be exercised by the Union, the principle of close cooperation applies at the stage of the adoption of the Council's position. As is well known, in the modernisation process of the ECT, the decision of the Energy Charter Conference was to be approved by the Council, but the qualified majority required for the adoption of the Council's position in favour of the modernised ECT was not reached.

As regards the exercise of the participation and voting rights in the ECT, it was clear from the adoption of the negotiating directives by the Council that

57 *Green Power Partners K/S and SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No V2016/135.

58 Ingle and Sullivan (n 46) 274.

59 Nikos Braoudakis, Rosanne Craveia and Clémentine Baldon, 'Neutralising the ECT Sunset Clause *Inter Se*' (2024) 39(2) ICSID Rev 367 <<https://doi.org/10.1093/icsidreview/siae011>> accessed 23 July 2025.

they should be exercised by the Union. Mixity did not affect the negotiating power of the EU, as the Member States agreed on the need not to jeopardise unity and to efficiently promote green transition objectives. However, the note in the negotiating directives that the Commission should conduct the negotiations “without prejudice to the division of competences”, raised the question of the exercise of the Union’s competence. The Council decision proposed by the Commission for the approval of the modernised ECT mentioned Articles 207 TFEU and 194 TFEU as substantive legal basis. The question was therefore whether the approval of the decision of the Energy Charter Conference on the modernised ECT by the Council was to be understood as the exercise of the Union’s shared competence in the field of energy. The approval of the modernised ECT by the Union could be seen as an expression of unity in international representation without exercise of the Union’s shared competence in the field of energy. The new ECT should be approved by the Member States, after the adoption of the decision on its modernisation. But the approval of the modernised ECT by the Union could also be seen as an exercise of its shared competence in the field of energy, in which case mixity would be imposed only by the ISDS provisions. The question of the exercise of the Union’s shared competence through the adoption of the modernised ECT had no practical consequences for mixity, as the new ECT should be approved by the Member States, but it could have an impact on the Member States’ obligations after the withdrawal of the Union, which will be discussed below. From the point of view of the management of mixity in the ECT, the approval of the decision of the Energy Charter Conference on the modernised ECT by a decision of the Council, whether it is interpreted as the exercise of the Union’s shared competence or merely as a representative mandate conferred on the Union, ensured unity in external representation and thus fulfilled the requirement of sincere cooperation.

However, the principle of sincere cooperation reached its limits at the level of the adoption of the Council’s decision expressing the position of the Union at the 33rd meeting of the Energy Charter Conference.⁶⁰ Most Member States considered the results of the modernisation process to be insufficient, as the modernised ECT did not prohibit the protection of fossil fuel investors and was not in line with the Paris Agreement, the Union’s environmental standards and the objectives of the European Green Deal. As a result, the Member States

60 European Commission, Proposal for a Council Decision on the Position to Be Taken on Behalf of the European Union in the 33rd Meeting of the Energy Charter Conference, COM/2022/521 final (5 October 2022).

failed to reach a qualified majority in the Council in favour of the approval by the Union of the modernised ECT.

The non-adoption of the modernized ECT by the Union is not a breach of the principle of sincere cooperation. Indeed, the exercise of the Council's legislative competence does not fall within the scope of the principle of sincere cooperation, since the exercise of the voting rights in the Council falls within the discretion of the Member States.⁶¹ Although the Court of Justice has acknowledged the Member States' obligation, in case of mixity and with the view to the adoption of the Council's position on the basis of Article 218 (9) TFEU, to facilitate the exercise of the Union's competence,⁶² that obligation consists in the duty to abstain from expressing an individual position and to participate in the adoption of the Council's decision, but does not imply an obligation to vote in favour of that decision.

Similarly, the obligation of the Member States to facilitate the Union's participation in international agreements⁶³ is a best endeavors obligation as contracting parties and not a voting obligation in the Council. The principle of sincere cooperation does not have a wider scope in the field of energy, despite the reference to the spirit of solidarity in Article 194 TFEU.⁶⁴ The Court of Justice recognized in the *OPAL pipeline* judgment, that the energy solidarity principle entails rights and obligations for both the European Union and the Member States, which are bound by an obligation of solidarity with each other and with regard to the common interest of the European Union and the energy

61 Marc Blanquet, *L'article 5 du Traité C.E.E.*, (LGDJ 1994) 136 et seq.

62 The obligation not to jeopardise unity in external representation seems to be a more important constraint on the Member States, as it relates to the Union's objective of actor-ness, irrespective of any concrete limitation of the Member States' competence. In *PFOs* (n 47) the Advocate General referred to the obligation to facilitate the exercise of the Union's competence, given that Sweden had expressed an individual position while the Council had not yet reached a common position. Opinion of AG Maduro, Case C-246/07 *Commission v Sweden (PFOs)* [2009] ECLI:EU:C:2009:589, paras 47, 58–59. However, the Court of Justice referred to the obligation not to jeopardise unity. CJEU (n 47) paras 103–04. Peter Van Elswege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in Marton Varju and Veronika Czina (eds), *Between Compliance and Particularism* (Springer 2019) 283, 291.

63 CJEU, Joined Cases 3, 4 and 6–76 *Cornelis Kramer and others* [1976] ECLI:EU:C:1976:114, para 45.

64 Article 194 (1) TFEU reads: 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, *in a spirit of solidarity* between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

policy objectives.⁶⁵ However, the specific legal duties imposed by the energy solidarity principle consist rather in mutual support in times of crisis to enable the Member States to ensure the effective implementation of EU policies through the principle of sincere cooperation.⁶⁶ In other words, the principle of energy solidarity does not interact with the principle of sincere cooperation but precedes its application. Consequently, it does not intervene in the exercise of voting rights in the Council in order to establish an obligation to support the proposed decision.

4 The Absence of a Coordinated Withdrawal: The Member States of the Union as Autonomous Contracting Parties and the Limits of the Principle of Sincere Cooperation

The failure of the Union to approve the modernized ECT was followed by a vague of withdrawals, which revealed the limits of the Union's efficiency in promoting its sustainability standards in a plurilateral context. The constitutional requirements of the EU legal order made the Union's withdrawal a necessity, raising the question of the obligation of a coordinated withdrawal in the name of unity and efficiency.

In fact, the non-adoption of the modernised ECT did not allow the Union to remain a contracting party. Nor was it possible for the Union to adopt the modernised ECT after the withdrawal of the Member States that objected, with the number of votes of the remaining Member States. The EU's participation in a mixed agreement by qualified majority concerns the Union as a whole, even if some Member States are not contracting parties, unless the agreement has a limited territorial scope of application within the Union, which is not the case with the ECT. Moreover, the hypothesis of a reduced Union approving the modernised ECT would be equivalent to an enhanced cooperation, which is incompatible with the exclusive competence claimed by the Union over the substantive provisions of the ECT.⁶⁷ Consequently, the withdrawal of the Union from the non-modernised ECT appeared to be imposed, first of all because of the conflict with the Union's climate goals under the European

65 CJEU, Case 848/19 P *Germany v Commission* [2021] ECLI:EU:C:2021:598, para 49.

66 Federico Casolari, 'The Odd Couple: A Legal Reflexion on the Interaction between Loyalty and Solidarity in the EU Legal System' (2023) 2 *Nordic Journal of European Law* 84, 93.

67 It could be argued that the reduced Union is exercising a shared competence directly in the external field, via the approval of the modernised ECT. However, the establishment of an enhanced cooperation is dependent on a specific procedure, requiring the approval of the Council. See Articles 329–330 TFEU.

Green Deal and the Paris Agreement, but also because of the lack of legitimacy following the withdrawal, or the intention to withdraw, of the Member States forming the blocking minority. The rejection of the modernised text and the denunciation of the ECT was equivalent to the withdrawal of the consent within the Council that allows the Union to be a contracting party. The Commission had no choice but to propose the Union's withdrawal.

Beyond the substantive reasons for withdrawal, which are related to the Unions regulatory autonomy and the preservation of its sustainability standards, there was also a question of unity and credibility of the Union as an international actor. A coordinated withdrawal would meet these objectives and would allow the Union to consider the establishment of a new legal framework. On 24 November 2022, the European Parliament adopted a resolution on the outcome of the modernisation, calling for the coordinated withdrawal of the EU and its Member States from the ECT.⁶⁸ On 7 July 2023, the European Commission proposed a coordinated withdrawal.⁶⁹ However, several Member States have expressed their wish to remain parties to the ECT. The question therefore arose as to whether the principle of sincere cooperation entailed an obligation for Member States to withdraw and, moreover, to withdraw in a coordinated manner.

Withdrawal could be seen as the counterpart to the ratification of a mixed agreement. It is therefore important to recall the debate on the obligation of result as to the conclusion of a mixed agreement, given the Member States' loyalty obligation to facilitate the accomplishment of the Union's tasks, which has been interpreted as limiting the Member States' discretion each time that the Union has begun to exercise its competence.⁷⁰ The negotiation process of a mixed agreement could indeed be considered as the beginning of the exercise of the Union's competence. However, no obligation to ratify a mixed agreement has been recognised. Notwithstanding the status of a mixed agreement in the EU legal order after its entry into force, the conclusion of a mixed agreement is governed, from the point of view of EU law, by Article 218 TFEU. The Council's decision on the signature, provisional application and conclusion of an international agreement under this provision is limited to the scope of the exercised EU competence and the principle of close cooperation does not

68 European Parliament, European Parliament Resolution of 24 November 2022 on the Outcome of the Modernisation of the Energy Charter Treaty, Pg_TA(2022)0421 (24 November 2022) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html accessed 23 July 2025.

69 European Commission, Proposal for a Council Decision on the Union Withdrawal from the Energy Charter Treaty, COM(2023) 447 final (7 July 2023).

70 CJEU, Case C-246/07 (n 58).

justify an exemption from the procedural rules of Article 218 TFEU.⁷¹ Consequently, the approval of the mixed agreement by the Member States does not fall under EU law, and the principle of sincere cooperation does not apply at this stage. Although the non-ratification of a mixed agreement by the Member States may lead to an incomplete or partial mixed agreement,⁷² or even prevent its entry into force,⁷³ thus jeopardizing the attainment of the Union's objectives, there is no obligation to ratify under EU law.⁷⁴ Member States act as contracting parties under international law in the exercise of their own competence. They should do so in accordance with their national constitutional requirements and must refrain from taking a common decision in the Council.⁷⁵

As regards the requirement of unity, the Court of Justice has subsequently clarified that the Council may await, before adopting the decision concluding a mixed agreement on behalf of the Union, the common agreement of the Member States. However, the common accord should not be expressed by a Council decision, nor should the adoption by the Council of the decision concluding the agreement be made conditional on the prior establishment of such a common accord.⁷⁶ Consequently, such a common accord is more of political guarantee than an obligation under EU law.

71 CJEU, Case C-28/12 *Commission v Council* [2015] ECLI:EU:C:2015:282, para 55.

72 It is suggested that a partial mixed agreement is based on the fact that the Union and its Member States each act exclusively within their spheres of competence. See Laurens Ankersmit (n 32) 10; CJEU, Opinion 1/19 (n 29) paras 259–60. This argument confirms the absence of an obligation of the Member States to ratify a mixed agreement, that could derive from the principle of sincere cooperation: if the Member States do not act in the sphere of EU competence, the Union cannot impose on the Member States the ratification of a mixed agreement as an obligation to act on behalf of the Union.

73 Nanette Neuwahl, 'Editorial Comment' (2018) 23 *European Foreign Affairs Review* 145, 148.

74 The obligation to facilitate the exercise of the Union's competence through the conclusion of a mixed agreement, as well as the obligation to refrain from jeopardizing the Union's objectives, are in the case of ratification of a mixed agreement best endeavors obligations, rather than obligations of result. Marcus Klamert (n 47) 203; Guillaume Van Der Loo and Ramses Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 *CMLR* 744–45. The obligation to refrain from jeopardizing the Union's objectives also found expression in the duty to remain silent, to refrain from adopting an individual position. See CJEU, Case C-246/07 (n 47). Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *E L Rev* 524–41. However, the duty to remain silent is an obligation to refrain, while the ratification of a mixed agreement requires taking action. Ankersmit (n 32) 9.

75 CJEU, Case C-28/12 (n 71).

76 CJEU, Opinion 1/19 (n 29) paras 249, 274. Panos Koutrakos and Viktorija Soneca, 'The Future of the Istanbul Convention Before the CJEU' in Levrat and others (n 29) 189, 200–04.

