Towards Better Regulatory Governance of Transatlantic Trade: The Case for Labour and Environmental Standards in the EU-Canada Partnership

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ABSTRACT

This thesis analyses the effectiveness of the regulatory governance objectives concerning labour and environmental standards in the EU-Canada partnership. The topic has emerged out of my interest in examining the EU's commitment to the 'trade and sustainable development' agenda that the Union has reiterated for over a decade since the *Global Europe Strategy* communication of 2006 to the *Open, Sustainable and Assertive Trade Policy* communication of 2021.

The Comprehensive and Economic Trade Agreement (CETA) between the EU and Canada contains provisions on sustainable development dedicated to labour and environmental standards. The text of CETA suggests that the EU and Canada seek to promote the provisions and standards as part of regulatory governance i.e., based on the principles of transparency, accountability, efficiency, adaptability, and coherence. This makes the agreement stand apart from other EU free trade agreements (FTAs) that contain provisions on labour and environment. Even for Canada, CETA's commitments stand apart from those undertaken in other FTAs.

CETA also represents the closest partnership in the transatlantic sphere in the aftermath of the failure of the EU-US negotiations on the Transatlantic Trade and Investment Partnership (TTIP). In Canada, the EU has a trade partner it considers 'like-minded'. Therefore, this thesis examines 'trade and sustainable development' in a recalibrated transatlantic area where Canada and the EU are primary trade partners. It draws inferences on the whether the extensive coverage of the trade-labour-environment linkage in CETA promotes better regulatory governance in transatlantic and global trade.

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LIST OF ABBREVIATIONS

Abbreviation	Full Title
AB	Appellate Body
CCP	Common Commercial Policy
CDoR	Cabinet Directive on Regulation
CELA	Canadian Environmental Law Association
CETA	Comprehensive and Economic Trade Agreement
CFTA	Canada Free Trade Agreement
CJEU	Court of Justice of the European Union
CSF	Civil Society Forum
CSOs	Civil Society Organisations
CSR	Corporate Social Responsibility
CTEO	Chief Trade Enforcement Officer
DAGs	Domestic Advisory Groups
DG	Directorate-General
EC	European Communities
EES	European Employment Strategy
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
EUSFTA	EU-Singapore Free Trade Agreement
EUTIP	EU Trade and Investment Policy
FCEC	Framework for Commercial and Economic Cooperation
FIT	Feed in Tariff
FLEGT	Forest Law Enforcement Governance and Trade Regulation
FRCT	Framework Agreement on Regulatory Cooperation and Transparency
FSDS	Federal Sustainable Development Strategy
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organisms
GRP	Good Regulatory Practices
GSP	Generalised Scheme of Preferences
GVCs	Global Value Chains
IA	Impact Assessment
IAA	Impact Assessment Act
ICS	Investment Court System
ICT	Information and Communications Technology

IGAs	Intergovernmental Agreements
ILO	International Labour Organization
ISDS	Investor State Dispute Settlement
MDGs	Millennium Development Goals
MEAs	Multilateral Environmental Agreements
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OMC	Open Method of Coordination
POGG	Peace, Order and Good Government
RBC	Responsible Business Conduct
RCC	Regulatory Cooperation Council
RCF	Regulatory Cooperation Forum
SDGs	Sustainable Development Goals
SMEs	Small and Medium Enterprises
SOMO	Centre for Research on Multinational Corporations
SPA	Strategic Partnership Agreement
SPS	Sanitary and Phytosanitary
TBCS	Treasury Board of Canada Secretariat
TBT	Technical Barriers to Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNCs	Transnational Corporations
TSD	Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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CHAPTER 1: INTRODUCTION

1. Research Context

The European Union (EU) has self-subscribed to advancing sustainable development through its trade policy.[1] The Union perceives that it has a responsibility in the *governance of globalisation*[2] to ensure that it functions 'within a moral framework' anchored in sustainable development.[3] In this respect, the EU derives its constitutional mandate from the Treaty on the European Union (TEU), Article 3(5), 21(2)(e), 21(2)(h) and the Treaty on the Functioning of the European Union (TFEU), Articles 206 and 207(1). In line with the priorities identified by the United Nations (UN) and the International Labour Organization (ILO), the EU identifies social justice, human rights, and labour and environmental standards as the four components of sustainable development.[4] The instruments that seek to implement sustainable development objectives are primarily of two types: unilateral special incentives (such as the Generalised Scheme of Preferences (GSP) for developing countries, GSP+ for low and lower-middle income countries and

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[1] Commission, *Trade for All* (European Commission 2015) <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> ; Bruno Boissière, 'The EU Sustainable Development Discourse' (2009) 352 L'Europe en Formation 23, 31.

[2] 'The Laeken Declaration', Presidency Conclusions of European Council Meeting, Annexure I, 14-15 December 2001 <https://www.consilium.europa.eu/media/20950/68827.pdf> accessed 22 July 2022; Jeff Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 306 (emphasis added).

[3] ibid.

[4] Diane F. Frey and Gillian MacNaughton, 'A Human Rights Lens on Full Employment and Decent Work in the 2030 Sustainable Development Agenda' [2016] Journal of Workplace Rights 1; European Commission, 'Sustainable Development' <https://ec.europa.eu/trade/policy/policy-making/sustainable-development/index_en.htm#_trade-agreements> accessed 22 July 2022.

the Everything But Arms arrangement for least developed countries[5] and free trade agreements (FTAs).

The FTAs entered into by the EU are with countries at different stages of development and now reflect a shared intention to further the nexus between trade and labour and environmental standards.[6] The EU refers to such FTAs, beginning with the 2011 agreement with Korea[7] and the ones negotiated thereafter, as 'new generation' FTAs that 'can […] spur […] sustainable development and prepare the ground for future global trade rounds.'[8] These agreements cover labour and environmental standards under a set of trade and sustainable development provisions (TSD provisions) incorporated as 'Trade and Sustainable Development' chapters (TSD chapters). The EU has entered into such 'new generation' FTAs with diverse countries including Canada, Colombia, Peru, Ecuador, Singapore, South Korea, and Vietnam.[9]

This thesis investigates the progress on labour and environmental standards in one such FTA between the EU and its Member States and Canada namely, the Comprehensive and Economic Trade Agreement (CETA). The motivation behind

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[5] Commission, 'Generalised Scheme of Preferences' <http://ec.europa.eu/environment/integration/trade_en.htm> accessed 22 July 2022.

[6] Commission, 'Commission Unveils New Approach to Trade Agreements to Promote Green and Just Growth' (*2022*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3921> accessed 22 July 2022.

[7] Free Trade Agreement between the European Union and its Member States and the Republic of Korea, [2011] OJ L127/6.

[8] Commission, 'Report From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions On Implementation Of Free Trade Agreements' COM (2017) 654 final 7; Commission, 'Global Europe: Competing in the World', (Commission Staff Working Document) COM(2006) 567 final 16.

[9] Commission, 'Implementation of Free Trade Agreements' (2019) <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-455-F1-EN-MAIN-PART-1.PDF> 9-14.

choosing the said agreement is its potential for strengthening the trade-labour-environment linkage as detailed in Chapter 2 of this thesis. For this chapter, it is imperative to underline that CETA, as an EU agreement with an advanced G7 economy, is a unique engagement with labour and environmental standards in a trading partnership. On the one hand, the TSD provisions of CETA pursues regulatory governance objectives akin to all EU FTAs such as:

(i) Establishing structures to monitor the implementation of TSD chapters (Chapters 21-24, CETA)
(ii) Utilising these structures as forums for engaging state and non-state actors in their governance
(iii) Identifying opportunities for regulatory cooperation on labour and environmental standards[10]

On the other, whether the EU-Canada partnership invigorates the trade-labour-environment linkage and renders more sophistication to its governance requires further analysis.

The fundamental reason for the presence of TSD provisions in CETA is that the EU's Treaties establish a constitutional obligation i.e., under Article 21, TFEU for the Union to ensure that sustainable development is an integral objective of its trade policy. This is an objective shared by Canada. Running parallel is 'a global trend for trade agreements to address 'behind-the-border' policies that impact on bilateral trade and investment flows' that have been difficult to address within the system of the World Trade Organization (WTO).[11] The adoption of the

[10] Patricia Augier and others, 'Non-Tariff Measures: Regional Cooperation and Competitiveness Through Regulatory Governance' in Michael Gasiorek (ed), *The Arab Spring: Implications for Economic Integration* (CEPR 2013) 132.
[11] Bernard Hoekman, 'Deep and Comprehensive Free Trade Agreements' EUI Working Papers RCAS 2016/29, 2.

United Nations (UN) 2030 Agenda for Sustainable Development has only amplified the need for channelling international trade in a way that contributes to labour and environmental welfare.[12] This is evident from the European Commission's 'new strategy' to define the EU's trade policy objectives.[13] It emphasises the need to reform the WTO in line with the UN Sustainable Development Goals (SDGs) and the ILO's related Decent Work Agenda.[14]

Under CETA, the parties have stated that large scale liberalisation will increase competitiveness of producers in the EU and Canada but it does not mean a waiver of its sustainable development commitments on labour and environmental standards.[15] The EU's discourse on trade liberalisation continues to be tied to the narrative of sustainable development, but it depends on how effective the mechanisms for the regulatory governance of CETA are.

2. Research Questions

Against the backdrop of transatlantic developments (detailed in Chapter 2 of this thesis), CETA represents a move to reduce dependence on the US economy for Canada as well as the EU.[16] The agreement is the only FTA finalised between G7 members,

[12] United Nations, 'Trade' <https://sdgs.un.org/topics/trade> accessed 22 July 2022.
[13] Commission, 'An Open, Sustainable and Assertive Trade Policy' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_645> accessed 22 July 2022.
[14] Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM(2021) 66 final 2, 12; 'Annex to Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM(2021) 66 final ANNEX 2, 5.
[15] Commission, 'Standards and Values in CETA' (2017) <https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156061.pdf> accessed 22 July 2022.
[16] Amy Verdun, 'Canada–EU and Europe Relations' in Robert W. Murray and Paul Gecelovsky (eds), *The Palgrave Handbook of Canada in International Affairs* (Springer 2021) 683.

a bloc that has struggled to formulate a common response in the sphere of international trade and related issues in recent times.[17] Additionally, Brexit is an internal factor driving the EU to seek closer cooperation with Canada.[18] This is because the Union continues to be bound by a constitutional mandate of undertaking a values-based trade policy but the economic and diplomatic capacities that provide it the support to do so are put to test after the UK's departure from the Union.[19] If the EU's FTAs with third countries can include CETA-like provisions on labour and environment, it 'could potentially increase their economic weight'[20] at the global level. Furthermore, the multilateral trading system does not fully address the trade-labour-environment linkage. The challenges facing the WTO in this respect are coupled with transnational demand for the integration of sustainable development in trade policies. These contentions in respect of the WTO are supported by the discussion that follows in Chapter 3 of this thesis.

This research is thus informed by the geopolitical undertones marking CETA together with CETA's relevance as a vehicle for furthering the trade-labour-environment linkage. Accordingly, CETA's conception as an object of research under this thesis is embedded in the objective of understanding the way the EU and Canada seek to implement the trade-labour-environment

[17] Davide Cichero, 'The G7 and International Trade' (Istituto Affari Internazionali (IAI) 2018) 2.
[18] Annegret Bendiek and others, 'EU-Canada Relations on the Rise' (2018) German Institute for International and Security Affairs Working Paper No. 3 <https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/1_WP_Bendiek_etal_EU-Canada_relations_final_01.pdf> accessed 22 July 2022.
[19] Joris Larik, 'EU External Relations Law and Brexit: "When Pluto Was a Planet"' (2020) 4 Europe and the World: A Law Review 3, 16.
[20] Bendiek and others (n 18).

linkage (i) *beyond* the developments achieved so far under the WTO system and (ii) *differently* at the bilateral level.

The overarching question posed by this thesis is:

> *Does the EU-Canada partnership lead to better regulatory governance of labour and environmental standards in transatlantic trade?*

The lens of regulatory governance is utilised to analyse the approach of developed economies such as Canada and the EU that aim to deliver on the shared, globally recognised environmental and labour goals alongside trade objectives. Since regulatory governance was conceived by developed countries, the EU and Canada also intend to promote their frameworks such as 'better regulation' and 'good governance' at the global level.[21] For instance, in the proposed European Green Deal the Commission provides an example of its better regulation toolbox as 'a solid basis' for mainstreaming sustainability in inter alia its trade policy.[22] The internal frameworks of the EU and Canada and the extent to which they shape regulatory governance in trade policy is analysed in Chapters 4 and 5 of this thesis.