Does the absence of an obligation under EU law to conclude a mixed agreement and to express a common accord on a coordinated conclusion also apply in the case of withdrawal? If withdrawal is seen as the counterpart of the conclusion, then we could affirm that the principle of sincere cooperation does not entail an obligation to withdraw, nor an obligation to withdraw in a coordinated manner, since the Member States still act as contracting parties under international law. However, withdrawal takes place after the entry into force of a mixed agreement, which has already acquired the status of an EU agreement and is a source of EU law obligations for the Member States. Is withdrawal to be considered as falling under the management of mixity, which implies an obligation of sincere cooperation to ensure unity in external representation? Is there an obligation to withdraw if the Union's shared competence has been exercised in the context of the mixed agreement and the Member States cannot invoke the exercise of their reserved competence?

Firstly, an obligation of coordinated withdrawal is linked to the status of the EU and its Member States as contracting parties. It should be recalled that the application of the principle of sincere cooperation in the management of mixity entails a reinforced obligation of result on the part of the Member States. But does the objective of unity imply that the Union and its Member States should be considered as a single contracting party to a mixed agreement once it has entered into force? The practice of mixed agreements shows that the status of contracting party is determined not by EU law, but by international law. It is the mixed agreement that determines the exercise of participation rights and the status of contracting party. Mixed agreements may refer to the 'EU Party' to be defined as 'the Union and its Member States, in accordance with their respective competences',⁷⁷ however the Union and its Member States are autonomous contracting parties as it concerns the consent to be bound and the entry into force of the mixed agreement.⁷⁸ The objective of unity, which is covered by the EU law obligation of close cooperation, does not affect the perception of the contracting parties beyond what results from the text of the mixed agreement or from its objective. For example, despite the existence of a declaration of competences, in the absence of a clear division of responsibilities for the implementation of a mixed agreement, the Union and its Member States are to be considered as jointly and severally liable.⁷⁹ In

77 Strategic Partnership Agreement between the European Union and its Member States, of the One Part, and Japan, of the Other Part [24 August 2018] OJ L 216, 4, art 45.

78 Schaeffer and Odermatt, (n 40) 145.

79 Andrés Delgado Casteleiro and Cristina Contartese, 'International Responsibility of the EU and/or its Member States in International Agreements' in Levrat and others (n 29) 171, 176 et seq.

addition, in the absence of a disconnection clause in multilateral mixed agreements, according to which the obligations entered into do not apply between the Member States of the Union in so far as EU law applies,⁸⁰ the Member States of the Union are to be regarded as autonomous contracting parties from the point of view of international law, and the conventional links between them are established. As discussed under 3.1, the non-intra-EU application of a mixed agreement is an obligation of EU law arising from the need to preserve the autonomy of the EU legal order without affecting the third States parties to a mixed agreement, in the absence of a disconnection clause.

Consequently, the management of mixity, which is covered by the principle of sincere cooperation, does not cover an obligation to withdraw from a mixed agreement. The fact that the United Kingdom has not withdrawn from multilateral mixed agreements⁸¹ confirms that, from the point of view of international law, the Member States remain autonomous contracting parties. As such, the Member States of the Union can exercise their prerogative of withdrawal without any obligation arising from the requirement of unity and from the principle of sincere cooperation in this respect. Coordinated withdrawal is therefore not an obligation under EU law.

5 The Member States of the Union as Contracting Parties to the ECT Following the Union's Withdrawal

The Union's withdrawal from the ECT did not prevent the Member States from remaining contracting parties, should they wish to do so. However, their discretion is limited as they are bound by their EU law obligations, meaning the new ECT remains a specific plurilateral agreement.

5.1 *The Impact of the Union's Withdrawal on the Member States Discretion*

In the absence of an EU obligation to withdraw from the ECT, the next question was whether the Union's withdrawal limits the Member States' discretion as contracting parties to the ECT. This relates to the management of mixity,

80 Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Hillion and Koutravos (n 49) 160.

81 Withdrawal of the UK from bilateral mixed agreements was necessary because of the bilateral structure, while in multilateral mixed agreements the UK continued to be contracting party with adaptations as to the exercise of participation rights. Christine Kaddous and Habib Badjinri Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in Levrat and others (n 29) 271, 277.

given that the Union's withdrawal will only take effect one year after notification, but also to the division of competences.

As discussed, in the ECT, the Union's substantive competence is not exclusive, as energy and non-direct investments fall under shared competence. The Union's participation in the modernisation process could be considered to be an exercise of its shared competence, under Article 216 (1) TFEU, but this was not the intention of the Council, which mentioned that the negotiating directives were without prejudice to the division of competences. Nevertheless, upon completion of the modernisation process, the institutions acknowledged that the majority of ECT provisions fall within the Union's exclusive competence, except for the ISDS provisions, which fall under the Member States' competence. The question is what such an affirmation means. Are the remaining Member States considered to be acting within an area of exclusive EU competence, meaning that they require authorisation from the Union?⁸²

In the non-paper of 7 February 2023,⁸³ following the announcement of withdrawal from the ECT by a number of Member States, the European Commission set out the various options after the Union's withdrawal. The Commission stressed that the Union's withdrawal from the ECT would require a decision by the Council on the same legal basis as the decision to conclude an international agreement on behalf of the Union. Indeed, the withdrawal decision of the Council was based on the procedural legal basis of Article 218 (6) (a) TFEU, in conjunction with the substantive legal bases concerning the common commercial policy and the energy policy (Articles 207 and 194 TFEU). Withdrawal is therefore an exercise of the Union's competence. The Commission, in its non-paper, used this argument in order to affirm the exclusivity of the Union's competence and, therefore, to support an obligation of a coordinated withdrawal. Because a withdrawal obligation cannot, as discussed, be based on the obligation of sincere cooperation, the exercise of the Union's

82 Member States can participate in international agreements falling under the Union's exclusive competence if so empowered by the Union. CJEU, Case C-45/07 *Commission v Greece* [2009] ECLI:EU:C:2009:81, paras 30–31; CJEU, Case C-399/12 *Germany v Council (OIV)* [2014] ECLI:EU:C:2014:2258, para 52; CJEU, Case C-24/20, *Commission v Council (Accession to the Geneva Act)* [2022] ECLI:EU:C:2022:911, paras 99–102. Marise Cremona, 'Member States Agreements as Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 291.

83 European Commission, Non-paper, Next Steps as Regards the EU, Euratom and Member States' Membership in the Energy Charter Treaty <https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf> accessed 23 July 2025.

competence through the withdrawal decision affects the margin of discretion of the remaining in the ECT Member States.

However, the Union's exercise of its competence to withdraw has a specific *ERTA* effect.⁸⁴ In its non-paper, the Commission argued in favour of coordinated withdrawal by pointing out that if the Member States remained contracting parties to the ECT, they could affect the obligations arising from the acts of EU institutions that decided on the EU's withdrawal from the ECT. While the withdrawal Decisions constitute an exercise of the Union's competence in the fields of energy and investment protection, such exercise concerns not the substantive competence of the Union but its participation in an international body. Consequently, the participation of the Member States in the Energy Charter Conference must not affect the participation rights of the Union as expressed in its decision to withdraw. Moreover, since the Union remains in the ECT for one year after notifying its withdrawal decision, it can still exercise its participation rights, given that the ECT's provisions largely fall within the Union's exclusive competence. However, for reasons of coherence with its withdrawal decision, it may choose not to do so. In such a case, preserving the Union's objectives would mean that the remaining contracting Member States do not have unlimited discretion.

Therefore, the limitation of the Member States' discretion does not derive from a preemptive effect and the exclusivity of the Union's competence. This explains why the Council emphasised that, while Member States remaining in the ECT must act in accordance with the Union's decision, this does not affect the division of competences. Rather, the limitation of the Member States' discretion stems from the impact of the Union exercising its participation rights with regard to withdrawal from the ECT on the Member States' participation. Exercising the Union's participation rights would enable it to pursue its energy and trade policy objectives. If Member States remain contracting parties to the ECT after the Union withdraws, they should not jeopardise the attainment of the Union's objectives.

5.2 *The Member States' Obligations in the ECT: Modernisation of the ECT Following the EU's Withdrawal*

Since the substantive provisions of the ECT largely fall within the areas of EU exclusive competence, the Union must authorise those Member States that wish to remain contracting parties to the ECT to do so on the basis of Article 2(1) TFEU in conjunction with the substantive legal basis of Articles 194

84 Supra (n 21).

and 207 TFEU.⁸⁵ In this sense, the mixed nature of the agreement remains after the Union's withdrawal, even if it is no longer a party to it. This is because the Member States that remain parties to the ECT can only act in the field of the Union's exclusive substantive competence with its authorisation and in its interest. However, such authorisation will be required once the Union's withdrawal becomes effective. Furthermore, this authorisation relates to the exercise of energy and trade competence through the amendment of the ECT's substantive provisions. The enforcement of the investment protection provisions via the ISDS mechanism falls under the competence of the Member States, who are bound by their EU law obligations when implementing their ECT-related obligations. In any case, the absence of a withdrawal obligation on the Member States and the Union's decision concerning the exercise of the Member States' participation rights could be considered as authorisation.

Indeed, the Union's withdrawal from the Energy Charter Treaty (ECT) only took effect on 28 June 2025, one year after the withdrawal decision was notified.⁸⁶ Until this time, the Union remained a contracting party to the ECT. Consequently, the Council adopted decisions on the position to be taken by the remaining Member States regarding the approval of the modernised ECT.

In reality, the Council's decisions contain two levels. Firstly, a decision was made regarding who would exercise the participation and voting rights, given that both the Union and the Member States were still contracting parties in the ECT. In a field largely covered by exclusive EU competence and for the sake of consistency with the withdrawal decision, the Union opted to exercise its competence via its Member States. Secondly, a decision was made regarding the content and the position to be taken. The Council adopted a decision concerning the Union and one concerning the Euratom, together with the withdrawal decisions, on the position to be taken on behalf of the Union and of Euratom in the Energy Charter Conference.⁸⁷ By these decisions, based on Articles 218 (9), 207 (4) and 194 (2) TFEU and Article 101 of the Euratom Treaty, the Council

85 Ankersmit (n 32) 8.

86 Council of the EU, Press Release, 'Energy Charter Treaty: EU Notifies Its Withdrawal' (27 June 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/>>; International Energy Charter, Press Release, 'Written Notification of Withdrawal from the Energy Charter Treaty' <<https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-5/>> both accessed 23 July 2025.

87 Council Decision (EU) 2024/1644 of 30 May 2024 on the Position to Be Taken on Behalf of the European Union in the Energy Charter Conference [6 June 2024] OJ L 2024/1644; Council Decision (Euratom) 2024/1645 of 30 May 2024 on the Position to Be Taken on Behalf of Euratom in the Energy Charter Conference [6 June 2024] OJ L 2024/1645.

asked the Member States that were still contracting parties (regardless of their decision to withdraw) to express the Union's position that they should not prevent the adoption of the amended ECT.

More precisely, according to the Council's decisions of May 2024, the Member States that were Contracting Parties and that were present at the Energy Charter Conference should exercise their vote so as : not to prevent the adoption by the Conference of the proposed amendments to the ECT ; not to prevent the approval of the proposed modifications and technical changes to the Annexes; not to prevent the approval of the proposed changes to decisions, declarations and understandings; and not to prevent the approval of a decision regarding the entry into force and provisional application of amendments to the ECT and modifications and technical changes to its Annexes.”⁸⁸ However, the two Decisions stated that in case the modernized ECT enters into force before the withdrawal of the Union and Euratom becomes effective, “the Commission shall notify the depositary of the Agreement that the Union and Euratom opt out from provisional application.”⁸⁹

The Decisions of May 2024 were followed by two Decisions of December 2024, which allowed the amendments of the ECT to be adopted on 3 December 2024.⁹⁰ More precisely, the Council adopted a Decision on the position to be taken on behalf of the European Union in the Energy Charter Conference⁹¹ and a Decision approving the position to be taken on behalf of Euratom in the Energy Charter Conference.⁹² These Decisions were adopted, not only in order to determine and communicate the Union's (and Euratom's) voting position on the proposed amendments, but also in order to address procedural matters, and precisely the transition of depositary functions after Portugal's withdrawal from the ECT. The Decisions recalled that the Member States would act jointly, for matters falling within the Union's competence and that this was without prejudice to the division of competences between the Union and the Member States. That means that the Union's withdrawal does not have a preemptive effect on the Member States' substantive competence in the field of energy and investment policy, however, the Member States had no discretion as to the approval of the modernised ECT. As a consequence, the adoption of the modernised ECT is an expression of a specific form of

88 Article 1 of the Council's Decisions 2024/1644 and 2024/1645.

89 *ibid*, art 2.

90 Energy Charter Secretariat (n 9).

91 Council Decision (EU) 2024/3086 (n 15).

92 Council Decision (Euratom) 2024/3030 (n 15).

plurilateralism, where some contracting parties, the Member States of the Union, are acting as a group.

5.3 *The Modernised ECT from an EU Law Perspective*

The modernised ECT will enter provisionally into force on 3 September 2025,⁹³ pending ratification by three-quarters of the contracting parties. Although the Member States of the Union allowed the adoption of the modernised text, it is uncertain whether some of them will ratify the new treaty. The main problem however, from an EU law perspective, remains the intra-EU application of the ECT covered by the sunset clause.⁹⁴

Under Article 24 (3) of the modernised ECT, intra-EU ISDS claims are explicitly excluded. However, the modernized ECT will apply to the ratifying contracting parties, and those who have withdrawn from the ECT will be bound by the unamended treaty for 20 years following their withdrawal due to the ECT's sunset clause.⁹⁵ Although the Union is in the process of approving the *inter se* agreement,⁹⁶ which would also apply to Member States that have withdrawn from the ECT,⁹⁷ it is doubtful that international tribunals will decline jurisdiction in the name of the autonomy of EU law.⁹⁸ Therefore, it is doubtful that pending proceedings would be affected. It could be argued that the Energy Charter Conference's approval of the amendments constitutes a subsequent agreement under Article 31(3) of the Vienna Convention on the Law of Treaties. However, this would require the exclusion of intra-EU ISDS claims to be considered merely a clarification of existing disconnection clauses. This would necessitate acceptance of the Union's position, which

93 International Energy Charter, Press Release, 'The Energy Charter Conference Adopts Decisions on the Modernisation of the Energy Charter Treaty' (3 December 2024) <<https://www.energycharter.org/media/news/article/the-energy-charter-conference-adopts-decisions-on-the-modernisation-of-the-energy-charter-treaty>> accessed 23 July 2025.

94 Johannes Tropper, 'The ECT's Long Road to Modernisation: A Story of Delays and Miscalculations' (*Völkerrechtsblog*, 19 December 2024) <<https://doi.org/10.17176/20241219-225418-0>> accessed 23 July 2025.

95 Criticism of the sunset clause and its potential annulment on the grounds of conflict with climate objectives is beyond the scope of this paper.

96 On 18 June 2025, the agreement was approved by the European Parliament (P10_TC1-COD(2024)0148).

97 Braoudakis, Craveia and Baldon (n 59) 367.

98 Supra under Section 3.1.

contrasts with that of arbitral tribunals. Even if the Conference's approval of the disconnection is considered a subsequent agreement, its retroactive application is doubtful.⁹⁹

From an EU law perspective, the modernised ECT, admitting that some Member States will approve it, will constitute a Member States agreement, adopted on their own account, with the authorisation of the Union.¹⁰⁰ This is distinct from an international agreement concluded by Member States on behalf of the Union because the latter cannot exercise its own competence outside the EU legal order for political or other reasons. Therefore, the modernised ECT will have no effect within the EU legal order. Furthermore, authorisation from the EU is granted on the condition that the actions of the Member States are not contrary to the interests of the Union or incompatible with EU legal obligations. This means that Member States will be bound by an obligation to coordinate permanently, similar to the mechanisms established by the Regulation for bilateral investment treaties between Member States and third countries.¹⁰¹

5.4 *Conclusion*

Whether the EU and many of its Member States' withdrawal from the ECT was the optimal solution to align investment protection with climate objectives remains questionable. Some have argued that it would be better for the Union to first approve the modernised ECT and then withdraw, as this would allow it to benefit from the shortened sunset clause. According to the modernised ECT, existing fossil fuel investments will no longer be protected ten years after its entry into force. Even if we concede that the sunset clause does not apply within the EU, fossil fuel investors in extra-EU relations are covered by the 20-year sunset clause with regard to withdrawing Member States. Additionally, for a Member State that remains a contracting party to the ECT, the question of how to allocate international responsibilities in the event of a conflict with

99 Philipp Kehl and Sebastian Wuschka, 'The Energy Charter Treaty at a Tipping Point – Modernization Efforts, Withdrawal Plans and their Legal Consequences' (ZEuS 1/2024) 60, 85–86 <<https://www.nomos-elibrary.de/10.5771/1435-439X-2024-1-59.pdf>> accessed 23 July 2025.

100 Cremona (n 80) 315.

101 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries [20 December 2012] OJ L 351, 40.

EU law obligations arises.¹⁰² However, the EU's obligation on Member States not to block the adoption of the modernised ECT is a positive development in the new constellation of the plurilateral ECT framework.

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102 Paolo Palchetti and Luca Pantaleo, 'The Withdrawal of the EU and the Member States from the Energy Charter Treaty: Who Will Bear International Responsibility for Breaches of the Treaty?' (18 July 2023) <<https://www.veblen-institute.org/IMG/pdf/palchetti-pantaleo-2023-ect-withdrawal-and-ms-responsibility.pdf>> accessed 23 July 2025.

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CAPÍTULO 6

GOVERNING SUSTAINABILITY THROUGH TRADE IN EU EXTERNAL RELATIONS: THE ‘NEW APPROACH’ AND ITS CHALLENGES

Ramses A. Wessel
Gesa Kübek¹

INTRODUCTION

The Common Commercial Policy (CCP) has traditionally been the cornerstone of EU external relations law.² The reason is that the CCP is ‘not just a key external relations policy, but in substantive terms, it is at the heart of the European integration project and a logical consequence of the interaction between internal and external developments’.³ The renewed attention for sustainability questions (also driven by the United Nations Sustainability Development Goals⁴), has also entered the Free Trade Agreements (FTAs) that are the key instruments for the Union to regulate its trade relations with third states.⁵ The legal basis for EU FTAs is primarily derived from the European Union’s exclusive competence over trade policy, as outlined in the Treaty on

¹ Dr. Gesa Kübek and Prof. Ramses A. Wessel are part of the European and Economic Law group of the faculty of Law of the University of Groningen. This publication is part of the WISDOM II project as part of the Erasmus+ Jean Monnet Centre of Excellence at the UMCG.

² Many text books on EU external relations law, were largely devoted to this topic. See for instance P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 439; and P. Koutrakos, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015).

³ J. Larik, ‘Common Commercial Policy’, in J. Larik and R.A. Wessel (eds.), *EU External Relations Law: Text, Cases and Materials*, (Oxford, Hart Publishing, 2020).

⁴ See United Nations (UN) General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’, UN Doc/A/RES/70/1, 25 Sept. 2015.

⁵ See in general on FTAs, I. Bosse-Platière and C. Rapoport (ed.), *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Cheltenham, Edward Elgar Publishing, 2019); G. Kübek, ‘The European Union’s External Trade Agreements’ in C. Herrmann and J. Chaisse (eds.), *The International Law of Economic Integration* (Oxford, Oxford University Press, forthcoming).

the Functioning of the European Union (TFEU). Specifically, Articles 206 and 207 of the TFEU grant the EU the authority to negotiate and conclude trade agreements with third countries on behalf of its member states. These articles establish that the EU has the authority to define and implement a common commercial policy, which covers trade agreements, customs unions, and other trade-related matters. EU trade agreements are typically negotiated by the European Commission and require approval by the Council of the European Union and the European Parliament.

The Union's Common Commercial Policy is thus arguably the 'most exclusive' competence of the EU (see also Art 3(1) TFEU). Yet, for elements in these agreements for which the Union does not enjoy an exclusive competence, the Member States may have to step in as co-contracting parties, leading to 'mixed agreements'.⁶ While the need for Member States to join is based on an inclusion in the agreement of 'exclusive' Member State powers (such as for instance rules on indirect investments), the Union and its Member States may opt for EU-only agreements in the case of shared competences where no exclusive Member State powers are at stake.⁷ Obviously, bringing the Member States in through mixity may result in considerable delays, due to national ratifications and/or referendums. This may form a reason to 'split' comprehensive FTAs into two separate ones, one of which can be concluded as an EU-only agreement and one that deals with the areas that fall under Member State competences.⁸ While this goes against the comprehensive approach that is favoured by the EU, current treaty provisions seem to have been stretched as far as possible and after Opinion 2/15 in particular (see below) the Commission's approach seems to have become one of pragmatic acceptance.

Despite the still existing need to bring Member States in to include issues that are exclusively in the hands of the Member States, it is important to note that even EU-only FTAs can cover a range of issues as the '[t]he scope of the CCP has been drastically expanded over time through amendments to the EU Treaties as well as through interpretations of the Court of Justice'.⁹ Ar-

⁶ See for a recent analysis G. Kübek, *EU Trade and Investment Treaty-Making Post-Lisbon: Moving Beyond Mixity* (Oxford, Hart Publishing, 2024).

⁷ See extensively on this topic: M. Chamon and I. Govaere (Eds.), *The Law and Practice of Facultative Mixity* (Leiden, Martinus Nijhoff Brill, 2020).

⁸ This was done, for instance, in the case of the EU-Vietnam FTA and IPA. Originally designed as a comprehensive trade and investment agreement, the agreement was split in hindsight after the delivery of Opinion 2/15. See Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L 186/1. The text of the IPA has not yet been published in the OJ but see Council Decision (EU) 2019/1096 of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part [2019] OJ L 175/1.

⁹ Larik (n. 2).

title 206 TFEU not only mentions international trade, but also foreign direct investment (FDI) as forming part of CCP, which indeed turns it into a more full-fledged ‘commercial policy’. The first part of Article 207(1) TFEU clearly reflects the core of CCP, as it refers to ‘to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.’ Yet, the CCP is not to be approached in isolation, as underlined by the final part of the same provision: ‘The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.’ This reveals that the CCP is part of the Union’s external action, which also encompasses its foreign policy. In short, the CCP more and more developed from an economic policy towards a foreign policy instrument. As argued by Dimopoulos after the entry into force of the Lisbon Treaty, that treaty, ‘signals the transformation of the CCP from an autonomous field of EU external action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers. [...] In particular, the references to fair trade and integration to the world economy next to liberalization illustrate that trade liberalization should not be seen any longer as a self-determining objective, but it should be regarded within the broader context of economic and social development objectives.’¹⁰

These days, non-trade values seem to have become a standard element of FTAs concluded by the EU in the form of so-called ‘Trade and Sustainable Development’ (TSD) chapters.¹¹ The Court of Justice of the EU (CJEU) has in principle confirmed this broader scope. Thus, in relation to sustainability provisions in FTA’s, the CJEU in Opinion 2/15 concerning the EU’s FTA with Singapore, clearly held that ‘the objective of sustainable development [...] forms an integral part of the common commercial policy’.¹² As will be outlined in this contribution, sustainability as such also needs to be seen in broad terms. Thus, the new generation of FTAs may include provisions on environmental and labour standards, but the list seems to be getting longer and may also include issues such as climate change or gender equality.

¹⁰ A. Dimopoulos, ‘The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy’ (2010) 15 *European Foreign Affairs Review* 153, 169.

¹¹ See G. Marín Durán, ‘Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues’ (2020) 57 *CMLR* 1031-1068. The 2008 EU-CARIFORUM Economic Partnership Agreement is often mentioned as the first FTA to include legally binding environmental and labour provisions (O.J. 2008, L 289/3, Arts. 183-196). The first FTA that included a full-fledged TSD Chapter was the 2010 FTA with Korea (O.J. 2011, L 127/6).

¹² Opinion 2/15 *EU-Singapore FTA*, EU:C:2017:376, para 147. See further Kübek (n 5) 64.

The impact of this normative role of the Union should not be underestimated,¹³ also given the large number of FTA's and the dependence of many countries around the world on access to the EU's internal market. FTA's have thus become part of the Union's extraterritorial regulatory reach, famously coined the 'Brussels Effect'.¹⁴ At this moment, the EU lists 76 FTAs in force, 25 FTAs adopted, 6 FTAs in the pipeline, and 22 FTAs on hold.¹⁵ Indeed, countries not affected by the EU's trade policy are hard to find. The normative, or standard-setting role flows from the Union's own Treaty brief to 'export' its own values (Articles 3(5) and 21 TEU in particular), and has now become part and parcel of the Commission's policies in this regard.¹⁶

Despite the clear Treaty obligations, the EU's global actions to enhance environmental, labour and social standards through trade have also been criticised. There are two main points of critique. First, TSD Chapters have been widely condemned for their lack of effectiveness on the ground. Against that background, secondly, critical questions about the extent to which the EU should (aim to) interfere in the internal affairs of third states through its external action emerged.