In CETA, a combination of provisions on regulatory cooperation and TSD lay down the institutional mechanisms,[23] requirements for impact assessments[24] and obligations on the governance principles.[25] Thus, the agreement employs international regulatory governance in the implementation of labour and

[21] Yin-Fang Zhang, 'Towards Better Regulatory Governance?' (2010) 12 Public Management Review 873, 874, 876.
[22] Commission, 'The European Green Deal' COM(2019) 640 final 19.
[23] CETA, art 22.4.
[24] CETA, art 21.4 and art 22.1.
[25] CETA, art 21.2.4(c).

environmental standards. The Organisation for Economic Co-operation and Development (OECD) has defined international regulatory governance as a concept which covers the: (i) institutional design and implementation of instruments (ii) methods for assessing the impact of regulation and (iii) governance principles such as transparency, accountability, efficiency, adaptability and coherence to be followed in government administrative procedures.[26] Therefore, whether adopted internally or as a means to govern international economic relations, regulatory governance is not just about *what* it applies to (such as the fields of labour and environmental laws) but *how* it is applied.

The EU-Canada partnership on the trade-labour-environment linkage is a form of *international cooperation* that is marked by *structural constraints and opportunities* as affected by policy and institutional frameworks and the *strategic choices of the actors involved*.[27] Under regulatory governance theory states do not employ direct interventionism as a technique to define public policy objectives and regulate markets. Instead, they 'steer' the behaviour of public and private actors.[28] Therefore, we need to make an assessment along these parameters to draw conclusions on regulatory governance in the transatlantic. With this context, these parameters are conceived along three interconnected factors affecting international cooperation:[29]

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[26] OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD 2002) 16, 29-30, 43, 74, 150.
[27] Kate O'Neill, Jörg Balsiger and Stacy D. VanDeveer, 'Actors, Norms and Impact: Recent International Cooperation Theory and the Influence of the Agent-Structure Debate' (2004) 14 Annual Review of Political Science 149, 163 (emphasis added).
[28] Martin Loughlin and Colin Scott, 'The Regulatory State' in Patrick Dunleavy and others (eds), *Developments in British Politics* (Macmillan Press 1997) 205.
[29] Robert O Keohane, 'International Institutions: Two Approaches' (1988) 32 International Studies Quarterly 379, 380-383 (emphais added).

international - referring to arrangements under international law, *internal* - referring to the respective arrangements under EU and Canadian laws and *bilateral* - referring to the arrangements in EU-Canada partnership. Accordingly, the three sub-questions sought to be resolved in this thesis are set out as follows in Figure 1.A below:

Factors Affecting International Cooperation ▼		
International	Internal	Bilateral
Sub-Questions ▼		
What are the frameworks under international law governing the trade-labour-environment linkage?	What are the respective EU and Canadian approaches to regulatory governance and sustainable development in trade?	To what extent are the EU and Canada able to promote labour and environmental standards through CETA?

Figure 1.A: The Sub-questions Analysed in this Thesis Based on the Factors Affecting EU-Canada Partnership on the Trade-Labour-Environment Nexus

3. The Relevance of this Thesis

This thesis is my core contribution as a Marie Skłodowska-Curie Actions fellow in the EU Trade and Investment Policy – International Training Network (EUTIP) funded by the Horizon

2020 Framework Programme of the EU.[30] EUTIP was conceived to expand the knowledge base on EU law and trade policy. The research conducted herein is in accordance with EUTIP Working Packages 1 and 2 concerned with the themes of Governance and Regulation.[31] Therefore, in line with the objectives of EUTIP, this thesis combines the themes under 'regulatory governance' and presents research findings in the following respects:

3.1. Assessing the Actorness of the EU in the Trade-Labour-Environment Linkage

The inclusion of TSD provisions in CETA is on account of the EU's trade and external policies. The EU's objectives are two pronged, first it seeks to promote trade liberalisation by underscoring sustainable development as an underlying principle to foster globalisation. The second objective is to utilise FTAs to promote its own model of regulatory governance in partner countries.[32] Therefore, even in the context of CETA it is the 'actorness'[33] of the EU that plays a leading role in advancing the 'trade and sustainable development' agenda.

Focussing on the EU's actorness helps assess three key questions. First, what are the interlinkages between the internal market and the external factors influencing it?[34] Second, what

[30] EU Horizon 2020 Marie Skłodowska-Curie Grant Agreement No 721916; 'EUTIP' <https://eutip.eu/> accessed 22 July 2022.
[31] EUTIP, 'Working Packages' <https://eutip.eu/working-packages/> accessed 22 July 2022.
[32] Andrea C Bianculli, 'Regulatory Governance Regimes and Interregionalism: Exploring the Dynamics of EU-Mercosur Negotiations' (2016) 41 Canadian Journal of Latin American and Caribbean Studies 173, 174. Stella Ladi and Dimitris Tsarouhas, 'International Diffusion of Regulatory Governance: EU Actorness in Public Procurement' (2017) 11 Regulation & Governance 388.
[33] For an overview of the EU's actorness across all dimensions of its external relations see Edith Drieskens, 'Golden or Gilded Jubilee? A Research Agenda for Actorness' (2017) 24 Journal of European Public Policy 1534, 1538-1540.
[34] Sanne Brasch Kristensen and Tamara Hoch Jovanovic, 'Introduction - Understanding EU Actorness Today: The Role of Crisis on the Division

does the EU's actorness mean 'in an international system that is transitioning from US dominance and unipolarity towards multipolarity'?[35] Third, how does the EU intend to utilise its most comprehensive (of its own accord)[36] transatlantic trade agreement signed with Canada to promote the trade-labour-environment linkage globally? In other words, whether the EU's global actorness[37] results in any diffusion of European regulatory governance through CETA.

The EU's actorness can be perceived both *outside-in* and *inside-out*. The *outside-in* view sees the EU's legal system as 'connected to, and embedded in, global regimes'.[38] It examines how the EU frames regulatory governance by seeking '[…] convergence in the global legal order […] beyond its own law-making'.[39] In the case of labour standards, the EU works with the ILO to promote international labour standards among its external trading partners and at the global level.[40] Internally,

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Between EU's Internal and External Actions and Practices' (2015) 38 International Journal of Public Administration 833, 834; Eugénia da Conceição-Heldt and Sophie Meunier, 'Speaking with a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance' (2014) 21 Journal of European Public Policy 961.

[35] Robert Falkner, 'Rethinking Europe's External Relations in an Age of Global Turmoil: An Introduction' (2017) 54 International Politics 389, 396.

[36] Commission, *Guide to the Comprehensive Economic and Trade Agreement* (European Union 2017) 21; Commission, 'CETA – Summary of the Final Negotiating Results' (2016) <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 22 July 2022.

[37] Julian Kitipov, 'External Perceptions of the European Union as a Global Actor' (2011) 23 European Journal of Development Research 507.

[38] Falkner (n 35) 395.

[39] Elaine Fahey, 'Introduction: On Framing Convergence of the EU with the Global Legal Order' in Elaine Fahey (ed), *Framing Convergence with the Global Legal Order* (Hart 2020) 13.

[40] Tonia Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO' in Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 214; In its trade relations, the EU promotes convergence with international labour standards see Aakriti Bhardwaj and Jeff Kenner, 'Labour Standards in EU-Mexico Trade: An Assessment along Two Narratives of Convergence' in Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020) 221.

ILO standards form the basis for policies, laws and collective agreements adopted in the member states and at the EU level.[41] In addition to the ILO's eight fundamental conventions,[42] the EU repeatedly encourages and expects member states to ratify other ILO conventions as seen in the instances of the Maritime Labour Convention[43] and the Domestic Workers Convention.[44] In the sphere of environmental standards, the EU calls itself a leading proponent of multilateral environmental agreements (MEAs)[45] and a front runner on climate change by highlighting its role in the adoption of the Paris Agreement.[46]

Viewed *inside-out*, the EU is inspired by its internal identity, values[47] and institutional structure which shape its approach to pursuing European interests and values at the global level.[48] EU trade policy is the external dimension of the EU's internal

[41] Examined in ch 4 of this thesis. For an overview see Giuseppe Casale, 'International Labour Standards and EU Labour Law' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 86-91.
[42] Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Equal Remuneration Convention, 1951 (No. 100), Abolition of Forced Labour Convention, 1957 (No. 105), Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182).
[43] European Union, 'Ensuring EU Countries Comply With and Enforce the Maritime Labour Convention' (10 August 2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:3204_1> accessed 22 July 2022.
[44] Commission, 'European Alliance Calls on EU Governments to Implement Convention on Domestic Workers' (*ec.europa.eu*, 28 June 2021) <https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=10037> accessed 22 July 2022.
[45] Commission, 'Multilateral Environmental Agreements' <https://ec.europa.eu/environment/international_issues/agreements_en.htm> accessed 22 July 2022.
[46] Claire Dupont, Sebastian Oberthür and Katja Biedenkopf, 'Climate Change: Adapting to Evolving Internal and External Dynamics' in Camilla Adelle, Katja Biedenkopf and Diarmuid Torney (eds), *European Union External Environmental Policy* (Palgrave Macmillan 2018) 105.
[47] TEU, arts 2 and 3(5).
[48] Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 Common Market Law Review 553; Falkner (n 35).

market.[49] The EU internal market is directed at improving inter alia labour and environmental standards.[50] In this connection, the EU and its members states undertake to observe the obligations laid down in the Charter of Fundamental Rights. In subjecting EU FTAs to 'higher-order principles'[51] (such as sustainable development), the Lisbon Treaty[52] lays the ground for the externalisation of the Union's normative agenda.[53] The EU's social (Title X, TFEU) and environmental (Title XX, TFEU) policies have an external dimension that intends to incorporate labour[54] and environment and climate change[55] objectives in the EU's economic relations with third countries.

3.2. EU-Canada Relations in the 'Transatlantic Area'

This thesis aims to highlight the evolution in the EU's international trade policy in the 'transatlantic area' conveying the meaning of this term to EU-US, EU-Mexico and EU-Canada trade relations.[56] The EU is in distinct phases of economic and

[49] Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (n 14); European Commission, *Trade for All* (n 1).
[50] Opinion of the European Economic and Social Committee on 'The Social and Environmental Dimension of the Internal Market' [2009] OJ C182/1.
[51] Franscesco Duina, 'Why the Excitement? Values, Identities, and the Politicization of EU Trade Policy with North America' (2019) 26 Journal of European Public Policy 1866, 1868.
[52] [2007] OJ C306/1.
[53] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 Journal of Common Market Studies 235; Ian Manners, 'The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective' [2009] European Foreign Affairs Review 785.
[54] Jan Orbie and Olufemi Babarinde, 'The Social Dimension of Globalization and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility' (2008) 30 Journal of European Integration: Policy Coherence and EU Development Policy 459.
[55] Kai Schulze and Jale Tosun, 'External Dimensions of European Environmental Policy: An Analysis of Environmental Treaty Ratification by Third States' (2013) 52 European Journal of Political Research 581.
[56] Gagliani Gabriele, 'Recent Evolution in International Trade in the Transatlantic Area' (2019) 53 Journal of World Trade 567; Franscesco Duina, 'North America and the Transatlantic Area' in Tanja A. Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (OUP 2016) 135; Ivan Vejvoda, 'The Transatlantic Relationship' [2015] Horizons: Journal of International Relations and Sustainable Development 96, 102.

regulatory cooperation with its transatlantic trade partners. With the US, the EU was negotiating the Transatlantic Trade and Investment Partnership (TTIP) prior to the election of Donald Trump as US President in 2016. With Mexico, the EU is currently in the process of modernising the trade pillar of the Global Agreement signed in 2000.[57] Once concluded the new EU-Mexico FTA will also contain TSD provisions covering labour and environmental standards.[58] With Canada, the EU's relations stand 'considerably strengthened in the last few years'.[59] They have adopted an overarching political agreement i.e., the EU-Canada Strategic Partnership Agreement (SPA). CETA is the trade and investment pillar of the SPA.[60] The SPA and CETA are provisionally in force since April 2017[61] and September 2017,[62] respectively as they await ratification by all EU member states. At the time of writing EU-Canada relations are the most developed in the transatlantic area. For this reason, this thesis looks beyond the EU-US relations and into the EU-Canada partnership.

Canada has been referring to its international relations with the EU as transatlantic for over two decades, during which it has sought to establish an independent transatlantic partnership

[57] The Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States and the United Mexican States [2000] OJ L276/45 (the Global Agreement).
[58] Bhardwaj and Kenner (n 40).
[59] European Parliament, 'Transatlantic Relations: The USA and Canada' (2020) <https://www.europarl.europa.eu/factsheets/en/sheet/174/transatlantic-relations-the-usa-and-canada> accessed 22 July 2022.
[60] ibid.
[61] Council Decision on the Provisional Application of the Strategic Partnership Agreement between the EU and Canada [2016] OJ L329/43.
[62] Commission, 'EU-Canada Trade Agreement Enters into Force' (2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3121> accessed 22 July 2022.

with the EU.[63] This applies inter alia in the context of trade as well as seeking alignment across different areas of regulation.[64] This thesis investigates how Canada views its partnership with the EU to avoid the 'EU-centric' understanding of 'the how' and 'the why' of regulatory governance as an objective of trade policy.[65] This also helps in circumventing the potential asymmetry arising from a formulation of a research premise that does not consider 'the other' in analysing an EU FTA.