The first point of critique has *inter alia* been raised by several Member States,¹⁷ the EP,¹⁸ and some academics.¹⁹ They content, amongst others, that TSD Chapters do not go far enough, are not sufficiently tailored to the on-ground situation in partner countries, and lack effective enforce-

¹³ See in general on the EU as a global normative actor recently M. Neuman, R.A. Wessel and T. de Zee (eds.), *The EU in a Globalising World* (The Hague, T.M.C. Asser Press, 2024); as well as J. Odermatt and R.A. Wessel (eds.), *Research Handbook on EU Law and Global Challenges* (Cheltenham, Edward Elgar Publishing, 2025 (forthcoming)).

¹⁴ A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford, Oxford University Press, 2020); see also E. Fahey, *The Global Reach of EU Law* (London, Routledge, 2017).

¹⁵ See for an overview: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

¹⁶ See Commission Communication, 'Trade for all – Towards a more responsible trade and investment policy', COM(2015)497 final, at p. 15; Commission, 'Strategic Plan 2016–2020 – DG Trade', 22 Dec. 2017. Cf. also Y. Kaspiarovich and R.A. Wessel, 'The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor', in E. Fahey and I. Mancini (eds.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Cheltenham, Edward Elgar Publishing, 2022) 92–106. More specifically on the treaty brief the EU has in this regard: E. Kassoti and R.A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch, 2023) 19–46.

¹⁷ See eg Non-paper from the Netherlands and France on trade, social economic effects and sustainable development (2020).

¹⁸ See eg, European Parliament resolution of 6 October 2022 on the outcome of the Commission's review of the 15-point action plan on trade and sustainable development (2022/2692(RSP)).

¹⁹ See eg, K. Hradilová and O. Svoboda, 'Sustainable development chapters in EU free trade agreements: Searching for effectiveness' (2018) 52 *JWT* 1019.

ment mechanisms. In 2022, the Commission unveiled a ‘new approach’ to trade and sustainability that responds to these concerns.²⁰ In particular, the Commission has broadened its ‘sustainability’ agenda and intends to tailor it more closely to the situation in partner countries. Moreover, the Commission seeks to improve the enforcement of TSD commitments, including by moving from a ‘cooperative’ (i.e. legally non-binding) to a ‘sanctions-based’ approach for individual commitments. At around the same time, the Commission furthermore proposed a series of unilateral trade instruments that essentially make access to the EU internal market conditional on compliance with environmental and/or human rights standards. Examples include the Deforestation Regulation,²¹ the proposed Corporate Due Diligence Directive,²² and the CBAM.²³ In view of the EU’s increased focus on the export and enforcement of global sustainability norms and the resulting (ambition of) the EU to exercise its jurisdiction extraterritorially, the above-mentioned second point of critique has re-gained prominence. In the words of Marín Durán, ‘[a]t the heart of this debate lies a disagreement over the extent to which the EU should govern through trade and use its trade-based market power to improve environmental and social conditions in partner countries.’²⁴

Against this background, the present contribution seeks to outline how the EU governs sustainability through trade, taking into account the changes made to the design of TSD Chapters since 2022 and the emergence of new unilateral instruments. It seeks to provide a concise overview of the current state of play of external and internal instruments deployed by the EU, as well as of the general direction the EU has taken, to export, promote, and enforce global sustainability norms. The relatively modest aim of this Chapter, therefore, is to assess recent and current developments in the EU’s choice to more closely link trade and sustainability on the basis of concrete examples and to look into a number of potential challenges related to this

²⁰ European Commission, ‘Commission unveils new approach to trade agreements to promote green and just growth’, Press Release, 22 June 2022. See, in more detail, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The power of trade partnerships: together for green and just economic growth’, COM(2022) 409 final.

²¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206.

²² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

²³ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130/52.

²⁴ Marín Durán (n 10) at 1033.

choice. While this is certainly not the first contribution to this topic,²⁵ it seems one of the first addressing these issues in a more comprehensive manner on the basis of recent developments.

The Chapter is structured as followed: Section 2 explains ‘standard’ design features of EU TSD Chapters. Although the ‘new approach’ to TSD has introduced some ‘twists’, these standard features are still common to TSD Chapters in EU FTAs, including more recent ones. Section 3 highlights some novelties brought about by the ‘new approach’, focusing particular on the scope and enforcement of these Chapters. Section 4 then turns to unilateral instruments that promote sustainability through trade, highlighting in particular the CBAM, the Deforestation Regulations, and the proposed Corporate Due Diligence Directive.

1. TSD CHAPTERS IN EU FTAS: ‘STANDARD’ DESIGN FEATURES

In addition to a more general ‘mainstreaming’ of sustainability issues throughout FTAs, the TSD Chapters have since become a standard element in the design of EU FTAs and the issues governed by these chapters, as well as the way there are enforced, has continuously evolved over the years. Nonetheless, the TSD Chapters in EU FTAs share a number of ‘standard’ features, such as their overarching objectives (section 2.1), key substantive clauses (section 2.2), and, generally, a ‘cooperative’ enforcement model (section 2.3).

1.1. Overarching Objectives

While there are some differences, TSD chapters usually share a number of common elements. One common feature is that the sustainability in general, and the protection of the environment and labour rights more specifically, are explicitly framed as objectives of EU FTAs – both in the preamble as well as in the specific chapter on TSD.

The preamble of EU FTAs typically includes an important starting point, which may be illustrated by a relatively recent example, the 2020 EU-Viet Nam FTA²⁶:

‘DETERMINED to strengthen their economic, trade and investment relationship *in accordance with the objective of sustainable development, in its economic, social and environmental dimensions*, and to promote trade and investment

²⁵ Ibid, but also other publications referred to in e.g. (n. 15, 18, 39, 42 and 47).

²⁶ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, OJ L 186/1, 12.06.2020.

under this Agreement in a manner *mindful of high levels of environmental and labour protection* and relevant *internationally recognised standards and agreements*.²⁷

By emphasising that trade and investment shall be strengthened only in accordance with broader sustainability goals, the parties underline that the objective of sustainable development in general, and environmental and labour protection specifically, form an inherent part of trade as conceived by the parties. Article 13.1 of the EU-Viet Nam FTA, which recalls the objectives of the agreement's TSD Chapter, further underlines that the promotion of sustainable is a self-standing end of the trade relationship between the EU and Viet Nam. Accordingly, '(t)he *objective of this Chapter is to promote sustainable development*, notably by fostering the contribution of trade and investment related aspects of labour and environmental issues'.²⁸ By framing sustainability as an objective of the FTA in and of itself, the parties underline their intention to create a strong connection between the environmental and labour rights protection and trade.²⁹

1.2. Key Substantive Rights

TSD Chapters in EU FTAs also share a number of common substantive clauses and/or regulatory techniques. Perhaps the most well-known feature is the so-called 'right to regulate', which forms the premise of the relationship between trade and non-trade values in TSD Chapters. Accordingly,

'The Parties recognise their respective right to:

- (a) determine its sustainable development objectives, strategies, policies and priorities;
- (b) establish its own levels of domestic protection in the environmental and social areas as it deems appropriate; and
- (c) adopt or modify accordingly its relevant laws and policies in a manner consistent with the internationally recognised standards [...].³⁰

The right to regulate underlines that EU FTAs do not intend to harmonise domestic environmental and social standards. In principle, the parties remain free to determine their own level of protection. However, the final sentence of the provision underlines that the parties' freedom to establish their own level of protection is limited by the obligation to uphold international (minimum) standards. In addition, the parties 'right to regulate' may

²⁷ Indent 4 of the Preamble of the EU-Vietnam FTA (n 25), emphasis added.

²⁸ Emphasis added.

²⁹ See also *Panel of Expert Proceedings Constituted under Art. 13.5 of the EU-Korea Free Trade Agreement*, 20 January 2021, p. 27 (hereinafter: *Korea-Labour Rights*).

³⁰ Art. 13.2(1) EU-Viet Nam FTA.

be confined by the terms of the FTA itself. TSD Chapters in EU FTAs commonly include three different types of clauses that limit the parties' sovereign right to regulate.³¹ First, there are so-called 'high level clauses', on the basis of which the parties need to aim for high environmental, social, and labour rights protection. Second, there are clauses establishing a minimum level of environmental, social, and labour rights protection by incorporating internationally recognised standards into the FTA. Third, TSD Chapters in EU FTAs commonly include so-called 'non-regression' clauses, which seek to prevent competitive pressure arising from greater economic liberalization leading to a 'race-to-the-bottom' in environmental and labour regulations. The following will briefly explain them in turn.

High level clauses are perhaps the most ambitious substantive feature of TSD Chapters. As a result, their wording is very ambitious and vague. They commonly stipulate that '(e)ach Party shall endeavour to ensure that its laws and policies provide for and encourage high levels of domestic protection in the environmental and social areas and shall continuously endeavour to improve those laws and policies.'³² Despite merely connotating 'soft' endeavours to achieve high levels of protection without setting out any 'hard' legal obligations, the Panel in *Ukraine-Wood Products* highlighted that high level clauses may serve as relevant context for justifying an otherwise FTA-incompatible measure under Article XX GATT.³³ Similarly, in *Korea-Labour Rights*, the Panel of Expert concluded that a TSD clause connotating the parties best endeavours to ratify fundamental ILO Conventions³⁴ 'creates a legally binding obligation'.³⁵

Aside from including high level ambitions, TSD Chapters in EU FTAs stipulate a minimum level of environmental, social, and labour rights protection. To do so, EU FTAs commonly incorporate multilateral labour, environmental, and social rights conventions that both parties have ratified or agreed to ratify. In doing so, the parties make these international standards a binding component of their trade relationship.³⁶ In respect to environmental rights, each FTA party 'reaffirms its commitment to effectively implement

³¹ As categorised by Marín Durán (n. 10).

³² Art. 13.2(2) EU-Viet Nam FTA.

³³ Article XX GATT has been incorporated into EU FTAs. See, in casu, Article 35 EU-Ukraine Association Agreement. See further *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, Final Report of the Panel established pursuant to Article 308 of the EU-Ukraine Association Agreement, 11 December 2020, para 245.

³⁴ Article 13.4.3 EU-Korea FTA. The provision stipulates that the parties 'will' (and notably not shall) 'make continued and sustained efforts towards ratifying fundamental ILO Conventions (...)'.
³⁵ *Korea Labour Rights* (n 28) paras 265, 271.

³⁶ See similarly the Opinion of Advocate General Sharpston, Opinion 2/15, *FTA with Singapore*, ECLI:EU:C:2016:992, para 498.

in its domestic law and practice the multilateral environmental agreements to which it is a party.³⁷ With the exception of the FTAs with Colombia and Peru,³⁸ no specific list of multilateral environmental agreements (MEAs) is mentioned, which allows for a dynamic interpretation. In respect to labour rights, the FTA parties typically confirm their commitment to the 'ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, to respect, promote and effectively implement the principles concerning the fundamental rights at work'.³⁹ The Panel in *Korea-Labour Rights* confirmed that the obligation to respect, promote, and effectively implement the principles concerning the fundamental rights at work is 'established by its own terms'.⁴⁰ In order to establish a breach, it therefore suffices that one party failed its obligation to respect, promote and effectively implement key ILO principles. The other party does not have to prove that this failure affected trade between the parties.

However, some TSD provisions expressly require a linkage to trade. A common example is the 'non-regression' clause. This clause typically stipulates that a party 'shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws, *in a manner affecting trade*'.⁴¹ A dispute between the USA and Guatemala under the Dominican Republic-Central America-United States FTA (CAFTA-DR) illustrated that the 'non-regression' clause may not bite in situations where a party (here: Guatemala) failed to effectively enforce its domestic (here: labour) laws because it is difficult to demonstrate that such a failure has demonstrable effects on trade between the parties.⁴² In the literature, the burden of proof for the 'effects on trade' criterion established in the *CAFTA-DR* case has been described as being very difficult, if not impossible, to meet.⁴³ Yet, in *Korea-Labour Rights*, the panel noted that there are important differences between the text of EU FTAs (here:

³⁷ See e.g. Article 13.5(2) EU-Vietnam FTA.

³⁸ See Marín Durán (n 10) 1037.

³⁹ See e.g. Art. 13.4(2) EU-Vietnam FTA. On the link between trade and core international labour rights in EU FTAs see T. A. Novitz, 'The role of the EU in making 'sustainable' labour linkages in contemporary trade: is being 'assertive' also 'good'?' in Fahey and Mancini (n. 15) 124.

⁴⁰ *Korea-Labour Rights* (n 28) para 68. See further T. A. Novitz, 'Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU-Korea Expert Panel Report' (2022) 47 *European Law Review* 3.