3.3. Examining the Role of Institutions in Regulatory Governance

Regulatory frameworks within the EU and Canada, established in line with constitutional or international obligations, are embedded in the *institutional context* defined at the state level.[66] Thus the EU and Canadian institutions implement their independent approaches to trade policy, labour and environmental policies and laws, rules on transparency and accountability as well as the norm of sustainable development. In institutionalising the organisational and economic relations between actors, they are conductors of policies in these areas.

[63] Peter Berg and Gerald Schmitz, 'Beyond NAFTA to a Canada-Europe Transatlantic Marketplace: Issues and Prospects' (*Government of Canada*, 1998) <https://publications.gc.ca/Pilot/LoPBdP/BP/prb989-e.htm> accessed 22 July 2022.
[64] See generally Evan H Potter, *Trans-Atlantic Partners: Canadian Approaches to the European Union* (McGill-Queen's University Press 1999); Government of Canada, 'An Economic Agreement with Canada - Expanding Transatlantic Opportunities' (2009) <https://publications.gc.ca/collections/collection_2010/maeci-dfait/FR5-39-2009-eng.pdf> accessed 22 July 2022; Government of Canada, 'Baird and Ashton Conclude Annual Transatlantic Dialogue' (2012) <https://www.canada.ca/en/news/archive/2012/04/baird-ashton-conclude-annual-transatlantic-dialogue.html> accessed 22 July 2022.
[65] See ch 5 of this thesis.
[66] Zhang (n 21) 876.

It is known that states depend on 'domestic institutional roots'[67] to shape the global regulatory agenda.[68] The constitutional allocation of powers in the EU and Canadian legal systems defines which level of government is entrusted to act and what the executive and legislative powers are in specific policy areas. The first aspect comprises the 'vertical' perspective on the transfer of power upwards and downwards along the levels of regulatory governance. This means from the sub-national and national levels, to the supranational level and vice versa in respect of the EU;[69] and to and from the provincial and territorial levels in respect of the Canadian federation.[70] The second aspect comprises the 'horizontal' perspective focussed on the institutional foundations that help in the conduct of foreign relations[71] and interact with the vertical arrangements in the EU[72] and Canadian systems.[73] In this relation, EU supranationalism and Canadian federalism need further examination to assess the employment of executive functions covering trade, labour, and environment policies in external relations.

[67] David Bach, 'Varieties of Cooperation: The Domestic Institutional Roots of Global Governance' (2010) 36 Review of International Studies 561, 570.
[68] Kenneth W. Abbott, 'Engaging the Public and the Private in Global Sustainability Governance' (2012) 88 International Affairs 543, 546.
[69] Geert De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 109; Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart 2014) 31, 77.
[70] John Quinn, 'Federalism and Foreign Economic Relations' (1988) 10 Canada-United States Law Journal 197.
[71] Jenny S Martinez, 'The Constitutional Allocation of Executive And Legislative Power Over Foreign Relations: A Survey', *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 97.
[72] George Tsebelis and Geoffrey Garrett, 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union' (2001) 55 International Organization 357.
[73] Robert Csehi, 'Horizontal Coordination in Federal Political Systems – Non-Centralization in the European Union and Canada Compared' (2017) 24 Journal of European Public Policy 562.

It is true that the legislature and the judiciary complete the institutional elements of a regulatory state.[74] The Commission is responsible for ensuring the sustainable development and global competitiveness of the EU's internal market.[75] However, the executive role of the Commission is central to the conduct of the EU's external trade policy. In this direction, the Commission engages member states and is responsible for ensuring transparency with them in the implementation of FTAs.[76] The Commission must maintain transparency at the horizontal level by keeping the Council and the Parliament informed on trade negotiations (Article 207, TFEU), and cannot conclude FTAs without obtaining their consent (Article 218, TFEU). Similarly in Canada, the federal executive (represented by Global Affairs Canada) negotiates FTAs and carries out consultations with sub-national provincial governments.[77] The involvement of the Canadian Parliament in the negotiations is 'fairly limited' with The Standing Committee on International Trade in its House of Commons and the Standing Committee on International Affairs and International Trade in its Senate exercising oversight.[78] The inquiry into rulemaking as shaped by constitutional values and the involvement of executive institutions in the EU and Canada helps us to assess convergences and divergences in their approaches. Based on this, we can identify how regulatory governance is being

[74] Zhang (n 21) 876.
[75] European Parliament, 'Report on Delivering a Single Market to Consumers and Citizens' (2010) <https://www.europarl.europa.eu/doceo/document/A-7-2010-0132_EN.pdf> see paragraph 89.
[76] Axel Marx and Guillaume Van der Loo, 'Transparency in EU Trade Policy: A Comprehensive Assessment of Current Achievements' (2021) 9 Politics and Governance 261.
[77] Bart Kerremans, Johan Adriaensen and Evelyn Coremans, *Parliamentary Scrutiny of Trade Policies Across the Western World* (European Parliament 2019) 33.
[78] ibid.

internationalised[79] in EU-Canada relations, whether there is a preference for 'top-down' and 'bottom-up' vertical convergence or horizontal diffusion based on either EU or Canadian approaches.

3.4. Highlighting the Role of Other Actors in the Regulatory Governance of 'Trade and Sustainable Development'

The examination of institutionalisation in the policy areas of trade, labour and environment is central to the assessment of regulatory governance as a *strategy*.[80] According to this view, we can analyse how actors 'govern and manipulate the design of institutions and mechanisms in order to shape choice and preferences'.[81] A chief characteristic of these institutions and mechanisms is the 'decentralization of power and the creation of decentralized, informal, and collaborative systems of governance'.[82] Therefore, there are two outcomes of the process of institutionalisation. The first outcome is intergovernmentalism wherein governments are the only actors.[83] The second outcome is transnational institutionalism[84] which is state-led but operates 'as part of a broader web of policies that are implemented by a more diverse range of

[79] OECD (n 26) 3.
[80] Peer Zumbansen, 'Governance: An Interdisciplinary Perspective' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012) 8 (emphasis added).
[81] ibid.
[82] David Levi-Faur (n 80).
[83] Tsebelis and Garrett (n 72) 386.
[84] Micheline Ishay, 'Promoting Human Rights in the Era of Globalization and Interventions: The Changing Spaces of Struggle' (2004) 1 Globalizations 181, 187; Arno Kourula and others, 'New Roles of Government in the Governance of Business Conduct: Implications for Management and Organizational Research' (2019) 40 Organization Studies 1101, 1113.

actors'.[85] The Commission on the EU's side[86] as well as Global Affairs Canada[87] carry out consultations and engage with private actors in the areas of labour, environmental and trade policies. Furthermore, private actors play a role in shaping the respective regulatory cultures[88] which underpin regulatory institutions. In this connection, this thesis unpacks the institutional developments and the methods of implementation of regulatory policies for sustainable development in trade in the EU and Canada.

This thesis explores the role accorded to non-state actors i.e., business and civil society actors representing labour and environmental interests, in the EU, Canada and under CETA. Given Canada's identity as a federal nation-state, as opposed to that of the EU as a (regional) transnational legal order, a variation is made to the effect that 'transnational institutionalism' is termed as 'trans-provincial institutionalism'.

3.5. Bridging Gaps in the Literature

Lastly but most importantly, the predominant contribution of this thesis lies in its attempt to connect the field of trade law, the theme of regulatory governance, and the EU and Canadian approaches to the governance of labour, environmental and trade policies when analysing the implementation of the TSD provisions of CETA.

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[85] John Yasuda, 'Regulatory Governance' in Christopher Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Edward Elgar 2016) 428.
[86] Lotte Drieghe and others, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive Is Inclusion?' [2021] New Political Economy 1.
[87] Kerremans, Adriaensen and Coremans (n 77).
[88] Regulatory culture means 'a perspective (a way of looking at things) […] the understandings that are negotiated and enacted by actors in regulatory arenas' see Errol Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9 Law & Policy 355, 356, 376.

Figure 1.B. below seeks to explain this by demonstrating the overlap between the various components utilised to construct the research premise of this thesis. Sets I, II and III comprise regulatory governance and both EU approaches and Canadian approaches to trade, labour and environment, respectively.

Subset A signifies the overlap between Sets I and II i.e., it covers the Canadian approaches to regulatory governance in trade labour and environment. Subset B signifies the overlap between Sets I and III i.e., it covers the EU's approaches to regulatory governance in trade labour and environment. Subset C signifies the overlap between Sets II and III i.e., transatlantic trade. Subset D signifies the field covered by all three sets as in the case of CETA i.e., a trade agreement that implicates regulatory governance in the promotion of labour and environmental standards.

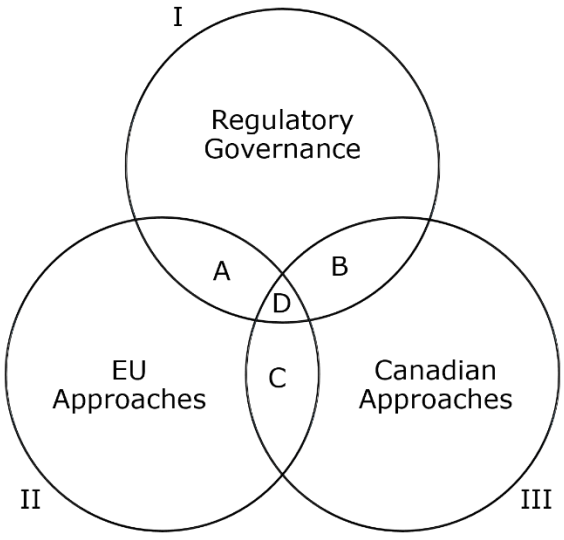


Figure 1.B. The Overlap Between the Key Components of this Research

Analysis on trade law and policy as a mode for combining regulatory governance and sustainable development is as much needed as it is underdeveloped. For instance, the role that the

WTO plays in regulatory governance in member countries has been considered but outside the context of sustainability.[89] International organisations look at regulatory governance in a country-specific manner. It is an investigative exercise directed at ascertaining whether governments are applying the tools, institutions, and procedures that strengthen regulatory governance of strategic policy objectives.[90] In both contexts, regulatory governance is taken to be as a means to an end. Much has been written about the importance of regulatory policy for sustainable growth,[91] but then again, the focus has evolved around state-practice. Moreover, the role of EU external relations law and trade policy in the trade-labour-environment linkage has rarely been considered from the perspective of regulatory governance. A broader field of 'governance' or 'global governance' has been a prominent subject of analysis.[92] For instance, as presented by the analysis on the EU's influence on the governance of labour or environmental policies in partner countries.[93] Building on existing research, this thesis analyses EU trade relations in relation to both labour and environmental objectives.

[89] Gregory Shaffer, 'How the World Trade Organization Shapes Regulatory Governance' (2014) 9 Regulation & Governance 1.
[90] International Finance Corporation, Multilateral Investment Guarantee Agency and World Bank, 'Regulatory Governance in Developing Countries' (2010) <https://openknowledge.worldbank.org/handle/10986/27881>.
[91] 'Incorporating Green Growth and Sustainable Development Policies into Structural Reform Agendas' (*OECD, World Bank and United Nations*, 2012) <http://www.oecd.org/economy/greeneco/G20_report_on_GG_and_SD_final.pdf> accessed 22 July 2022.
[92] James N. Rosenau, 'Governance, Order and Change in World Politics' in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (CUP 2000), 4-5.
[93] Jan Wouters and others (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar 2015); Jeff Kenner (n 2); Charlotte Bretherton and John Vogler, 'The European Union as a Sustainable Development Actor: The Case of External Fisheries Policy' (2008) 30 European Integration 401, Mark Langan and Sophia Price, *Sustainable Development in Africa-EU Relations* (Routledge 2018).

4. Methodology

This thesis utilises doctrinal legal analysis, comparative legal method, and socio-legal research methods as follows.

4.1. Doctrinal Legal Analysis

At the outset, the doctrinal method serves the purpose of establishing the research question as a legal problem.[94] This is paramount especially because labour and environmental standards are examined in relation to the concept of sustainable development in this thesis. Issues related to sustainable development are predominantly perceived as socio-environmental or socio-economic.[95] Consequently, we refer to existing legal frameworks for conceptualising a social problem as a legal problem and avoid the separation between law and society.[96]

The second purpose that it fulfils is that of an interpretative tool. It is thus used in analysing the agreements and case law of the WTO, the EU's treaty and policy frameworks and the legal frameworks under Canadian law. The objective to utilise this method is to (i) explain or justify segments of the larger system of law and (ii) demonstrate whether rules have been applied consistently or are undergoing changes.[97] Where this thesis refers to the text of CETA, the doctrinal approach is put to a third use of conducting 'descriptive analysis and normative

[94] Wade Mansell, Belinda Meteyard and Alan Thomson, *A Critical Introduction to Law* (Cavendish Publishing 1999) 4.
[95] Greg William Misiaszek, 'Ecopedagogy: Teaching Critical Literacies of "Development", "Sustainability", and "Sustainable Development"' (2020) 25 Teaching in Higher Education 615; Walter Leal Filho and others, 'Reinvigorating the Sustainable Development Research Agenda: The Role of the Sustainable Development Goals' (2018) 25 International Journal of Sustainable Development and World Ecology 131.
[96] Mansell, Meteyard and Thomson (n 94).
[97] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 84-85.

evaluation of the process of decision-making'.[98] Therefore, the doctrinal method is applied at relevant points throughout the thesis.