⁴¹ See e.g. Art. 13.3(2) EU-Vietnam FTA. Emphasis added.

⁴² *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Final Report of the Panel, 14 June 2017.

⁴³ See e.g. K. Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story' (2020) 25 *Journal of International Economic Law* 34; or A. Alvarez-Jimenez, 'The International Law Gaze: The Protection of Labour Rights in Free Trade Agreements: Mission Impossible?' (2018) 287 *New Zealand Law Journal* 291. In the EU context see M. Brockers and G. Gruni, 'Taking the enforcement of labour standards in the EU's free trade agreements seriously' (2019) 6 *CMLR* 1591, 1604.

the FTA with Korea) and the CAFTA-DR.⁴⁴ As a result, it is not clear whether the standard of demonstrating ‘in a manner affecting trade’ established in the *CAFTA-DR* case could be applied in the same way for enforcing non-regression clauses under EU FTAs.

1.3. Cooperative Enforcement Mechanisms

EU FTAs contain special procedural rules for settling disputes on sustainability rules. In many EU FTAs (e.g. the FTAs with Korea, Canada, Singapore, Vietnam, or Japan), TSD Chapters contain their own dispute settlement procedure. Under this special TSD dispute settlement procedure, alleged breaches of TSD Chapter provisions can be brought before a Panel of Experts which ‘shall issue an interim and a final report to the Parties’.⁴⁵ The reports of the Panel of Experts ‘shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations’.⁴⁶ The parties must subsequently ‘discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein’.⁴⁷ The parties’ domestic advisory groups, which are composed of economic, social and environmental stakeholders, oversee the implementation of the report by the parties and may issue observations.⁴⁸ In contrast to the FTA’s horizontal dispute settlement mechanism, trade sanctions are generally not foreseen to enforce compliance with the report of the Panel of Experts. According to the Commission, such a ‘cooperative’ approach to TSD enforcement enables a broader scope for TSD Chapters, as the EU’s negotiating partners have ‘been clear that they would not accept a broad scope combined with trade sanctions’.⁴⁹ The *Korea-Labour Rights* case has shown that a report by a Panel of Experts can yield practical change. Korea ratified three fundamental ILO Conventions in response to the report⁵⁰, even though the Panel of Experts concluded that Korea had not acted in breach of its obligation to ‘make continued and sustained efforts towards ratifying’ these ILO Conventions.⁵¹ Yet, the changes made by Korea to its ‘Trade Union

⁴⁴ *Korea-Labour Rights* (n 28) para 93.

⁴⁵ See, eg, Art. 13.17(8) EU-Vietnam FTA.

⁴⁶ *Ibid.*

⁴⁷ See, eg, Art. 13.17(9) EU-Vietnam FTA.

⁴⁸ *Ibid.*, in conjunction with Art. 13.15(4) EU-Vietnam FTA. See more generally V. Kube, *EU Human Rights, International Investment Law and Participation* (Berlin, Springer, 2019) 289.

⁴⁹ Non paper of the Commission services, ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’ (2018) p. 3.

⁵⁰ See International Labour Organisation, ‘Korea recognizing respect for fundamental labour standards as the foundation for tackling the challenges of the future of work’, Press Release, 29 April 2021.

⁵¹ *Korea-Labour Rights* (n 28) para 293.

and Labour Relations Adjustment Act' have widely been deemed insufficient to fully comply with the Panel of Expert's report, including by the EU.⁵² Overall, the implementation of TSD Chapters through cooperative enforcement mechanisms has hence yielded mixed results in practice.

2. THE EU'S 'NEW APPROACH' TO TRADE AND SUSTAINABILITY

As above mentioned, the Commission proposed a 'new approach' for governing sustainability through trade in 2022, which a view to making FTAs 'an even bigger driver of positive change'.⁵³ Since then, aspects of the 'new approach' have been implemented in the latest EU FTAs, most notably the ones with Chile and New Zealand. It is beyond the scope of this chapter to discuss all elements of the 'new approach'. Looking at the FTAs with Chile and New Zealand in some detail, this section instead seeks to highlight to elements of it: first, the broadened understanding of 'sustainability' as reflected in the scope of FTAs, and secondly the changes made to the enforcement of TSD clauses.

2.1. Towards a Broader Notion of Sustainability in EU FTAs: The Case of Trade and Gender

One of the more recent changes to TSD Chapters is that they increasingly deploy a broader definition of 'sustainability'. In view of the division of competence between the EU and its Member States, a broadened definition of sustainability is not without risk, as it may raise new questions of mixity. As has been argued elsewhere, the 'absorption capacity' of the CCP in relation to sustainability matters is not endless.⁵⁴

Newer items on the Commission's TSD agenda include inter alia ocean governance, the promotion of responsible business conduct, the shift towards a circular economy, deforestation-free supply chains, or gender equality. Out of these examples, the latter has recently gained considerable traction, amongst others with the EU finalizing its first FTA with a self-standing chapter on trade and gender equality (i.e. the 2022 Interim Trade Agreement with Chile). The case of trade and gender thus serves as a case in point to illustrate why and how the EU broadens its sustainability agenda in FTAs.

The fact that the first EU FTA with a self-standing Chapter on trade and gender is the one with Chile is not a coincidence. The development of

⁵² See, eg, EU-Korea Free Trade Agreement, 9th session of the Committee on Trade and Sustainable Development, Joint Minutes, 6 and 7 September 2023.

⁵³ European Commission (n 19).

⁵⁴ Kübek (n 5) 64 et seq.

including chapters on women's empowerment and gender equality in FTAs can largely be attributed to the former Chilean President Michelle Bachelet, who had also served as the executive director of the UN Entity for Gender Equality and the Empowerment of Women.⁵⁵ In fact, the first FTA to include a designated chapter on trade and gender equality was the 2016 Chile-Uruguay FTA. Until very recently, EU FTAs did not address gender equality, aside from a couple of minuscular provisions.⁵⁶ From that perspective, the 2022 Interim Trade Agreement marks a directional change in EU trade practice. As commitments on gender equality and women's empowerment were explicitly highlighted by the Commission as new elements of the EU's latest FTAs,⁵⁷ future FTAs may follow the blueprint of the EU-Chile FTA. This was at least the case for the 2023 EU-New Zealand FTA, which includes a provision that mimics, albeit in short, the trade and gender equality chapter of the EU-Chile FTA.⁵⁸

When looking at how the EU governs gender equality through trade in its recent FTAs with Chile and New Zealand, it become apparent that it essentially applies the 'standard' regulatory TSD techniques that were described above to a new issue area. As a baseline, the parties recognize their respective right 'to establish its own scope and guarantees of equal opportunities for men and women (...)' (*right to regulate*).⁵⁹ The parties must however exercise their right to regulate in conformity with international agreements addressing gender equality to which they are a party (*minimum level of protection*) and strive to improve relevant laws and policies promoting gender equality (*high level clause*).⁶⁰ Moreover, the parties 'shall not, in order to encourage trade or investment, weaken or reduce the protection granted under their respective laws aimed at ensuring gender equality or equal opportunities for women and men' (*non-regression clause*).⁶¹

Overall, the commitments made by the parties are rather weak. They connote a 'best effort' endeavour, rather than a legal obligation. This is also due to the scarcity of multilateral conventions setting minimum standards on gender equality⁶² and the parties lack of political willingness to

⁵⁵ On link between trade and gender equality and the recent development to integrate gender equality chapters into FTAs see esp. R. Klimke, 'Ist das EU-Außenwirtschaftsrecht gender-blind?' (2023) 61(1) *Archiv des Völkerrechts* 27.

⁵⁶ See Art. 13.14(1)(e) EU-Vietnam FTA; and Art. 2.5(2)(d) EU-Vietnam IPA.

⁵⁷ See European Commission (n 19) 3. The EP has long been pushing for the integration of clauses on gender equality in EU FTAs. See European Parliament, 'Gender equality and trade' (2018).

⁵⁸ Art. 19.4 EU-New Zealand FTA.

⁵⁹ Art. 27.3 EU-Chile Interim Trade Agreement.

⁶⁰ Art. 27.2 EU-Chile Interim Trade Agreement.

⁶¹ Art. 27.3(7) EU-Chile Interim Trade Agreement.

⁶² Aside from a generic reference to the ILO, Art. 27.2 EU-Chile Agreement mentions only one multilateral agreement, namely the 1979 UN Convention on the Elimination of all Forms of Discrimination Against Women.

integrate some of the more recent and/or ambitious international instruments, such as the Istanbul Convention or the WTO Buenos Aires Declaration on Trade and Women's Economic Empowerment,⁶³ into the scope of the FTA. Clauses that stipulate a binding commitment, such as the non-regression clause, require a direct link to trade between the parties and are therefore difficult to enforce in practice. Whether the simple 'export' of standard regulatory TSD techniques is the best way to govern new, and internationally less regulated, aspects of sustainability may therefore be questioned. One may wonder whether the Commission's approach to 'transfer' its standard TSD techniques to new issue areas such as trade and gender equality may be in part be due to competence concerns: by deploying TSD techniques that were excluded by the CJEU as triggers of mixity in Opinion 2/15⁶⁴, the Commission may seek to ensure that FTAs with a broadened TSD agenda can nonetheless be concluded by the EU without its Member States. Irrespective of this potential rationale, questions about the suitability of the Commission's approach of course pertain. At the very least, the agreements with Chile and New Zealand, and – in hindsight, by means of a committee decision,⁶⁵ – CETA, include a commitment to engage in cooperation activities 'designed to improve the capacity and conditions for women' to access and fully benefit from the opportunities created by the respective FTA.⁶⁶ In practice, these cooperation activities could provide an opportunity to better understand the effects of trade liberalisation on gender equality, to strengthen the existing rules⁶⁷ and to improve future practice.

2.2. Towards a Sanctions-Based Enforcement

With its 'new approach' to TSD, the Commission sought to increase the assertiveness of the enforcement of TSD Chapters. In particular, the Commission announced that it will 'extend the standard state-to-state dispute settlement compliance phase to the TSD chapter of our trade agreements' and

⁶³ The Declaration has been adopted by 127 WTO members to date, including all EU member states and Chile. There is a generic reference to acknowledging the work of and cooperating in multilateral fora, such as the WTO and OECD, on trade and gender issues (eg, Art. 19.4(9) EU-New Zealand FTA).

⁶⁴ In Opinion 2/15, the CJEU *inter alia* argued that TSD Chapter fall within the scope of the CCP because they merely refer to existing multilateral agreements the parties had already signed up to and are not enforceable through the agreement's main dispute settlement procedure. See further Opinion 2/15, paras 152, 154-155. See further Kübek (n 5) 66-67.

⁶⁵ Recommendation 002/2018 of 26 September 2018 of the CETA Joint Committee on Trade and Gender.

⁶⁶ See eg, Art. 27.4 EU-Chile Interim Trade Agreement.

⁶⁷ Notably, Art. 27(2) of the EU-Chile Interim Trade Agreement contains a 'rendre-vous clause', which allows reviewing the trade and gender equality chapter 'in light of experience gained in their implementation'. If necessary, the parties may 'suggest how the [relevant provisions] may be strengthened.'

‘include the possibility to apply, as a last resort, trade sanctions for material breaches of the Paris Climate Agreement and the ILO fundamental labour principles’.⁶⁸ The EU-New Zealand FTA is the first agreement that follows the Commission’s new approach.⁶⁹ It aligns dispute settlement procedures on sustainability and trade issues under a single horizontal mechanism.⁷⁰ That said, the horizontal dispute settlement mechanism included in the EU-New Zealand FTA largely incorporates the ‘specific’ procedural rules for settling TSD disputes that were previously set out in the TSD Chapter itself.⁷¹ As a result, dispute settlement procedures on sustainability issues remain ‘specific’ to those on pure ‘trade’ issues. In particular, the enforcement of panel reports remains largely ‘cooperative’. While the extension of the horizontal dispute settlement procedure to sustainability implies that a party found in violation of a TSD commitment is obliged to ‘deliver a notification to the complaining Party of any measure that it has taken to comply with the final report’⁷², the complaining party can generally not adopt temporary remedies if the party complained against does not comply with the final report.⁷³ By way of exception, temporary remedies are possible if the report of the panel finds that the complaining party either violated the ILO fundamental labour principles or defeated the material object and purpose of the Paris Agreement, and did not sufficiently remedy its behaviour.⁷⁴ A similar sentence can be found in Article 27.4(3) of the EU-New Zealand FTA, which concerns compliance with the agreement’s ‘essential elements’. Accordingly, a party may take any ‘appropriate measures relating to this Agreement in the event of an act or omission that materially defeats the object and purpose of the Paris Agreement.’ In both instances, it remains unclear, however, how a party, through its individual conduct, can ‘materially defeat’ the object and purpose of the Paris Agreement. It therefore remains to be seen if these provisions will stand the test of practice.

⁶⁸ Commission Press Release (n 19).

⁶⁹ See previously however Art. 411(2) TCA, which introduces a novel rebalancing procedure. Commentators have criticised the high burden of proof for the complaining party posed by Article 411(2) TCA. Indeed, it would be very difficult to prove that ‘material impacts on trade and investment’ between the EU and the UK actually results from a lowering of TSD standards. See further eg J. Bäumlér, ‘Level Playing Field and Sustainable Development’, in G. Kübek, C. J. Tams and J. P. Terhechte (eds.) *EU-UK Trade and Cooperation Agreement: A Handbook* (Baden-Baden/Oxford/Munich, Nomos, Hart, Beck, 2024).

⁷⁰ Art. 26.2 EU-New Zealand FTA.

⁷¹ See, eg, Art. 26.5(3)(b) and 26.6(1)(b) (composition of the panel); or Art. 26.13(3) (compliance monitoring) of the EU-New Zealand FTA.

⁷² Art. 26.15(1) EU-New Zealand FTA.

⁷³ Art. 26.16 EU-New Zealand FTA has limited application for disputes based on the TSD Chapter (see second paragraph).

⁷⁴ Art. 26.16(2) EU-New Zealand FTA.

3. UNILATERAL ‘TRADE AND SUSTAINABILITY’ INSTRUMENTS

Around the same time when the Commission announced its ‘new approach’ to sustainable development in its external trade agenda, it also proposed a number of internal measures that link sustainability and trade. These measures are however not legally based on the CCP (Art. 207 TFEU) but on the EU’s internal competence for environment (Art. 192 TFEU) and/or the internal market (Art. 50, 114 TFEU). Yet, these measures have apparent effects on external because they use access to the EU internal market as a ‘leverage’ to demand compliance with sustainability standards by (economic operators from) third states. This section will briefly introduce three of these instruments: the Corporate Sustainability Due Diligence Directive (CSDD Directive), the Deforestation Regulation, and the Carbon Border Adjustment Mechanism (CBAM).

The proposed CSDD Directive seeks to incentivise companies to internalize negative externalities in their global corporate conduct. To do so, it introduces mandatory human rights and environmental due diligence obligations on the parent company.⁷⁵ Prior to the design of the CSDD, various Member States had taken similar legislative initiatives (eg the French Vigilance law, the German Sorgfaltspflichtengesetz, the Norwegian Transparency Act or the Dutch Child Labour Due Diligence Act).⁷⁶ The CSDD Directive thus also aims to approximate national sustainability due diligence requirements. At the time of writing, it remains unclear whether the Member States in the Council can agree on a common approach and how that common approach precisely looks like.⁷⁷ The proposed version sets out that the Directive will apply to EU companies that have more than 500 employees and an annual net worldwide turnover of more than EUR 150 million.⁷⁸ It will also apply to EU companies with more than 250 employees and a net worldwide turnover of more than EUR 40 million if these companies operate in high-risk sectors (e.g. the textiles, agriculture, or extraction of mineral resources).⁷⁹ Moreover, it will apply to third state companies that generate a net annual turnover of more than EUR 150 million within the EU, or of more than EUR 40 million, if that turnover is largely generated in risk sectors.⁸⁰ Companies that fall within the

⁷⁵ Article 1 of the Proposal for a Directive (n 21).

⁷⁶ See further eg C. Patz, ‘The EU’s Draft Corporate Sustainability Due Diligence Directive: A First Assessment’ (2022) 7 *Business and Human Rights Journal* 291; or A. Schilling-Vacaflor and A. Lenschow, ‘Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges’ (2021) 17 *Regulation & Governance* 677.

⁷⁷ Support for the proposed Directive, in its current form, could not be found in the Council on 28 February 2024.

⁷⁸ Article 2(1)(a) of the proposed Directive (n 21).

⁷⁹ Article 2(1)(b) of the proposed Directive (n 21)

⁸⁰ Article 2(2) of the proposed Directive (n 21).

scope of the directive must inter alia (1) identify actual or potential adverse impacts arising from their activities along the supply chain; (2) bring actual adverse impacts to an end and prevent and mitigate potential adverse impacts; (3) establish a complaints procedure; and (4) monitor the effectiveness of their due diligence policies annually.⁸¹ The Member States must ensure that their national implementation act of the CSDD Directive includes sanctions for non-compliance.⁸² Moreover, the CSDD Directive stipulates that companies incur civil liabilities if they do not comply with the due diligence requirements and damage has been suffered as a result.⁸³

The Deforestation Regulation seeks to ‘minimi[se] the Union’s contribution to deforestation and forest degradation worldwide’ and, in so doing, its ‘contribution to greenhouse gas emissions and global biodiversity loss’.⁸⁴ As the second largest importer of goods linked to global deforestation, the EU indeed ‘bears significant responsibility for the dangerous trend of global deforestation and forest degradation’.⁸⁵ The Deforestation Regulation concerns six main ‘forest risk commodities’: cocoa, coffee, oil palm, rubber, soya and wood.⁸⁶ In accordance with Article 3 of the Regulation, products may no longer be made available on the EU internal market or exported, unless they (a) are deforestation-free; (b) have been produced in accordance with the relevant legislation of the country of production; and (c) are covered by a due diligence statement. Operators and traders of the six covered commodities must exercise due diligence to ensure that their products comply with Article 3.⁸⁷ They must, inter alia, collect information and data about the commodity, make a risk assessment and adopt risk-mitigation measures.⁸⁸ The regulation provides for control procedures and penalties for non-compliance.⁸⁹

The CBAM seeks to align the carbon price of imported goods with the price that EU producers pay for carbon emissions under the Emissions Trading System (ETS). By levying a ‘carbon tax’ on imported goods, the EU addresses the risk of ‘carbon leakage’ that may be caused by the relocation of EU producers to countries with less stringent climate standards.⁹⁰ The CBAM

⁸¹ Article 4; 6-8 of the proposed Directive (n 21).

⁸² Article 20 of the proposed Directive (n 21).

⁸³ Article 22 of the proposed Directive (n 21).

⁸⁴ Article 1(1)(a) and (b) of the Deforestation Regulation (n 20). For these products, the Deforestation Regulation is *lex specialis* to the CSDD.

⁸⁵ G Marín Durán and J Scott, ‘Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union’ (2022) 34 *Journal of Environmental Law* 245.

⁸⁶ Article 2(1) Deforestation Regulation (n 20).

⁸⁷ Article 4(1) of the Deforestation Regulation (n 20).

⁸⁸ Articles 5, 8, 9-11 of the Deforestation Regulation (n 20).

⁸⁹ Articles 25-26 of the Deforestation Regulation.

⁹⁰ See indents 9-15 of the CBAM regulation.

regulation applies to products in six different sectors (cement, electricity, fertilisers, iron and steel, aluminium, and chemicals (specifically hydrogen)) imported into the EU from all third countries⁹¹, with the exception of Iceland, Lichtenstein, Norway and Switzerland⁹². During a transition period that lasts until 2026, importers of these products are obliged to report the total actual direct emissions. From 2026 onwards, they must pay sufficient CBAM certificates to cover these emissions.⁹³ The price of the CBAM certificate will mirror the weekly price of carbon under the ETS with a view to ensuring that importers and EU producers pay the same price for carbon emissions. Yet, importers can apply for a reduction to take account of the price for carbon paid in the country of production.⁹⁴

With the proposed CSDD Directive, the Deforestation Regulation, and the CBAM, the EU is certainly testing the boundaries of international law. Doubts have in particular been raised with regard to the compatibility of these unilateral measures with WTO law, as they are likely to be inconsistent with the non-discrimination rules of the GATT.⁹⁵ WTO members are required not to discriminate between ‘like product’ imported from third countries (most-favourite nation principle, Art. I:1 GATT) and not to discriminate between foreign and domestic ‘like’ products (national treatment obligation, Art. III:4 GATT). There are exceptions to this. WTO-inconsistent measures can *inter alia* be justified on ground of conserving exhaustible natural resources (Art. XX(g) GATT). Whether the EU’s new unilateral measures comply with the conditions for invoking such an exception, and in particular the ‘chapeau’ of Art. XX GATT, remains unclear. In case of the CBAM, further concerns have been raised with regard to the instrument’s compliance with the Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC).⁹⁶ More broadly, scholars have also criticised the extent of the EU’s new unilateral turn, which stand in contrast with EU constitutional objectives pro-

⁹¹ Article 2(1) in conjunction with Annex 1 of the CBAM Regulation (n 20).

⁹² Annex III of the CBAM regulation. These countries are either part of the EU ETS or have an emission trading system that is linked to the ETS.

⁹³ Article 4 read in conjunction with Article 6 of the CBAM Regulation (n 22).

⁹⁴ Article 9 CBAM Regulation (n 22).

⁹⁵ See eg A. Dias, A. Nosowicz and S. Seeuws, ‘EU Border Carbon Adjustment and the WTO: Hand in Hand Towards Tackling Climate Change’ (2020) 15 *Global Trade and Customs Journal* 15; S. Sato, ‘EU’s Carbon Adjustment Mechanism: Will It Achieve Its Objective(s)?’ (2022) 56 *Journal of World Trade* 383; Marín Durán and Scott (n 84) 261; or J. Bäumlér, ‘Germany’s Supply Chain Due Diligence Act: Is It Compatible with WTO Obligations?’ (2022) 25 *Zeitschrift für europarechtliche Studien* 265 (similar concerns arise for the CSDD Directive).

⁹⁶ See, eg, Art. 2(2) Paris Agreement. See further G. Marín Durán, ‘Carbon Border Adjustments: Ensuring Compatibility with the International Climate and Trade Regimes’ (2023) 72 *International & Comparative Law Quarterly* 73.

moting openness towards international law.⁹⁷ This brings us back to one of the main critiques against the promotion of sustainability norms by the EU, including through unilateral measures, in third states, which the conclusion will further engage with.

CONCLUDING OBSERVATIONS

The Union's 'new approach' for governing sustainability through trade, launched in 2022, can be seen as a new step in using FTAs to live up to its treaty brief to 'uphold and promote its values and interests' (Art. 3(5) TEU) and to 'ensure consistency between the different areas of its external action and between these and its other policies' (Art. 21(3) TEU). Indeed, as we have seen, the goal was to make FTAs 'an even bigger driver of positive change'. Since then, aspects of the 'new approach' have been implemented in the latest EU FTAs, most notably the ones with Chile and New Zealand. At the same time, the more recent TSD Chapters deploy a broader definition of 'sustainability' and may include ocean governance, the promotion of responsible business conduct, the shift towards a circular economy, deforestation-free supply chains, or gender equality. The importance of this development is not to be underestimated. By emphasising that trade and investment shall be strengthened only in accordance with broader sustainability goals, the parties underline that the objective of sustainable development in general, and environmental and labour protection specifically, form an inherent part of trade as conceived by the parties.

The need to ensure consistency between different policy areas forms a large part of the explanation to not only link sustainability and trade, but also to more clearly link internal developments to external action. In a way this is nothing new. The CCP as such developed out of the need to develop a trade policy as a result of the coming of age of the internal market. The 'new approach' to sustainable development in the external trade agenda, not only aimed to connect to the increasing role of sustainability issues in internal policies, but also went hand in hand with a number of new internal measures, such as the proposed Corporate Sustainability Due Diligence Directive (CSDD Directive), the Deforestation Regulation, and the Carbon Border Adjustment Mechanism (CBAM).

While no one could deny the importance of a link between trade and sustainability – also given the Sustainable Development Goals (SDGs) agreed upon in the UN framework⁹⁸ – the debate continues on the extent to which

⁹⁷ G. Kübek and I. Mancini, 'EU Trade Policy between Constitutional Openness and Strategic Autonomy' (2023) *European Constitutional Law Review* 518.

⁹⁸ Available at: <https://sdgs.un.org/goals>.

the EU should use its trade power in an extraterritorial manner by imposing 'its' values on other states.⁹⁹ While for the EU itself it has become virtually impossible to agree on a trade agreement that would not take sustainability issues into account, the reluctance of some third states to 'swallow' values that the EU had a long time to develop itself under far better economic conditions, remains an issue. Some situations may seem close to a violation of the principle of non-intervention under international law, and it is clear that this principle may set limits to the extent to which the EU wishes to push the export of its values.