4.2. Comparative Legal Method

This method is employed to demonstrate how the EU and Canada have come to develop their own approaches to (i) regulatory governance (ii) labour and environmental standards and (iii) their application in external relations. On the one hand, we see that there is resemblance in the way these concepts have been expounded by legal systems. On the other, there are differences because of the ways in which they have developed historically, conceptually, and operationally.[99] We tap into the *legal culture* of the EU and Canada comprising the internal/domestic laws that derive meaning from regional/local contexts, driven by both state and non-state actors such as business and the civil society, inseparable from the cultural patterns that support them.[100]

The comparative legal method also helps assess the EU's actorness through trade. To say that the EU is a normative[101] or market power[102] or capable of diffusing regulatory governance[103] is also to say that its trading partners accrue *legal borrowings* of rules.[104] However, such rule export will not

[98] Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 9.
[99] Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 102.
[100] ibid. 110 (emphasis added); David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1.
[101] Manners, 'Normative Power Europe: A Contradiction in Terms?' (n 53).
[102] Chad Damro, 'Market Power Europe' (2012) 19 Journal of European Public Policy 682.
[103] Ladi and Tsarouhas (n 32).
[104] Graziadei (n 99) 121 (emphasis added).

be without the willingness of the receiving country. As has been explained,

> […] the source which generated the original rule, institution or doctrine does not control the outcome of the process of transplantation or diffusion. The donee, not the donor, has the last word on the uses of the imported law […][105]

In other words, the Canadian legal system and/or government must indicate some inclination to adopt foreign (EU) rules but if it does, it does not necessarily mean that it is on account of the EU's persuasive influence. The problem is compounded by the difficulty in verifying that such inclination if any, is attributable to the government. This paradox, however, is not without a silver lining for 'If the government is silent on a certain point, some other group will speak'.[106] Therefore, for such instances we could work our way into the assessment of EU actorness by examining the opinions of other actors involved in EU-Canada relations and CETA's implementation. Therefore, we apply the socio-legal research methods meant for exploring the relationship between law and society.

4.3. The Socio-Legal Approach

While socio-legal methodology is required to unpack the role of other actors, it plays an instrumental role in analysing a point that governments are *not* silent about i.e., the EU's 'trade and sustainable development' agenda that has made its way into CETA and is effectively accepted by Canada. Starting with a discussion on this aspect, we move to the more challenging and specific issues pertaining to the principles of regulatory

[105] ibid. 122.
[106] Graziadei (n 99).

governance, and the substantive labour and environmental standards on which other actors, particularly members of the civil society may have more to say than governments and should be heard.

A socio-legal approach to the EU-Canada partnership is also necessitated for evaluating the transnational networks of community (represented by state, business and social actors) that render a 'transnational character' to CETA.[107] An assessment in this direction is undertaken to explore the extent to which CETA promotes better regulatory governance by engaging governments and private individuals.[108] It is aided by findings that are outcomes of engaging with participants of transnational networks in EU-Canada relations.

4.3.1. 'Law in Context'

The conception of facts and norms in other disciplines (such as international relations and political economy) can aid in building their context in law. We know that there is a body of interdisciplinary literature on the relationship between law and international relations.[109] At the points where this thesis investigates *what* the EU means by 'trade and sustainable development' in its partnership with Canada, the discussion takes an interdisciplinary turn. With this intention, I examine the EU's actorness from the perspective of constructivism which

[107] Roger Cotterrell, 'Transnational Networks of Community and International Economic Law' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Taylor & Francis 2013) 133.
[108] Gregory C. Shaffer, 'How Business Shapes Law: A Socio-Legal Framework' (2009) 42 Connecticut Law Review 147.
[109] Anne-Marie Slaughter, Andrew S Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 The American Journal of International Law 367.

is defined as a *way* of studying international relations.[110] In other words, constructivism is applied as a method[111] to examine the (i) EU's 'ideas' on the trade-labour-environment linkage as they manifest causally and constitutively[112] in the EU FTAs (ii) structure or function of particular international, EU and Canadian legal rules and institutions[113] that operate in the area of this linkage and (iii) the TSD rules generated under CETA to govern EU-Canada partnership in the transatlantic and global trade interactions. To complete the analysis on CETA, it is essential to further utilise this 'law in context' approach.

CETA is referred to as a 'living agreement'.[114] Insofar as CETA's objective to promote regulatory governance is concerned, a question that arises from the legal perspective is whether CETA is 'living law' which is defined as:

> the law that [is derived from] the modern legal document [and] direct observation of life, of commerce, of customs and usages, and of all associations not only of those that

[110] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2012) 3 (emphasis added).
[111] Philip A Karber, '"Constructivism" as a Method in International Law' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 189.
[112] Causal explanation assists us in answering 'why' and 'how' does the EU address the trade-labour-environment linkage in CETA i.e., because it is driven by its own constitutional provisions as well as international legal obligations which take the form of TSD chapters and provisions in CETA. The constitutive explanation accounts for the structures that the EU establishes to answer the 'how-possible?' which as per my analysis places emphasis on the role of institutions involved in regulatory governance see Alexander Wendt, 'On Constitution and Causation in International Relations' (1998) 24 Review of International Studies 101, 104-106.
[113] Slaughter, S Tulumello and Wood (n 109).
[114] Federico Ortino and Emily Lydgate, 'Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP, and USMCA: Revolution or Timid Steps?' (2019) 2019 The Journal of World Investment & Trade 680, 703; Günter Walzenbach, 'Procedure Over Substance? CETA and the Political Economy of Subsidiarity' (2019) 57 Commonwealth & Comparative Politics 153, 154.

> the law has recognised but also of those that it has overlooked or passed by […].[115]

4.3.2. Empirical Observations

Since the implementation of the TSD provisions in CETA is an ongoing process, two empirical legal research methods: participant observation and interviews[116] are applied in the thesis to arrive at findings. They offer qualitative insights on the topic and assist in building the connection of law with policy.

For participant observation, the social situation[117] or setting[118] comprise the meetings and forums organised by the Commission, on its own or in collaboration with Canadian counterparts. These settings are supervised by public institutions responsible for steering dialogue on policy objectives such as labour and environmental standards. Examining CETA's implementation from this perspective serves the purpose of demonstrating the correlation between the disciplines of law and public administration.[119] My engagement in participant observations falls between the categories of passive engagement (i.e., as a spectator) and active

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[115] Quoted from Eugene Ehrlich's original article see David Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 Legal Studies 157, 161.

[116] Conducted in line with the University of Nottingham's (UoN) 'Code of Research Conduct and Research Ethics' (Version 6a, March 2019). The interviewees were approached with an information sheet providing details on the research project, a consent form and privacy information based on UoN guidelines and EU General Data Protection Regulation. Participants were given a chance to review the transcripts within a stipulated timeframe after the interview took place. All interviewees are referenced by numbers for reasons of anonymity.

[117] James P Spradley, *Participant Observation* (Harcourt Brace Jovanovich College Publishers 1980) 39.

[118] Marc Simon Thomas, 'Teaching Sociolegal Research Methodology: Participant Observation' (2019) 14 Law & Method 1.

[119] Aakriti Bhardwaj, 'Collaborative Governance for Addressing Climate Change: Evaluating CETA's Scope' in Robert G Finbow (ed), *CETA Implementation and Implications: Unravelling the Puzzle* (McGill-Queen's University Press) (In Press).

engagement (i.e., fully engaging with 'what other people are doing').[120] This is because some of the meetings offered limited scope for engagement as they focused on debriefing exercises or needed a membership of a civil society organisation. Instances wherein I was able to engage fully, I raised questions related to TSD chapters in CETA to the convening panel and other members among the participants.

Conducting transnational, interdisciplinary, and/or intersectoral research was one of the training objectives under EUTIP aimed at improving researchers' skills and bridging disciplinary boundaries.[121] Accordingly, the research and training placements at partner institutions were utilised to attend meetings, network, identify potential research participants and conduct interviews. Most of the events that I participated in were during my placement at the Centre for Research on Multinational Corporations (SOMO) from 15 April 2019 to 15 June 2019 as part of the training programme under EUTIP. After the onset of the Covid-19 pandemic, I attended meetings remotely as and when the arrangements by the organisers allowed participation for academic researchers.

A complete list of the meetings that I attended is as follows:

1. Civil Society Dialogue on Trade and Sustainable Development organised by the Commission and held in Brussels, Belgium on 29 April 2019.[122]

[120] Spradley (n 117). 67-70.
[121] EUTIP, 'Training Objectives' <https://eutip.eu/training-objectives/> accessed 22 July 2022.
[122] Commission, 'Civil Society Dialogue on Trade and Sustainable Development' (2019) <https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157881.pdf> accessed 22 July 2022.

2. Stakeholder Event on the Modernised EU-Mexico Global Agreement: Better Rules, Common Values and More Opportunities for Trade and Investment organised by the Commission and held in Brussels, Belgium on 20 May 2019.[123]
3. Civil Society Dialogue with EU Trade Commissioner Cecilia Malmström organised by the Commission and held in Brussels, Belgium on 24 May 2019.[124]
4. Third EU-Canada (CETA) Civil Society Forum organised virtually on 8 and 9 December 2020.[125]
5. Comprehensive Economic and Trade Agreement (CETA) - Regulatory Cooperation Forum: Stakeholders Debrief Meeting organised virtually on 10 February 2021.[126]

Semi-structured interviews helped answer questions related to transparency, the conduct of regulatory cooperation and civil society dialogues. They also helped my understanding of how the selected interview participants pursue the prioritisation of labour and environmental standards. The pool of participants comprises five interviewees representing sustainable development interests. To avoid overlap and duplication two participants each, from EU and Canadian sides were

[123] Commission, 'Stakeholder Event on the Modernised EU-Mexico Global Agreement: Better Rules, Common Values and More Opportunities for Trade and Investment' (2019) <https://trade.ec.europa.eu/doclib/events/index.cfm?id=2009> accessed 22 July 2022.
[124] Commission, 'Civil Society Dialogue with EU Trade Commissioner Cecilia Malmström' (2019) < https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkxr5vumdkz1?ctx=vg9ibapthoyq&tab=1> accessed 22 July 2022.
[125] Commission, 'Third EU-Canada (CETA) Civil Society Forum' (2020) <https://trade.ec.europa.eu/doclib/events/index.cfm?id=2217> accessed 22 July 2022.
[126] Commission, 'Comprehensive Economic and Trade Agreement (CETA) - Regulatory Cooperation Forum: Stakeholders Debrief Meeting' (2021) <https://trade.ec.europa.eu/doclib/events/index.cfm?id=2236> accessed 22 July 2022.

interviewed. One participant is a former senior employee of the Secretariat-General of the European Commission. The aim was to focus on *a smaller number of 'observations' or 'data sources'* and *an individual's experiences* on and *interactions* with[127] CETA's TSD provisions. Additional details about the participants are as follows:

Research Participant No. 1

Organisation: Centre for Research on Multinational Corporations (SOMO)

Position: Researcher

Why Chosen: Specialism in the transnational governance of trade and investment and their impact on labour, environment, democracy, and human rights, civil society participation

Research Participant No. 2

Organisation: Eurogroup for Animals

Position: Programme Leader

Why Chosen: Member of CETA Domestic Advisory Group (EU)

Research Participant No. 3

Organisation: European Commission

Position: Ex-Deputy Head of Unit in the Secretariat General of the European Commission

Why Chosen: Specialism in EU transparency policy, stakeholder relations and the public right of access to EU documents

Research Participant No. 4

Organisation: Unifor

[127] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 934, 937 (emphasis added).

Position: Research Lead

Why Chosen: Member of Canada's largest private labour union, specialism in trade and labour in FTAs, civil society participation

Research Participant No. 5

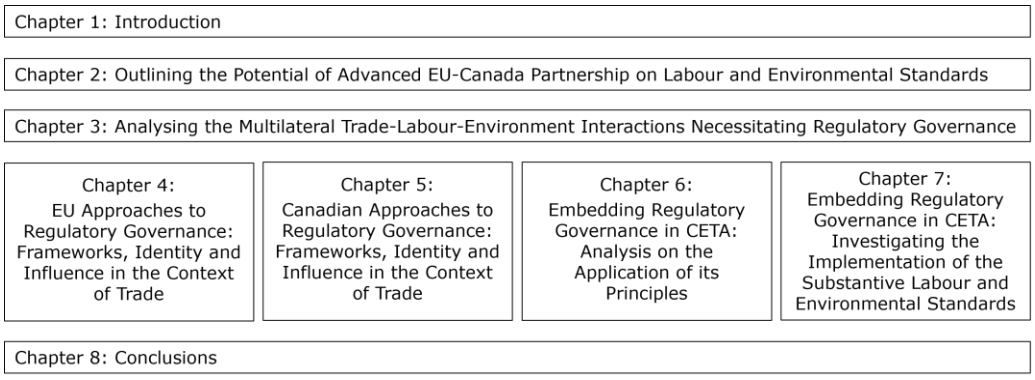
Organisation: Canadian Environmental Law Association

Position: Counsel

Why Chosen: Member of CETA Domestic Advisory Group (Canada)

5. Chapter Outline

Figure 1.C. below presents an outline of the chapters and highlights their central objective in the direction of resolving the research questions.



Chapters 2 and 3 provide the necessary contextual perspectives on the research questions. Chapter 2 explores why the EU-Canada partnership is an example of the most developed transatlantic alliance on the trade-labour-environment linkage. Chapter 3 brings out the difference in the EU and Canadian approaches to the trade and environment linkage at the WTO level. As for the trade and labour linkage, both the EU and Canada need to consider a myriad of issues that fall outside the current WTO framework. In doing so, it brings out the gaps and

fragmentation between the international trade, labour, and environmental regimes. This chapter, therefore, introduces regulatory governance as a way forward. Chapters 4 to 7 are the core analytical chapters of the thesis. Chapters 4 and 5 discuss the EU and Canadian perceptions of regulatory governance with reference to the labour and environmental standards and how they are approached in trade. They also hold importance as in-depth accounts of the vertical dimension of CETA since the implementation of the TSD provisions of the agreement will depend on the constitutional and regulatory frameworks of the EU and Canada. Therefore, these chapters help identify the internal constraints in this context. Chapters 6 and 7 investigate regulatory governance mechanisms under CETA. The chapters correspond to the two parts into which this inquiry has been split. One pertaining to the assessment of the cross-cutting principles of transparency, accountability, efficiency, and coherence and the other concerning the implementation of labour and environmental standards. Chapter 8 presents key findings from a methodological perspective of relevance to the implementation of the TSD provisions in CETA.

CHAPTER 2: TRANSATLANTIC PERSPECTIVES ON TRADE, LABOUR AND ENVIRONMENTAL STANDARDS

1. The European Union and Canada: Moving on to the New Transatlantic Partnership

The term 'transatlantic' in international relations is predominantly utilised in the context of the relationship between the systems of the United States (US) and the EU across policy areas such as security, defence and trade.[1] Nevertheless, insofar as the EU's economic and trade relations are concerned, the term 'transatlantic' has two facets, one referring to EU-US and the other to EU-Canada.[2] A third facet, covering the EU-Mexico trade relations is currently evolving.[3] This research asserts that the EU-Canada Comprehensive Economic and Trade Agreement (CETA) lays down the most robust framework on labour and environmental standards insofar as regulatory governance in the 'transatlantic area'[4] is concerned.

The EU-US partnership has conventionally been referred to as transatlantic to focus on the relationship between two of the

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[1] Elaine Fahey and Deirdre Curtin, *A Transatlantic Community of Law* (CUP 2014); Ernst-Ulrich Petersmann and Mark A. Pollack, *Transatlantic Economic Disputes: The EU, The US and The WTO* (OUP 2003); Mark A Pollack and Gregory C Shaffer, *Transatlantic Governance in The Global Economy* (Rowman & Littlefield 2001).

[2] European Parliament,'Transatlantic Relations: The USA and Canada' (2020) <https://www.europarl.europa.eu/factsheets/en/sheet/174/transatlantic-relations-the-usa-and-canada> accessed 22 July 2022.

[3] The EU and Mexico are in the process of updating the trade pillar of the 2000 Global Agreement that liberalised trade in goods (2001) and services (2002) 'The Modernised EU-Mexico Global Agreement: Better Rules, Common Values and More Opportunities for Trade and Investment' (2019) <https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157887.pdf> accessed 11 July 2022.

[4] Referring to EU-US, EU-Canada and EU-Mexico trading partnerships see Gagliani Gabriele, 'Recent Evolution in International Trade in the Transatlantic Area' (2019) 53 Journal of World Trade 567.

world's largest economies.[5] For this reason, if there is an advancement in EU-US trade relations that materialises in a free trade agreement (FTA), it is expected to have a significant impact on global trade governance.[6] Additionally, it may lead to an increase in benefits for stakeholders because of reduced non-tariff barriers (NTBs) to trade.[7] During the negotiations on the proposed EU-US Transatlantic Trade and Investment Partnership (TTIP), launched in 2013 but ended without conclusion in 2016, social and political interest in EU-US trade relations intensified because the parties had identified areas of regulatory difference, including labour and environmental standards as a 'signature issue'.[8]

The change in the US administration from Barack Obama to Donald Trump in January 2017 led to a 'freeze' in the TTIP negotiations[9] as a nationalist agenda became prominent in US trade policy. With another change in the US administration in January 2021, from Trump to Joe Biden, the EU was keen to explore whether there would be an opportunity 'to discuss and define a stronger transatlantic partnership' with a more outward

[5] The EU and US together account for about half the entire world GDP and for approximately one-third of the world's trade flows see 'United States - Trade - European Commission' (*ec.europa.eu*, 2017) <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/index_en.htm> accessed 11 July 2022.

[6] Lucian Cernat and Nuno Sousa, 'TTIP: A Transatlantic Bridge for Worldwide Gains' (2014) 15 CESifo Forum 32, 36.

[7] Gabriel J Felbermayr and Mario Larch, 'The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives' (2013) 14 CESifo forum 49, 59. Stakeholders comprise 'domestic consumers, various producers involved in the supply chain, and governments, as well as foreign suppliers, and, wherever relevant, foreign consumers and governments' John Beghin and others, 'Welfare Costs and Benefits of Non-Tariff Measures In Trade: A Conceptual Framework and Application' (2012) 11 World Trade Review 356, 359.

[8] Simon Lester and Inu Barbee, 'The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership' (2013) 16 Journal of International Economic Law 847, 848, 857 (emphasis added).

[9] 'TTIP - The EU-US Trade Deal' (*ec.europa.eu*, 2017) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 11 July 2022.

looking US.[10] EU-US ties are caught between fluctuations for the time being and it remains uncertain when and in what form will they revive.

In the midst of uncertain EU-US ties, EU and Canada reiterate the significance of their bilateral partnership with reference to their engagements in organisations such as the UN, OECD and WTO and political forums such as the G7 and G20. They contend that the EU-Canada Strategic Partnership Agreement (SPA) and the CETA are meant to advance the objectives identified in the international fora for inter alia sustainable trade.[11] Moreover, from a legal perspective, the EU-Canada trade partnership stands substantially advanced because of CETA. The introductory chapter explained that this thesis studies the implementation of CETA from the Canadian perspective as well. Canada has referred to the EU as its transatlantic partner since at least the 1980s.[12] Therefore, it is imperative to avoid a one-sided view of transatlantic ties. The sections that follow establish the centrality of CETA in terms of introducing regulatory governance for the promotion of labour and environmental standards in transatlantic trade while also underlining the agreement's global significance.

[10] European Parliament, 'Transatlantic Relations: The USA and Canada' (n 2).
[11] 'European Union-Canada Summit 2021 - Joint Statement' (2021) <https://www.consilium.europa.eu/media/50757/20210614-joint-statement-final.pdf> accessed 11 July 2022; Government of Canada, 'Joint Statement - EU and Canada: A Progressive and Dynamic Strategic Partnership' (2021) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/europe/2017-12-04-spa-aps.aspx?lang=eng> accessed 11 July 2022.
[12] Patrick Leblond, 'A Transatlantic Perspective on CETA' [2016] CIGI Policy Brief No. 89.

2. The EU and Canada as Allies in 'Trade and Sustainable Development'

The EU seeks to engage on 'trade and sustainable development' (TSD) with third countries for three reasons that apply in the case of its partnership with Canada as well. Firstly, the EU's trade relations with third countries are governed by its Common Commercial Policy (CCP) which needs to be 'conducted in the context of the principles and objectives of the Union's external action'[13] detailed under Article 21, TEU. There is no hierarchy between economic and non-economic objectives of the CCP.[14] Secondly, the EU is advancing regulatory governance through bilateral trade covering regulatory issues that have been difficult to address at the WTO level.[15] Thirdly, by pursuing the protection of labour rights and the environment in trading partnerships with third countries, the EU aims to wield influence by acting as a 'power through trade'.[16] The sections below highlight that (i) Canada tends to take a position close to that of the EU on sustainable development, labour and environmental issues and (ii) both parties acknowledge their importance in CETA by expanding the scope of regulatory cooperation under the agreement to address them. The next chapter explains that regulatory cooperation has come to assume the role of regulatory governance in CETA (Chapter 3,

[13] TFEU, art 207(1).

[14] Markus Krajewski, 'The Reform of the Common Commercial Policy' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 294. I analyse the constitutional aspects shaping the EU's trade policy in connection with labour and environmental standards in detail in chapter 3.

[15] James H. Mathis, 'Multilateral Aspects of Advanced Regulatory Cooperation: Considerations for a Canada-EU Comprehensive Trade Agreement (CETA)' (2012) 39 Legal Issues of Economic Integration 73.

[16] Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 Journal of European Public Policy 906.

Section 3.3). For the purpose of this chapter, we retain the term 'regulatory cooperation' as used in EU-Canada frameworks.

2.1. EU-Canada Alignment on Sustainable Development

Canadian trade policy is being shaped by sustainable development considerations and this signals a divergence from the approach taken by the US. Canada adopted the Federal Sustainable Development Act, 2008, for

> '[…] coordinated action across the Government of Canada to advance sustainable development and [respect] Canada's domestic and international obligations relating to sustainable development […]'.[17]

The Act provides the legal framework for developing and implementing a Federal Sustainable Development Strategy (FSDS).[18] Currently, the 2019 to 2022 FSDS sets out Canada's national and international sustainable development priorities.[19] It identifies Canada's FTAs as avenues to strengthen its leadership role in chemicals management and air quality and trade in products and services related to clean and renewable energy.[20] It seeks to incorporate substantive climate change provisions in all Canadian FTAs in accordance with the Paris Agreement.[21]

In the process of developing the FSDS, Canada has engaged representatives of environmental, labour and business organisations. The ratification of two fundamental ILO

[17] Federal Sustainable Development Act 2008, s3.
[18] ibid.
[19] *Achieving a Sustainable Future* (Government of Canada 2019).
[20] ibid. 51, 103.
[21] *Achieving a Sustainable Future* (Government of Canada 2019) 5, 24.

conventions by Canada,[22] to complete its ratification of the eight fundamental conventions, is a step towards promoting the ILO's Decent Work Agenda and achievement of the 2030 Sustainable Development Goals (SDGs).[23] All 27 EU member states and Canada have now ratified all the fundamental conventions[24] of the ILO whereas the US has ratified just two.[25] Even in the sphere of climate change, while Canada, the EU and its member states completed the ratification of the Paris Agreement,[26] whereas the US rejected the agreement at first under Trump but reversed its decision when Biden took office.[27]

The position that Canada takes in the international fora is closer to that of the EU across the fields of climate action, environmental protection, and labour standards. The EU and Canada have framed a common position on pursuing TSD at the WTO level as part of the Ottawa Group,[28] which has proposed a WTO Reform Agenda.[29] In a joint communication, the group has

[22] Canada ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Minimum Age Convention, 1973 (No. 138) on 14 Jun 2017 and 08 Jun 2016, respectively ILO, 'Ratifications for Canada' <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102582> accessed 11 July 2022.

[23] Such as the ratification of Labour Inspection Convention, 1947 (No. 81) and the Protocol of 2014 to the Forced Labour Convention, 1930 see 'Canada Renews Commitment toward International Labour Standards' (2019) <https://www.ilo.org/global/standards/WCMS_710865/lang--en/index.htm> accessed 11 July 2022.

[24] The conventions are listed in ch 1 of this thesis, section 3.1, fn 42.

[25] International Labour Organization, 'Ratifications by Country' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO:::#C> accessed 11 July 2022.

[26] United Nations, 'United Nations Treaty Collection: Depository' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 11 July 2022.

[27] ibid.

[28] Comprising Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland.

[29] Governnment of Canada, 'Ottawa Group and WTO Reform' (2018) <https://www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html#a1> accessed 11 July 2022.

stated that WTO 'rules must also be updated to reflect 21st century realities, such as the [SDGs]'.[30] The objective of improving regulatory governance in the field of international trade requires EU-Canada engagement to realise economic growth that supports environmental protection and the welfare of workers. CETA's role in this respect is vital.

CETA's TSD provisions reflect the global framework on labour and environmental standards. Therefore, the agreement acts as a platform for country-specific action and marks an innovative and globalised approach to economic regulation.[31] Discussed in chapters 6 and 7 of this thesis, EU-Canada cooperation on trade and sustainable development is thus based on a redefined regulatory agenda.