This implies that the EU has to find a balance between the fulfilment of its mandate regarding the promotion of its values in its relations with the world and respect for one of the fundamental principles of international law.¹⁰⁰ While sustainable trade may indeed have become a universal value, the relationship between the EU and certain third countries is not always an equal one and taking differences between trading partners into account will lead to a more sustainable trade relationship.

⁹⁹ Marín Durán (n 10) at 1033.

¹⁰⁰ Cf. G. Fernández Arribas and R.A. Wessel, 'Promoting the Rule of Law through EU External Relations and the Principle of Non-Intervention under International Law', in L. Hinojosa and C. Pérez-Bernárdez (ed.), *Enhancing the Rule of Law in the EU's External Action* (Cheltenham, Edward Elgar Publishing, 2023) 41-62.

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Ramses A. Wessel, Digital Diplomacy: The EU as a Global Digital Actor, 21 *Croatian Y.B. Eur. L. & Pol'y* VII (2025).

APA 7th ed.

Wessel, R. A. (2025). Digital Diplomacy: The EU as Global Digital Actor. *Croatian Yearbook of European Law and Policy*, 21, VII-XVI.

Chicago 18th ed.

Wessel, Ramses A. 2025. "Digital Diplomacy: The EU as a Global Digital Actor." *Croatian Yearbook of European Law and Policy* 21: VII-XVI. HeinOnline.

McGill Guide 10th ed.

Ramses A. Wessel, "Digital Diplomacy: The EU as a Global Digital Actor" (2025) 21 *Croatian YB Eur L & Pol'y* VII.

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OSCOLA 4th ed.

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Editorial note

Ramses A Wessel*

DIGITAL DIPLOMACY: THE EU AS A GLOBAL DIGITAL ACTOR

In the context of rapid technological change and increasing geopolitical instability, the European Union (EU) has sought to redefine its global role through the lens of what has been termed 'digital diplomacy'. Digital diplomacy, as practised by the EU, integrates regulatory influence, cybersecurity initiatives, and artificial intelligence (AI) policy into broader external relations.

Over the past few years, the European Union has emerged as a significant actor in the global digital policy arena, utilising its regulatory power and external relations mechanisms to project values and norms beyond its borders.¹ Although not a State, the EU wields considerable normative power due to its legal personality (Article 47 TEU) and competences in areas such as trade, data protection, and internal market regulation. Articles 3(5) and 21 TEU set out the Union's external objectives: promoting peace, democracy, human rights, and the rule of law. These form the normative backbone of its digital diplomacy,² and the 2025 International Digital Strategy for the European Union expressly presents 'Digital as a core element of the EU's external action'.³

This editorial note briefly examines how legal frameworks, strategic objectives, and geopolitical shifts shape the EU's external digital engagements. Drawing from EU treaties, institutional strategies, and academic analysis, the aim is to evaluate the coherence and limitations of the

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¹ Elaine Fahey, *The EU as a Global Digital Actor: Institutionalising Global Data Protection, Trade, and Cybersecurity* (Hart 2024). In this book, Fahey concludes that the EU has firmly positioned itself as a proactive rule-maker and global norm exporter. Its approach to digital regulation – particularly in data protection – has influenced legal frameworks in many third countries, often prompting them to align with EU standards to facilitate digital trade and data flows.

² Uphold and promoting its values and interests and contributing to the protection of its citizens are even formal legal obligations for the EU on the basis of Art 3(5) TEU. In a broader sense, Art 21(1) TEU refers to the principles which inspired the Union's own creation to guide its global actions.

³ Joint Communication to the European Parliament and the Council, 'An International Digital Strategy for the European Union' JOIN(2025) 140 final.

EU's digital foreign policy. We will also assess its development through brief case studies in cybersecurity and AI governance. Given the EU's self-declared lag in technological innovation,⁴ a key question is what the EU's ambitions are in this field. It is not the objective of this short note to provide an extensive overview of this complex field. Rather, it aims to draw attention to a development that is becoming increasingly relevant: the 'externalisation' of the EU's internal regulation of the digital world as part of its 'digital diplomacy'.

While the EU's digital diplomacy is framed as a values-driven, normative project, its effectiveness in translating internal regulatory power into global influence remains contested. The EU's reliance on 'regulatory power' – rather than technological or military power – raises questions about its ability to shape global norms in a multipolar digital landscape. Can a model built on human rights, democracy, and the rule of law compete with the market-driven pragmatism of the US or the State-controlled digital authoritarianism of China? This note argues that the EU's normative ambitions, while laudable, face structural and geopolitical limitations that may ultimately constrain its global leadership.

Conceptualising EU digital diplomacy

Digital diplomacy has not clearly been defined by the EU. Any conceptualisation therefore needs to be done on the basis of descriptions provided by policy documents and by the relevant literature. It is fair to say that, in general, digital diplomacy refers to the strategic use of digital tools and policies in diplomatic practice. For the EU, this includes the promotion of a rules-based international digital order, the export of normative standards (eg, the GDPR, the AI Act), and partnerships with global actors to counter digital authoritarianism. As articulated by the European External Action Service (EEAS), the EU's digital diplomacy involves engagement with States, international organisations, and private sector stakeholders to shape global digital norms.⁵

On 6 June 2025, the European Commission adopted a Joint Communication on an International Digital Strategy for the European Union, setting out a joint vision for the EU's external action for digital.⁶ This Strategy aims to enhance tech competitiveness through cooperation, re-

⁴ See in particular the Draghi Report on EU Competitiveness <https://commission.europa.eu/topics/competitiveness/draghi-report_en> accessed 7 June 2025. One of the responses of the EU was the adoption in 2025 of the EU's 'Competitiveness Compass', Communication on a Competitiveness Compass for the EU, COM(2025) 30 final.

⁵ European External Action Service, *Digital Diplomacy for an Inclusive and Sustainable Digital Future* <www.eeas.europa.eu/eeas/digital-diplomacy_en> accessed 14 December 2025.

⁶ An International Digital Strategy for the European Union (n 3).

search, and digital trade agreements. It focuses on strengthening cybersecurity, tackling cybercrime, and securing ICT supply chains. The strategy promotes a values-based approach to global digital governance, emphasising human rights and responsible technological advancement.

Reference is made to the 2023 Council Conclusions on Digital Diplomacy.⁷ The conclusions mark an evolution towards a holistic, value-driven, and proactive digital foreign policy. While grounded in human rights and democratic values, the strategy balances these with concrete actions on security, technological leadership, and effective international engagement – positioning the EU as both a global standard-setter and a pragmatic international player. The Council conclusions phrase this as follows:

The Council [...] underlines the need for a stronger, more strategic, coherent and effective EU policy and action in global digital affairs to confirm EU engagement and leadership. This is essential to strengthen the EU's strategic autonomy, while preserving an open economy. It requires the EU and its Member States to further develop cooperation with partners around the world, bringing together and leveraging all diplomatic and policy tools, and ensuring complementarity and coherence between internal and external policies.⁸

It is interesting to see that the aims of digital diplomacy combine a need for EU global engagement and leadership, a strengthening of the EU's strategic autonomy,⁹ and at the same time an emphasis on multilateralism. The latter element is also strengthened by the EEAS:

[t]he EU approach to the digital transition is firmly anchored in its commitment to multilateralism and the promotion of universal human rights and fundamental freedoms, the rule of law and democratic principles. The EU, with the full involvement of the Member States, is developing tailored approaches to strengthen cooperation in and with the UN system, the G7, the G20, the OSCE, the OECD, the WTO, NATO, the Council of Europe and other multilateral fora, including multi-stakeholder organisations, and particularly in standardisation bodies, in which coherent and harmonised European standards play an influential role.¹⁰

Key aspects of digital diplomacy include: *Global Digital Governance* (the EU actively participates in international forums (eg, UN, G7, G20, WTO) to advocate for a rules-based digital order); *Regulatory Influence*

⁷ Council conclusions on EU Digital Diplomacy – Council conclusions approved by the Council at its meeting on 26 June 2023.

⁸ Council conclusions on EU Digital Diplomacy (n 7).

⁹ See, for instance, for a legal appraisal of strategic autonomy, Eva Kassoti and Ramses A Wessel (eds), 'Strategic Autonomy: The Legal Contours of a Security Policy Construct' (2023) 28 European Foreign Affairs Review, special issue.

¹⁰ EEAS (n 5).

(the EU's digital regulations, such as the GDPR and the AI Act, serve as global benchmarks); *Cybersecurity & Resilience* (strengthening global cybersecurity cooperation, combating cybercrime, and promoting digital rights); *Technology & Trade Agreements* (engaging in digital trade policies and partnerships with key allies like the US, Japan, and India);¹¹ *Countering Digital Authoritarianism* (promoting an open, secure, and free internet while countering disinformation and digital repression);¹² and *Capacity Building* (supporting digital development in emerging economies through initiatives like Global Gateway).¹³

All of this is to be done on the basis of what Anu Bradford has famously described as a 'Rights-Driven Regulatory Model', which focuses on safeguarding individual rights, data privacy, and claims a human-centric, and a fair digital marketplace through strong regulatory frameworks (like the GDPR and the Digital Markets Act).¹⁴ Guided by its own values (compare Article 21 TEU), the EU thus attempts to set global standards for tech regulation, emphasising democratic values and protection against both corporations and the State. Bradford contrasted this model with both the American and the Chinese models. The American 'Market-Driven Model' prioritises economic growth, innovation, and free speech. Regulation is minimal, allowing tech companies significant freedom and influence. The Chinese 'State-Driven Model' positions the State at the centre of digital governance, using technology for political and social control. The government heavily monitors and guides the tech sector, prioritising State interests and surveillance, often at the expense of individual freedoms and data privacy.

It has to be kept in mind, however, that while the EU's 'Rights-Driven Regulatory Model' is often celebrated for its emphasis on human rights, data privacy, and democratic oversight, this model also has evident flaws. First, the EU's regulatory approach risks overburdening innovation with compliance costs, potentially stifling the very technological leadership it seeks to foster. Second, the model's effectiveness depends on the willingness of third countries to adopt EU standards – a process that is far from

¹¹ See also on the sensitive link between trade and technology Charlotte Beaucillon and Sara Poli (eds), 'Special Focus on EU Strategic Autonomy and Technological Sovereignty' (2023) 8(2) *European Papers*.

¹² As part of its digital diplomacy efforts, the EU itself has also become much more active with regard to the use of social media. As argued by Zaiotti, 'The EU has recognized that digital platforms are an essential tool in contemporary world affairs for the purpose of communicating and engaging with the outside world, particularly foreign audiences'. See Ruben Zaiotti, 'The European Union and Digital Diplomacy: Projecting Global Europe in the Social Media Era' in Corneliu Bjola and Ilan Manor (eds), *The Oxford Handbook of Digital Diplomacy* (OUP 2024) 457.

¹³ See '2025 International Digital Strategy for the European Union' (n 3).

¹⁴ Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (OUP 2023).

automatic and often contingent on economic or political leverage. Finally, the EU's normative framework may struggle to address the asymmetrical power dynamics of the digital economy, where a handful of non-European tech giants dominate the market. The EU's ability to 'export' its values is thus not just a question of legal design, but of geopolitical clout.

All these elements together allow us to loosely define EU digital diplomacy as: *The strategic use of digital technologies – including the internet and social media – to strengthen the EU's global role, protect its strategic interests, advance its regulatory values (such as human rights, rule of law, and democracy), and shape international digital policy and governance, both by conducting diplomatic activities online and by addressing digital issues (like cybersecurity, internet governance, and AI) as key topics in foreign policy.*¹⁵

Cybersecurity as a diplomatic priority

One key element of digital diplomacy concerns cybersecurity. The EU lacks an explicit treaty basis for cybersecurity, necessitating a piecemeal legal approach.¹⁶ At the same time, the EU has recognised cybersecurity as a strategic priority since the 2013 Cybersecurity Strategy.¹⁷ Subsequent documents, including the 2016 Global Strategy and the 2020 EU Security Union Strategy, emphasise resilience, cooperation, and the integration of cyber elements into the Common Security and Defence Policy (CSDP). Other recent instruments also reveal the ongoing attention the EU pays to this topic: the *2016 NIS Directive*, updated in 2020 as *NIS2* (concerning measures for a high common level of security of network and information systems across the Union);¹⁸ the *2019/2025 Cybersecurity Act* (strengthening the role of the European Union Agency for Cybersecurity – ENISA, and providing for a European Cybersecurity Certification Framework – ECCF); the *2024 Cyber Resilience Act* (establishing common standards for products with digital elements, including hardware and software); and the *2024 Cyber Solidarity Act* (improving the prepared-

¹⁵ In their *Oxford Handbook of Digital Diplomacy* (n 12) 3, Bjola and Manor define digital diplomacy in a general, non-EU related, context as: 'the use of digital technologies, such as social media and other online platforms, including virtual communication channels and the metaverse, by ministries of foreign affairs (MFAs) and international organizations (IOs) to communicate with each other and the general public, conduct diplomacy, and advance their foreign policy goals'. Here, much more than in the case of the EU, the emphasis is on communication.