2.2. The Evolution and Expansion of EU-Canada Regulatory Cooperation

EU-Canada regulatory cooperation can be traced to the 1976 Framework Agreement for Commercial and Economic Cooperation (FCEC).[32] At the 2004 Canada-EU Summit in Ottawa, the parties agreed on a framework for a Trade and Investment Enhancement Agreement (TIEA) which was to give regulatory cooperation a *central role*.[33] The EU and Canada had

[30] Government of Canada, 'Joint Communiqué of the Ottawa Ministerial on WTO Reform' (2018) <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html> accessed 11 July 2022.
[31] Brian Levy, 'Innovations in Globalized Regulation' (2011) World Bank Policy Research Working Paper 5841.
[32] Stanko Krstic, 'Regulatory Cooperation to Remove Non-Tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement (CETA)' (2012) 39 Legal Issues of Economic Integration 3.
[33] 'Canada-European Union Trade and Investment Enhancement Agreement' (2013) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/tiea.aspx?lang=en> accessed 11 July 2022 (emphasis added).

recognised the need to reduce 'unnecessary regulatory differences, to facilitate trade while ensuring quality and effectiveness of regulations'.[34] Pending the negotiations on the TIEA, the parties signed a Framework Agreement on Regulatory Co-operation and Transparency (FRCT) in 2004 which is the precursor to the regulatory cooperation arrangement under CETA.[35] Negotiations on the TIEA were never completed. In the meantime, FRCT established the framework for federal-supranational intergovernmental coordination on '[…] compatible solutions, [to] minimise unnecessary differences and to identify – and where possible resolve - unintended *trade effects* [of regulatory barriers]'.[36] CETA's provisions on regulatory cooperation not only replace the FRCT framework but also expand its scope to include 'the development, review and methodological aspects' related to TSD.[37] For the first time we can see that labour and environmental standards appears as an objective in EU-Canada regulatory cooperation.

The figure below shows the various frameworks leading up to regulatory cooperation under CETA starting with the FCEC.

[34] ibid.
[35] It has now been replaced by CETA's Chapter 21 on Regulatory Cooperation see CETA, art 21.2.5.
[36] 'EU-Canada Framework for Regulatory Co-Operation' (2004) <https://ec.europa.eu/transparency/regdoc/rep/2/2004/EN/2-2004-1605-EN-1-0.Pdf> accessed 11 July 2022 (emphasis added).
[37] CETA, art 21.1.

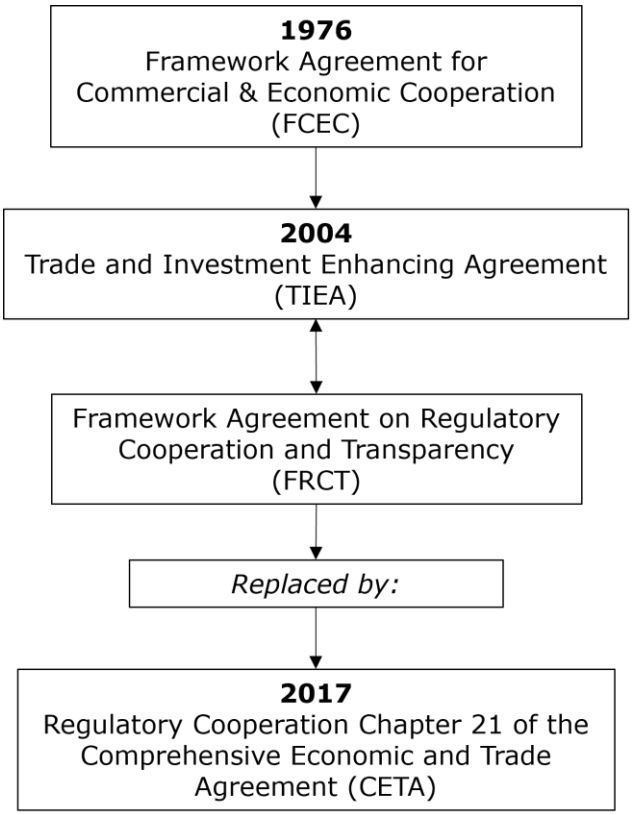


Figure 2.A. EU-Canada Regulatory Cooperation Frameworks Over the Years

There is significant overlap with the content of previous EU-Canada agreements on environmental issues. Parallel programmes on environmental cooperation[38] dealt with water pollution; the natural environment; climate change and energy.[39] The EU and Canada have also relied on multilateral cooperation in the areas of climate change, biological diversity, chemicals, ozone layer depletion, trans-boundary movement of hazardous waste, as the basis for advancing bilateral discussions.[40] Given this background, the EU-Canada partnership may not seem fresh in the respect of the

[38] Commission and the Government of Canada, 'Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership' (2013) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/study-etude.aspx?lang=eng>.
[39] 2007 EU-Canada Summit Statement (Berlin, 4 June 2007).
[40] EU-Canada Regulatory Cooperation Roadmap 2007-2008 (Berlin, 4 June 2007).

environment. Nevertheless, it stands renewed and assimilated within trade relations now. The FRCT did not touch upon labour cooperation and it was broadly addressed under the multilateral purview of the ILO, the OECD and the G7.[41] However, the possibility that regulatory cooperation can now address labour standards represents a new field of regulatory cooperation in EU-Canada relations.

3. CETA and the Trade-Labour-Environment Nexus

3.1. Regulatory Scope

CETA enhances the regulatory scope on the trade-labour-environment linkage on two counts by: (i) incorporating the 'Trade and Sustainable Development' agenda in an FTA between advanced economies and (ii) bringing the TSD chapters under regulatory cooperation and consequently, applying it beyond the traditional areas of Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) and mutual recognition.

This is because the EU advocates 'a *deep* trade agenda' seeking bilateral cooperation on trade-related issues beyond the scope of existing WTO agreements.[42] The 'deepness' is attributed to the coverage of 'WTO-plus' commitments and 'WTO-extra' obligations.[43] 'WTO-plus' commitments comprise transparency and participation which are essential ingredients,[44] also known

[41] Commission and the Government of Canada (n 38).
[42] Patrick Leblond and Crina Viju-Miljusevic, 'EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges' (2019) 26 Journal of European Public Policy 1836, 1840 (emphasis added).
[43] ibid. 1843; Alasdair R. Young and John Peterson, 'The EU and the New Trade Politics' (2006) 13 Journal of European Public Policy 795 and Melo Araujo, *The EU Deep Trade Agenda* (OUP 2016).
[44] Steve Charnovitz, 'Transparency and Participation in the World Trade Organization' (2004) 56 Rutgers Law Review 927, 938.

as the cross-cutting principles of regulatory governance.[45] 'WTO-extra' obligations cover the substantive standards that are presently outside the purview of WTO agreements. All labour and the majority of the environmental standards (beyond the scope of Article XX(b) GATT and under the TBT and SPS agreements) are considered WTO-extra obligations. There is no conclusive definition of deeper integration as it covers all trade arrangements that go beyond liberalising tariffs, but it is assessed against two broad dimensions: the regulated policy areas that are covered and the institutional structures that govern this integration.[46] In other words, a free trade agreement that seeks to eliminate differences in environmental or labour standards indicates a greater degree of deepness[47] than a tariff-only eliminating FTA.

3.2. 'Trade and Sustainable Development' in the Context of the Transatlantic Advanced Economies

Before CETA, the coverage of labour and environmental standards in FTAs has typically been a characteristic of north-south/developed-developing country FTAs. Starting with the North American Free Trade Agreement (NAFTA), the US took the lead on addressing the trade-labour-environment linkage by signing two side agreements.[48] Even after the renegotiation of NAFTA, leading to the United States-Mexico-Canada Agreement

[45] Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 The American Journal of International Law 211; Susan E. Dudley and Kai Wegrich, 'The Role of Transparency in Regulatory Governance' (2015) 19 Journal of Risk Research 1141.
[46] *Mainstreaming Trade to Attain the Sustainable Development Goals* (WTO 2018), 110.
[47] See also ch 7 of this thesis, section 3.
[48] 32 ILM 289 and 605 (1993); North American Agreement on Environmental Cooperation, 32 ILM 1480 (1993) and North American Agreement on Labor Cooperation, 32 ILM 1499 (1993).

(USMCA)[49] that entered into force on 1 July 2020, the US, as the lead player, continues to differ from the EU in its approach to labour and environmental standards in FTAs. This is reflected in USMCA's Annex 23-A on Worker Representation in Collective Bargaining in Mexico[50] which is an example of the conventional North-South paradigm that entrenches the process of trade liberalisation between developed and developing economies. The EU is currently in the process of renegotiating its FTA with Mexico.[51] As negotiating texts indicate, the EU maintains that labour and environmental standards are part of sustainable development in its partnership with Mexico.[52] There is emphasis on upward vertical convergence[53] with inter alia ILO frameworks and the SDGs reflecting a degree of uniformity in EU FTAs with developed and developing countries. Furthermore, a specific labour right, such as the right to organise and collective bargaining is not singled out in the draft EU-Mexico FTA. It is true that Mexican labour unions are in need of improved legal protection but the EU chooses to address this through mechanisms for civil society participation and anti-corruption provisions in the envisaged EU-Mexico FTA.[54] While the EU faces the challenge of delivering on an extensive normative agenda

[49] Office of the United States Trade Representative, 'United States-Mexico-Canada Agreement' <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 11 July 2022.
[50] USMCA, ch 23 'Labor'.
[51] Commission, 'EU-Mexico Trade Agreement' (2020) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en> accessed 11 July 2022.
[52] ibid.
[53] Aakriti Bhardwaj and Jeff Kenner, 'Labour Standards in EU-Mexico Trade: An Assessment along Two Narratives of Convergence' in Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020) 221.
[54] ibid. 231.

in its external relations,[55] the incorporation of labour standards as such under the USMCA is the result of the perceived threat to the US manufacturing sector wherein firms may choose to relocate to Mexico because of lower labour standards.

CETA reaches beyond the scope offered by the WTO agreements. Additionally, it takes an innovative approach to the linkage compared to that of US. In the case of NAFTA for instance, the side agreements on labour and environment were intended to pacify the political contestation of the agreement in the US.[56] Another reason was avoiding '[…] a split between American liberals and developing-country governments.'.[57] Not that CETA is untouched by political contestation being one of the most opposed EU FTAs along with TTIP mobilising citizens, civil society as well as political actors against the agreement.[58] The core political segment of contestation arises from within the EU which is why CETA has not taken full effect and is in force provisionally[59] (since 21 September 2017) at the time of writing.[60] While we cannot delve on all the reasons for CETA's

[55] Thomas Diez, 'Normative Power as Hegemony' (2013) 48 Cooperation and Conflict 194.
[56] Edward Gresser, 'Labor and Environment in Trade since NAFTA: Activists Have Achieved Less, and More, Than They Realize' (2010) 45 Wake Forest Law Review 491.
[57] ibid.
[58] Franscesco Duina, 'Why the Excitement? Values, Identities, and the Politicization of EU Trade Policy with North America' (2019) 26 Journal of European Public Policy 1866.
[59] Article 218(5), TFEU see Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement OJ L 11/1080.
[60] As of October 2019, 13 of the then EU member states (including the UK) had ratified CETA. In the past, the Walloon parliament in Belgium and more recently, the Cypriot parliament refused to ratify the agreement see Maïa de La Baume, 'Walloon Parliament Rejects CETA Deal' (*Politico*, 2016) <https://www.politico.eu/article/walloon-parliament-rejects-ceta-deal/> accessed 11 July 2022 and International Institute for Sustainable Development, 'CETA Faces Hurdle After Cypriot Parliament Fails to Ratify the Agreement' (*Investment Treaty News*, 2020) <https://www.iisd.org/itn/en/2020/10/05/ceta-faces-hurdle-after-cypriot-parliament-fails-to-ratify-the-agreement/> accessed 11 July 2022.

politicisation here, it is important to mention that transatlantic trade with either the US or Canada is highly contested. This is because the EU engages on regulatory issues, including labour and environmental standards, with the US and Canada *more than it has with other trade partners* such as Japan*,* Australia, Mercosur, New Zealand.[61] Even though other trade partners include advanced economies, the US and Canada are 'major competitors and regular reference points'[62] at the international level when it comes to addressing the trade-labour-environment linkage.

CETA's provisions on 'Trade and Labour' and 'Trade and Environment' under the heading of 'Trade and Sustainable Development' indicate the intention to reconcile trade objectives with sustainability.[63] This prefacing of labour and environmental standards is missing from the USMCA.

The USMCA does not integrate labour standards with sustainable development. It underscores the obligation of the parties as members of the ILO[64] under the Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)[65] and the Declaration on Social Justice for a Fair Globalization (2008).[66] Only environmental standards are said to be an 'integral element of sustainable development'.[67] Therefore, the USMCA is an example of 'unidirectional' cooperation[68] arranged around the idea of economic benefits *for*

[61] Duina (n 58). 1870-1871 (emphasis added).
[62] ibid.
[63] Chapter 22 'Trade and Sustainable Development' applies to Chapter 23 'Trade and Labour', Chapter 24 'Trade and Environment' see CETA, art 21.1.
[64] USMCA, art 23.2.1.
[65] USMCA, art 23.1.
[66] USMCA, art 23.2 and art 23.3.
[67] USMCA, art 24.2.1.
[68] Adolf Kloke-Lesch, 'The Untapped Functions of International Cooperation in the Age of Sustainable Development' in Sachin Chaturvedi and others

Mexico in a trading relationship with the US and Canada. Whereas CETA signifies a 'transformative' approach to post-2015 sustainable development wherein developed economies seek to alter their approach to trade and cooperate with each other to inculcate sustainability as one of the objectives of their trading partnership.[69] In other words, CETA goes beyond the objectives of promoting labour and environmental standards as part of development cooperation in North-South trading partnerships. It follows in the footsteps of the 2030 Agenda which speaks of the universality of the SDGs for *all countries*[70] and recognises labour standards as a standalone goal under the purview of Decent Work (SDG 8). Since Canada as well as all EU member states have ratified all fundamental conventions of the ILO, the focus now shifts to the domestic implementation of and international cooperation on labour standards.[71] On environment, the agreement includes specific obligations on climate change.[72] Thus, the relevance of 'sustainable development' as renewed *ratione materiae* by the SDGs is evident in CETA. This is in line with the new paradigm of global development as opposed to international development based on the 'interconnectedness of globalized capitalism' and '*shared* (sustainable) development challenges'.[73]

(eds), *The Palgrave Handbook of Development Cooperation for Achieving the 2030 Agenda* (Springer 2021) 127.

[69] ibid. 149.

[70] Adolf Kloke-Lesch, 'The Untapped Functions of International Cooperation in the Age of Sustainable Development' n 68 147 (emphasis added).

[71] CETA, art 23.3(4) and art 23.7.

[72] 'Recommendation 001/2018 of 26 September 2018 of the CETA Joint Committee on Trade, Climate Action and the Paris Agreement' <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157415.pdf> accessed 22 July 2022.

[73] Rory Horner, 'Towards a New Paradigm of Global Development? Beyond the Limits of International Development' (2019) 44 Progress in Human Geography 415, 418-419, 424 (emphasis in original).

3.3. Utilising Regulatory Cooperation for Sustainable Development

In a first for an EU FTA, CETA's chapter on Regulatory Cooperation[74] applies to its TSD chapters. This signifies an expanded 'policy space' that CETA covers in comparison to TTIP, EU-Mexico and contrasts with the USMCA. The United Nations Conference on Trade and Development (UNCTAD) defines 'policy space' as:

> […] the freedom and ability of governments to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development in their own national contexts, but as constituent parts of an interdependent global economy[75]

CETA states that:

> The Parties recognise the value of regulatory cooperation with their relevant trading partners both bilaterally and multilaterally. The Parties will, whenever practicable and mutually beneficial, approach regulatory cooperation in a way that is open to participation by other international trading partners.[76]

The global and regional ambition of CETA is thus elucidated. It is regarded as a 'gold standard' for future FTAs by the EU and Canada alike.[77] It may be the blueprint for the proposed EU-

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[74] CETA, ch 21.
[75] *Trade and Development Report, 2014* (UNCTAD 2014) VII.
[76] CETA, art 21.2.3.
[77] European Parliament, 'Ceta: "This Trade Deal Is Important for Europe Geopolitically as Well as Economically"' (2017) <https://www.europarl.europa.eu/news/en/headlines/world/20170219STO63201/ceta-this-deal-is-important-for-europe-geopolitically-as-well-as-economically> accessed 11 July 2022; Brian Johnson, 'Chrystia Freeland: CETA "A Truly Gold Standard Agreement"' (*The Parliament Magazine*, 2016) <https://www.theparliamentmagazine.eu/news/article/chrystia-freeland-ceta-a-truly-gold-standard-agreement> accessed 11 July 2022.

Australia and EU-New Zealand FTAs.[78] Additionally, CETA's potential as a 'model agreement' in framing global governance has been mapped.[79] The agreement makes use of its premise on the TSD chapters whilst highlighting them as a *global approach* to trade-related labour and environmental standards.[80] Direct linkages between regulatory measures (applied in a non-discriminatory way to domestic and foreign firms) and sustainable development have been identified at the international level.[81] The mechanism of regulatory convergence is paramount for addressing sustainable development through trade.[82] CETA seeks to 'enhance the climate for competitiveness and innovation in a way that […] pursues compatible regulatory approaches […] through […] the promotion of convergence'[83] which may be utilised towards transforming economic activities for sustainable development.

Regulatory convergence under CETA targets *substantive* regulatory harmonisation (in the form of similar or equivalent regulations) and the *process* by which regulations are developed, adopted and implemented.[84] For instance, the promotion of 'transparent, efficient and effective regulatory processes that support public policy objectives'.[85] Vertical convergence can be top-down, by engaging at the international level or bottom-up by implementing good regulatory practices

[78] Annmarie Elijah, 'Is the CETA a Road Map for Australia and the EU?' in Annmarie Elijah and others (ed.), *Australia, the European Union and the New Trade Agenda* (ANU Press 2017) 55.
[79] Elaine Fahey, 'CETA and the Global Governance Law: What Kind of Model Agreement Is It Really in Law?' (2017) 2 European Papers 292.
[80] CETA, art 22.1.
[81] 'Non-Tariff Measures and Sustainable Development Goals: Direct and Indirect Linkages' (UNCTAD Policy Brief, No. 37, 2015).
[82] ibid.
[83] CETA, art 21.2.4(b).
[84] Rodrigo Polanco Lazo and Pierre Sauvé, 'The Treatment of Regulatory Convergence in Preferential Trade Agreements' (2018) 17 World Trade Review 575 (emphasis in original).
[85] CETA, art 21.2.4(c).

and maintaining regulatory transparency in the domestic sphere.[86] CETA combines both approaches because it envisages 'leveraging international resources in areas such as research, pre-market review and risk analysis to address important regulatory issues of local, national and international concern […]'[87] for 'the protection of human life, health or safety, animal or plant life or health and the environment'.[88]

Additionally, under CETA, the parties may shape regulatory governance by 'discuss[ing] regulatory reform and its effects on [their] relationship'.[89] This provision is embedded in horizontal convergence. Horizontal convergence is an idea for steering regulatory reform towards sustainable development that the EU has been pursuing for its internal market since the 1980s.[90] We can expect upward convergence as the parties seek to 'minimise unnecessary divergences in regulations through means such as […] achieving a harmonised, equivalent or compatible solution […] while more effectively improving health, safety and environmental protection'.[91] The EU and Canada foresee potential for developing regulatory cooperation. There is another category 'Further Cooperation between the Parties' that focuses on information exchange directed at the parties' ongoing and anticipated regulatory initiatives.[92] This is in line with the observation that the EU and Canada are keen to develop a better understanding of each other's systems.

[86] Polanco Lazo and Sauvé (n 84).
[87] CETA, art 21.3(a)(i).
[88] CETA, art 21.3(a).
[89] CETA, art 21.4(a)(i).
[90] Fabrizio Francesco De and Claudio M Radaelli, 'Indicators of Regulatory Quality' in Colin Kirkpatrick and David Parker (eds), *Regulatory Impact Assessment* (Edward Elgar 2007) 36.
[91] CETA, art 21.4(g)(ii), art 24.4(n)(vi).
[92] CETA, art 21.7.1.

CETA envisages regulatory cooperation in non-food product safety. It states that cooperation between the Parties may lead to 'coordinated product recalls or other similar actions'.[93] This provision under the chapter on regulatory cooperation complements a TSD provision that directs the parties to fulfil obligations under international legal frameworks such as the OECD Guidelines for Multinational Enterprises[94] and may be instrumental in conforming supply chains with sustainability objectives. Regulatory governance frameworks in the domain of sustainability need to consider challenges posed along global value chains (GVCs). Most GVCs are designed, structured, and operationalised within North America, Europe, and East Asia.[95] Therefore, CETA is highly relevant in ensuring that multinational enterprises undertake corporate social responsibility or 'due diligence' for sustainable supply chain management. Product recalls are predominantly undertaken for protecting consumers from unsafe products that need to be replaced, modified, or substituted by another product.[96] The ILO has contemplated product recall in the context of workers' safety and health.[97] Since the EU and Canada have agreed to pursue regulatory cooperation in the area of human health and safety,[98] further engagement in the respect of labour standards will fall well within this objective.

[93] CETA, art 21.7.3(f).
[94] CETA, art 22.3.2(b).
[95] Bernard Hoekman, 'Global Value Chains: Inter-Industry Linkages, Trade Costs and Policies' (2020) 57 Review of Industrial Organization 189.
[96] *Annual Report on the OECD Guidelines for Multinational Enterprises 2010* (OECD Publishing 2010) 165.
[97] ILO, *Safety and Health in the Use of Machinery* (ILO 2013) 15.
[98] CETA, art 21.7.3(b) and art 23.3.2(a).

4. Liberalising Trade and Promoting Sustainable Development: Forging a Transatlantic Response

The EU and the North American countries have developed separate approaches to the substantive coverage and institutional arrangements on labour and environmental standards in FTAs. The distinct roles assigned to the governmental, business, environmental and workers' representatives as part of a governance structure are meant to assist in the achievement of regulatory objectives. The objective of this research is not to conduct a comparative analysis of the EU and North American FTAs to assess 'failures and deficiencies'.[99] Aware of the different, competing approaches to the trade-labour-environment linkage, the primary aim of this research is to assess whether the EU-Canada partnership does advance the trade and sustainable development agenda in the areas of labour and environmental standards. Therefore, seeking answers to 'what they do' and 'how they do it' is not tied to the premise of 'in comparison to the US'. Rather, CETA needs to be assessed for its potential to diffuse regulatory governance in transatlantic trade and its outcomes for labour and environmental standards i.e., whether it truly promotes sustainable development.

It has been observed that compared to the USMCA, 'CETA goes a step further and promotes co-operation of parties in the development, adoption, implementation and maintenance of international standards'.[100] The USMCA does require that the parties make an effort to prevent, reduce, or eliminate

[99] James Harrison, 'The Labour Rights Agenda in Free Trade Agreements' (2019) 20 Journal of World Investment & Trade 705, 706.
[100] Céline Kauffmann and Camila Saffirio, 'Good Regulatory Practices and Co-Operation in Trade Agreements' (2021) OECD Regulatory Policy Working Papers No. 14, 27.

unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection.[101] However, CETA's objective to foster regulatory governance to improve regulatory implementation and compliance applies across fields of public policy and, consequently, appears to have a wider ambit.[102] However, the USMCA is not directly comparable because US-Canada regulatory cooperation is primarily undertaken by the United States-Canada Regulatory Cooperation Council (RCC)[103] set up in 2011.

Under the USMCA, regulatory cooperation means the promotion of good regulatory practices (GRPs). They are the *traditional* objectives of regulatory cooperation directed at ensuring transparency, and evidence and risk based rule-making on TBT and SPS measures.[104] When the EU began negotiations on the TTIP with the US, its proposal for regulatory cooperation was very much based on the objective to promote GRPs. The draft text stated obligations on transparent planning, stakeholder consultation, impact assessments and retrospective evaluations of regulatory acts.[105] GRPs are directed at maintaining the quality of regulation at the domestic level.[106] Whereas under the RCC, the US and Canada have taken a sectoral approach some of which is relevant for labour and environmental standards

[101] USMCA, art 28.1.
[102] CETA, art 21.3 (b) (i) (vii).
[103] 'US-Canada Regulatory Cooperation Council' <https://www.trade.gov/rcc> accessed 11 July 2022.
[104] Kauffmann and Saffirio, 'Good Regulatory Practices and Co-Operation in Trade Agreements' 12 (n 100) (emphasis added).
[105] Commission, 'TTIP - EU Proposal for Chapter: Good Regulatory Practices' (2016) <https://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf> accessed 11 July 2022.
[106] OECD, *International Regulatory Co-Operation: Addressing Global Challenges* (OECD Publishing, Paris 2013) 13.

such as work plans and partnership statements on workplace hazards, energy efficiency reporting and low carbon fuels.[107] Under the RCC, regulatory cooperation stands expanded and is utilised to 'address interconnected and cross-jurisdictional challenges' in the light of 'global policy issues requir[ing] that regulators look beyond their national borders'.[108] On the one hand, there is a similarity wherein EU-Canada regulatory cooperation under CETA may mirror the RCC as it also takes a sectoral approach to the process.[109] On the other, regulatory cooperation under CETA applies additionally in the context of sustainable development,[110] a feature that is absent from the US-Canada regulatory cooperation arrangement under the RCC.

The previous sections of this chapter delineate CETA's potential for channelling trade to attain sustainable development objectives. The regulatory scope of CETA engages the field of regulatory governance in international trade.[111] Trade has economic, social, and environmental dimensions making it imperative that sustainable development is integrated into FTAs.[112] However, this is not without challenges. The subject matter of TSD lies in the overlap between international trade, labour, and environmental laws. The conception of CETA's

[107] 'US-Canada Regulatory Cooperation Council' (n 103).
[108] OECD, *International Regulatory Co-Operation: Addressing Global Challenges* (n 106).
[109] Government of Canada, 'Comprehensive Economic and Trade Agreement Regulatory Cooperation Forum – Work Plan' <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2021-07-28-work-travail-plan.aspx?lang=eng> accessed 11 July 2022.
[110] CETA, art 21.1.
[111] OECD/Korea Development Institute, *Improving Regulatory Governance* (OECD Publishing, Paris 2017) 20, 'The Institutional Landscape of Regulatory Policy and Oversight', *OECD Regulatory Policy Outlook 2018* (OECD Publishing, Paris 2018) 75.
[112] WTO (n 46).

provisions as a framework on TSD invites the consideration of two primary concerns: normative and systemic.