¹⁶ of Helena Carrapico and André Barrinha, 'The EU as a Coherent (Cyber)Security Actor?' (2018) 56 *Journal of Common Market Studies* 1259; as well as Ramses A Wessel, 'European Law and Cyberspace' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar Publishing 2021) 490.

¹⁷ European Commission Joint Communication, 'Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace' JOIN(2013) 01 final.

¹⁸ See in general on the NIS and its implementation: Theodoros Karathanasis, *Cybersecurity and EU Law: Adopting the Network and Information Security Directive* (Routledge 2024).

ness, detection, and response to cybersecurity incidents across the EU).¹⁹ Furthermore, the EU Cyber Diplomacy Toolbox, adopted in 2017, aims for the ‘further development and implementation of a common and comprehensive EU approach for cyber diplomacy at global level’.²⁰ This toolbox enables joint diplomatic responses to cyber threats, including the use of targeted sanctions. This latter aspect led, *inter alia*, to the adoption of a Council Decision on restrictive measures against cyber-attacks threatening the Union or its Member States.²¹ In 2025, further steps were taken to clarify what a cyber crisis is, what triggers a cyber crisis mechanism at Union level, and how relevant actors should interact and make the best use of available mechanisms in terms of crisis management.²²

Other publications deal with these instruments in much more detail.²³ For this editorial note, it is particularly important to highlight that, based on various instruments, the growing ambition of the EU as a global cyber actor necessitates a shift from an inward-looking approach to cyber incidents towards a more outward-looking perspective. This signifies a transition from the traditional focus on network defence and resilience-building within the EU to one that promotes and enforces norms beyond its borders. Consequently, it can be noted that, with regard to cybersecurity, the EU’s internal rule-making has proven to be inseparable from its external rule-making. While the EU and its Member States²⁴ are

¹⁹ See respectively Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) [2019] OJ L151/15; Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828 (Cyber Resilience Act) [2024] OJ L2024/2847; Regulation (EU) 2025/38 of the European Parliament and of the Council of 19 December 2024 laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents and amending Regulation (EU) 2021/694 (Cyber Solidarity Act) [2025] OJ L2025/38.

²⁰ Council Conclusions on Cyber Diplomacy (2015) 6122/1511.

²¹ Council Decision 2019/797 of 17 May 2019, concerning restrictive measures against cyber-attacks threatening the Union or its Member States; and Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

²² Commission, ‘Proposal for a Council Recommendation for an EU Blueprint on cybersecurity crisis management’ COM (2025) 66 final.

²³ See, more extensively, Yuliya Miadzvetskaya and Ramses A Wessel, ‘The Externalisation of the EU’s Cybersecurity Regime: The Cyber Diplomacy Toolbox’ (2021) 7 European Papers 413; Wessel (n 16).

²⁴ In the UN framework in particular, it is above all some Member States that participate in discussions of the UN Group of Governmental Experts (UNGGE) on non-binding normative agreements for cyberspace, or in the Open-Ended Working Group (OEWG) open to all UN members. In addition, discussions continue to take place in the Council of Europe in the framework of the Budapest Convention on Cybercrime, <www.coe.int/en/web/cybercrime/the-budapest-convention> accessed 14 December 2025.

active at the global level to influence the creation of new norms and to set global standards by aiming at a certain harmonisation of the diverging rules,²⁵ the activities are more visible in regulating the EU's own market, with a keen eye on the protection of fundamental values.

While the EU's cybersecurity strategy thus reflects a commendable shift from reactive resilience to proactive norm-setting, the fragmented legal bases for cybersecurity – spanning internal market regulations, CSDP, and external relations – raise questions about institutional coherence and accountability. Moreover, the EU's emphasis on cyber solidarity and sanctions as tools of digital diplomacy may not be sufficient to deter State-sponsored cyber threats, particularly from actors like Russia or China. The EU's normative power in cybersecurity is further tested by its dependence on US-led intelligence sharing and the limited enforcement mechanisms for its cyber diplomacy toolbox. Without stronger operational capabilities and a unified strategic vision, the EU risks being perceived as a normative actor with limited practical influence.

Artificial intelligence and normative projection

A more novel aspect of digital diplomacy is related to the EU's global role in the regulation of AI.²⁶ Here also, the story starts with the adoption of internal instruments. The 2024 AI Act is the world's first horizontal AI regulation, adopting a risk-based framework.²⁷ It prohibits high-risk uses of AI and aims to secure the EU's digital sovereignty. At the same time, the Act is not just an internal instrument, but represents an effort to set global standards by leveraging the EU's internal market power. Indeed, the AI Act has strong extraterritorial ambitions, seeking to influence AI development globally.²⁸ This is emphasised again in the above-mentioned

²⁵ As famously analysed by Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2019). See also on the divergence, Tatiana Nascimento Heim and Ramses A Wessel, 'The Various Dimensions of Cyberthreats: (In)consistencies in the Global Regulation of Cybersecurity' (2023) 40 *Anales de Derecho* 39.

²⁶ See, in general, Nathalie A Smuha, *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence* (CUP 2025).

²⁷ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L2024/1689. Among the many publications on the AI Act, see for a general overview, for instance, Federico Casolari, 'A Constitutionally Oriented Reading of the EU Artificial Intelligence Act' in Luca Mezzetti (ed), *Science, Technology and Law: Mutual Impact and Current Challenges* (Bologna Press 2024) 215.

²⁸ See, for an extensive analysis, Riccardo Fidato and Luigi Lonardo, 'The Foreign Affairs Aspects of the Artificial Intelligence Policy of the European Union' (2025) 30 *European Foreign Affairs Review* 11.

2025 International Digital Strategy, as well as in the AI Continent Action Plan, adopted in the same year:²⁹ ‘the EU will continue to engage bilaterally, regionally and multilaterally with trusted partners to attract investments in the EU, support the establishment of a global level playing field for trustworthy AI, and to promote the good governance of AI globally’.

Yet, as argued by Fidato and Lonardo, ‘The EU has a problem: it is lagging behind in technological developments on Artificial Intelligence (AI). To solve it, the EU does what it does best: it regulates’. At the same time, ‘AI touches virtually any policy, so Brussels’ strategy can hardly work internally without a corresponding diplomacy to support it: the AI Act expressly aims at providing the EU with a strong *regulatory* basis to set a new *global* standard, with a view to achieve digital sovereignty’.³⁰

The European Union has indeed progressively developed a regulatory stance on AI through various strategic initiatives. In April 2018, the European Commission published a comprehensive strategy on AI, focusing on boosting technological capacity, preparing for socio-economic disruptions, and defining an ethical framework based on EU values. This strategy already highlighted the importance of international cooperation based – as often – on the EU’s idea that it ‘can lead the way’, in this case ‘in developing and using AI for good and for all, building on its values and its strength’.³¹ The 2020 White Paper on AI systematised previous efforts and introduced the EU’s dual-track approach: aiming for ‘excellence and trust’.³² The AI Act, which entered into force on 1 August 2024, aims to deliver on the trust element and was adopted under the internal market provision Article 114 TFEU, emphasising the harmonisation of rules for AI technologies to ensure the proper functioning of the internal market.

Since the start of the current European Commission in December 2024, the EU has shifted its focus towards positioning itself as a global leader in AI capabilities and uses, as outlined in the above-mentioned Competitiveness Compass. This document emphasises AI industrial uptake, research and innovation, and boosting supercomputing capacity as key enablers of global AI leadership. In April 2025 the Commission launched the *AI Continent Action Plan*, a plan that set the path for Europe to become a global leader in AI.³³ This was followed in the autumn of 2025 by the *Apply AI* and the *AI in Science* strategies as the next steps in delivering this ambition and in positioning the EU to accelerate the use

²⁹ Commission, ‘AI Continent Action Plan’ (Communication) COM(2025) 165 final.

³⁰ Fidato and Lonardo (n 28) 11–12.

³¹ Commission, ‘Artificial Intelligence for Europe’ (Communication) COM(2018) 237 final.

³² Commission, ‘White Paper on Artificial Intelligence – A European Approach to Excellence and Trust’ [2020] COM(2020) 65 final. See also Fidato and Lonardo (n 28) at 17.

³³ Commission, ‘AI Continent Action Plan’ (Communication) COM(2025) 165 final.

of AI in key sectors and science.³⁴ Indeed, these are not just internal instruments, but together with the AI Act are meant to allow the EU to become more of an assertive and influential global rule-maker in this area.

At the same time, the AI Act's success hinges on two critical, and uncertain, factors: compliance and competitiveness. First, the EU's ability to enforce its standards beyond its borders is untested, particularly in jurisdictions where local regulations conflict with EU norms. Second, the Act's stringent requirements may disincentivise innovation within the EU, further widening the technological gap with the US and China. The EU's normative leadership in AI governance is thus a double-edged sword: it may set global benchmarks for ethical AI, but it could also marginalise European players in the global AI race. The EU must therefore strike a delicate balance between regulatory rigour and technological pragmatism if it is to achieve its dual goals of ethical leadership and digital sovereignty.

Conclusion: challenges and limitations

Digital diplomacy has become a core component of the EU's external actions, reflecting its broader ambition to be a normative power in global digital governance. The governance and regulation of digital issues are developing strongly, partly due to their close relation to global cooperation in other areas, such as trade. Irrespective of the patchwork of soft- and hard-law instruments and cross-sectoral strategies, rather than a coherent, unified legal framework, digital diplomacy has emerged as a central component of the EU's external action. The governance and regulation of the digital sphere is evolving rapidly, driven in part by its close interconnection with other domains of global cooperation, such as trade.

Furthermore, the evolution of the EU's regulatory digital framework is increasingly characterised by what may be termed the 'externalisation' of its internal digital regime. The growing number of threats originating from actors in third countries and the risks connected to the misuse of AI have compelled the integration of digital elements into the Union's external policies, including its foreign and security policy.

While the EU has registered important successes – particularly in establishing global regulatory standards – it must address institutional and legal fragmentation if it is to fulfil its full potential. As digital threats continue to evolve and strategic competition intensifies, the Union may find it necessary to recalibrate some of its foundational principles to ensure greater agility and coherence in its external digital policies. Yet, as

³⁴ Commission, 'Apply AI Strategy' (Communication) COM(2025) 723 final; and Commission, 'A European Strategy for Artificial Intelligence in Science: Paving the way for the Resource for AI Science in Europe (RAISE)' (Communication) COM(2025) 724 final.

Ursula Von der Leyen stated in her State of the Union speech in September 2025: ‘Whether on environmental or digital regulation. We set our own standards. We set our own regulations. Europe will always decide for itself’.³⁵ That starting point seems important for the Union to continue playing the normative role that it has chosen for itself.

It is clear that digital diplomacy has now become an integral part of the EU’s external relations machinery. The Union aspires to play a leading role in shaping technology governance, including through global standard-setting. Cybersecurity and artificial intelligence serve as notable examples of its activity in this domain. While the EU’s traditional reliance on regulation is not the only factor causing its inability to lead in technological innovation and to act swiftly and effectively,³⁶ the developments seen in 2025 do reveal a certain change of policy and perception. The coming years will show whether the EU is capable of achieving its digital ambitions, and its future success seems to depend on addressing three key challenges. First, the EU must bridge the gap between regulatory power and technological leadership. Without a robust industrial base in digital technologies, the EU’s normative influence risks being perceived as hollow. Second, the EU needs to reconcile its multilateral aspirations with geopolitical realities. In a world where digital governance is increasingly shaped by US-China rivalry, the EU’s commitment to multilateralism may be tested by the need for strategic alliances and pragmatic compromises. Finally, the EU must demonstrate agility in adapting its digital policies to rapidly evolving threats, from AI-driven disinformation to cyber warfare. The EU’s normative model is not inherently flawed, but its effectiveness will ultimately depend on the Union’s ability to translate its values into action – and to do so with the speed and flexibility that the digital age demands.



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³⁵ 2025 State of the Union Address by President von der Leyen, 9 September 2025.

³⁶ Bradford argued that the relation between digital regulation and technological progress is considerably more complex than what is usually seen in public debates. The entire legal and technological ecosystem in Europe is simply different from the one in, for instance, the US. See Anu Bradford, ‘The False Choice Between Digital Regulation and Innovation’ (2024), 118(2) Northwestern University Law Review.