Normative concerns arise due to the 'competing conceptions of ''the good'' that should be pursued'.[113] For instance, the EU and Canada purport that CETA is beneficial for economic growth as well as the public policy objectives of the parties. However, two arguments are made against trade liberalisation. The first is the 'race to the bottom', which is explained as the movement of firms from high standard countries to locations offering the lowest level of labour and environmental standards. The second is 'regulatory competition' which is regarded as the phenomenon of countries loosening their regulatory standards to attract producers.[114] This is the reason that non-regression and right to regulate clauses such as Articles 23.2 (labour) and 24.3 (environment) are inserted into CETA, to confirm that trade will not hinder domestic labour and environmental standards.

Systemic concerns arise on account of fragmented legal systems[115] and the transnational interaction patterns of the actors involved in trade policy.[116] CETA has drawn a backlash, like TTIP,[117] on the grounds that it threatens labour and environmental standards within the two partner countries and

[113] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 137.
[114] In the context of labour, see Katherine VW Stone, 'Globalization and the Middle Class' in Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds) *Critical Legal Perspectives on Global* Governance (Hart Publishing 2014), 168-169.
[115] Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society: A Fragmented Constitutionalism or a Pluralistic Postnational Order' (2012) 4 Goettingen Journal of International Law 625.
[116] Joseph S Nye and Robert O Keohane, 'Transnational Relations and World Politics: An Introduction' (1971) 25 International Organization 329.
[117] Duina (n 58).

their trading partners in the supply chain.[118] A part of this backlash has arisen from labour and environmental groups and citizens i.e., the less traditional trade actors[119] but governments have also questioned the impact of the agreement on public policy objectives. The primary example in this respect is that of France where a domestic review of the agreement was undertaken to ensure that it does not compromise sustainable development. The report submitted at the end of the review did not identify any immediate risk posed by the provisional application of CETA, but France released a three-pronged CETA Action Plan aimed at (i) transparency in the implementation of the agreement and close cooperation with civil society (ii) tackling climate change (iii) improving sustainable development considerations in future EU FTAs.[120] In this direction, the French government has sought to advance its agenda at the EU level by partnering with the Netherlands to ensure the implementation of a CETA Action Plan.[121] The two countries will be working together to coordinate proposals with the

[118] The provisions on investors' rights protection and the lack of enforceability of the TSD provisions being the primary areas drawing criticism. For an overview see Ko-Yung Tung, 'CETA and TTIP: A New "Platinum" Standard for ISDS?' (2016) 110 Proceedings of the Annual Meeting (American Society of International Law) 54; Dirk De Bièvre, 'The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiations' (2018) 53 The International Spectator 70; 'EU Pushes New Environment Rules in TTIP, but without Enforceability' (2015) 33 Inside US Trade; Aneta Tyc, 'Workers' Rights and Transatlantic Trade Relations: The TTIP and Beyond' (2017) 28 The Economic and Labour Relations Review 113.

[119] Alasdair R. Young, 'Not Your Parents' Trade Politics: The Transatlantic Trade and Investment Partnership Negotiations' (2016) 23 Review of International Political Economy 345.

[120] Government of France, 'Implementation of CETA: Government Action Plan' (2017) <https://www.tresor.economie.gouv.fr/Articles/8930b45f-ccfd-499f-a7bb-d1f2c516ad91/files/a712fd2c-0f4d-40b0-a16d-d0958be5e135> accessed 11 July 2022.

[121] Ministry for Europe and Foreign Affairs Government of France, 'France-Netherlands Initiative to Strengthen the Link between Trade Policy and Sustainable Development' (2020) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/news/article/france-netherlands-initiative-to-strengthen-the-link-between-trade-policy-and> accessed 11 July 2022.

Commission and other member states on utilising EU trade policy for sustainable development.[122] France has also expressed its interest in utilising the G7 forum to strengthen transatlantic ties on inter alia combating climate change acknowledging that CETA provides them with a new momentum.[123] In Canada, the provinces are now committed to CETA, but social actors may still contest the legitimacy of the agreement.[124] As chapters 6 and 7 of this thesis demonstrate, economic actors on both sides of the Atlantic have not opposed its sustainable development objectives but are primarily interested in its economic dimension and seek ease of doing business.

The execution of the regulatory agenda under CETA depends on the actors that participate in the implementation of the agreement. Representations made by state, social, and economic actors are based on their respective interests operating in specific contexts. Their coordination and cooperation in EU-Canada trade relations (under the institutional mechanisms set up under CETA) [125] is relevant for analysing the 'transnational nature of law and regulation'.[126]

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[122] ibid.

[123] France Diplomacy, 'A Focus on the EU-Canada Comprehensive Economic and Trade Agreement (CETA)' (2017) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/the-french-government-s-trade-policy/a-focus-on-the-eu-canada-comprehensive-economic-and-trade-agreement-ceta/> accessed 11 July 2022.

[124] Christopher J Kukucha, 'Federalism and Liberalization: Evaluating the Impact of American and Canadian Sub-federal Governments on the Negotiation of International Trade Agreements' (2017) 22 International Negotiation 264.

[125] The forums and committees set up to engage on regulatory cooperation and sustainable development are the primary modes to attain the said objectives see Regulatory Cooperation Forum (CETA, art 21.6), Civil Society Forum (CETA, art 22.5), Committee on Trade and Sustainable Development (CETA, arts 22.4.1 and 26.2.1(g)).

[126] Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 Transnational Legal Theory 141.

From this perspective, regulatory governance is pervaded by pluralistic interests that seek representation and accountability within a transnational legal space beyond the nation state. The normative concern of legitimacy runs parallel to systemic concerns. Therefore, the EU-Canada partnership will need to counteract these concerns and justify individual or combined choices that shape regulatory governance in transatlantic trade.

5. Conclusions

This chapter set forth the primary reasons for considering the EU-Canada partnership as capable of redefining transatlantic trade. In setting out the research question being probed in this thesis, the previous chapter clarified *what* the object of analysis is whereas this chapter established key considerations pertaining to *why* EU-Canada relations are the most advanced in transatlantic relations compared to the other two (EU-US and EU-Mexico). However, to assess the extent to which regulatory governance can be advanced in transatlantic trade we will first need to map the international, EU and Canadian perspectives on the trade-labour-environment linkage. The next chapter initiates the analysis on the multilateral trading system and its interaction with international labour and environmental standards with the objective of clarifying the context within which the EU-Canada bilateral partnership on trade-labour-environment operates.

CHAPTER 3: INTERNATIONAL PERSPECTIVES ON TRADE, LABOUR AND ENVIRONMENT

1. Contextual Background to CETA: The International Framework on the Trade-Labour-Environment Linkage

The previous chapter explained the reasons that make CETA a novel transatlantic agreement for 'trade and environment' and 'trade and labour'. As has been observed, international cooperation in the future is influenced by 'the past history of conflict or cooperation'[1] between countries. For the most part, this chapter discusses the interactions between the international regimes on trade, labour and environment to map the legal context in which CETA operates.[2] These factors are likely to shape policy decisions in CETA's implementation.

2. International Trade, Labour and Environmental Regimes: Analysing Interactions

As each regime operates within a separate sphere of international law overlooked by institutions that have regime-centric outlooks and mandates, this section investigates questions that arise from the interaction between the regimes of international trade, environmental law, and labour law.

2.1. Trade-Labour-Environment: Conflicting Interactions

Within public international law scholarship, the interaction of trade law is viewed as either complementary to or conflicting

[1] Chris Ansell and Alison Gash, 'Collaborative Governance in Theory and Practice' (2007) 18 Journal of Public Administration Research and Theory 543; Aakriti Bhardwaj, 'Collaborative Governance for Addressing Climate Change: Evaluating CETA's Scope' in Robert G Finbow (ed), *CETA Implementation and Implications: Unravelling the Puzzle* (McGill-Queen's University Press) Forthcoming.
[2] See ch 1 of this thesis, section 2 (Research Questions).

with fields such as labour and environment.[3] The complementarity is based on the normative underpinnings of balancing environmental and social objectives with economic interests, presenting trade as a tool for environmental and social protection.[4] On the one hand, the preamble to the Marrakesh Agreement establishing the WTO[5] reiterates the obligation of members to utilise the world's resources in accordance with the objective of sustainable development.[6] On the other hand, not only do environment and labour fall outside the scope of WTO agreements, but these non-trade policy areas also come into conflict with trade regulation at the WTO level.

In saying that the environment and labour fall outside the purview of WTO law,[7] reliance is placed on the distinction made between WTO-plus[8] and WTO-extra[9] issues as identified and defined in the previous chapter under section 3.1. that discussed the regulatory scope of CETA. As WTO-extra obligations, labour and environmental regulation is typically framed in trade literature as derogating from core WTO obligations.

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[3] Gregory C. Shaffer and Mark A. Pollack, 'How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists' in Robert M Stern and Simon J Evenett (eds), *Systemic Implications of Transatlantic Regulatory Cooperation and Competition* (World Scientific Publishing 2011) 63-129, 79.

[4] Principle 12 of the Rio Declaration on Environment and Development 31 ILM 874 (1992); World Commission on Environment and Development, *Our Common Future* (OUP 1987).

[5] Agreement Establishing the World Trade Organization 1867 UNTS 154.

[6] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 1867 UNTS 14.

[7] WTO, 'WTO Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence' (Geneva, 2011), 11.

[8] Comprising transparency and participation-related obligations see ch 2 section 3.1.

[9] Ravi Soopramanien, 'Never For-GATT: What Recent TBT Decisions Reveal About the Appellate Body's Analysis of Environmental Regulation Under the WTO Agreements' (2017) 17 Sustainable Development Law & Policy 4.

2.1.1. Domestic Environmental Policy Space

WTO Members may draw a regulatory linkage between trade and environment under GATT Article XX (the general exemptions clause) relying on paragraphs (b) and (g). In *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)* the WTO's Appellate Body (AB) confirmed 'the importance and legitimacy of environmental protection as a goal of national and international policy'.[10] However, the threat of *de facto* discrimination has made policy application subject to exceptionally demanding requirements.[11] Policy measures must be 'necessary to protect human, animal or plant life or health' and/or 'relating to conservation of exhaustible natural resources' respectively.[12] Article XX(b) requires the measure to meet the 'necessity'[13] test and Article XX(g) specifies that the measure cannot be 'disproportionate' for attaining the policy objective of the conservation of exhaustible resources.[14] After a Member ascertains that a measure falls within paragraph (b) and/or (g), in order to be justified, the measure must fulfil the second requirement as under the *chapeau* of Article XX, i.e. that its application does not constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail', and is not 'a disguised restriction on international trade'.[15] These two

[10] General Agreement on Tariffs and Trade, 1997 55 UNTS 187 (GATT); *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)* see paragraph 129, Report of the Appellate Body, WT/DS58/AB/R 12 October 1998.
[11] Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' (1998) 32 International Lawyer 619, 622.
[12] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, Report of the Appellate Body, WT/DS135/AB/R 12 March 2001, paras 164-175.
[13] ibid.
[14] *US-Shrimp* (n 10) para 141.
[15] Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 The American Journal of International Law 95, 125.

requirements are prerequisite for the justification of an otherwise GATT-inconsistent environmental measure.

Subsequent cases after *US-Shrimp* where members have sought to justify their measures before the WTO on public policy grounds (including legitimate environmental purposes under Article XX) have met with failure.[16] To counter potential protectionism on the part of any Member, the WTO emphatically scrutinises such measures to ascertain that they

> 'are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or result in disguised restriction on international trade'.[17]

WTO decisions are therefore, made in the light of the fundamental principles of free trade under the WTO system i.e., non-discrimination, free and fair trade, transparency and reciprocity.

It remains arguable that the fundamental principles of the WTO, albeit established to ensure non-discrimination and access to the markets of members, clash with the promotion of societal values that seek protection of the environment. Observations on the extent to which this may be true in the EU-Canada partnership are presented in Chapter 7 of this thesis containing analysis of CETA's environmental provisions.

2.1.2. Risk Regulation

Transatlantic approaches to risk are one of the prime areas to attract attention in analysis seeking to demonstrate how regulatory divergences between the EU and its North American

[16] Niall Moran, 'The First Twenty Cases Under GATT Article XX: Tuna or Shrimp Dear?' in G Adinolfi and others (eds), *International Economic Law* (Springer 2017) 3, 10.
[17] *US-Shrimp* (n 10) para 186.

trade partners pose a problem for regulatory cooperation.[18] Notwithstanding the fact that there are regulatory divergences between the US and Canada which the countries have sought to address through bilateral regulatory cooperation,[19] experience at the WTO level has consistently shown that they side together against the EU in areas of health, safety and environmental risk regulation.[20] This tension is reinvigorated in the context of CETA since one of the purposes of the agreement is to deepen regulatory cooperation in risk identification, assessment and management.[21] Both sides of the Atlantic utilise regulatory measures based on the precautionary principle to manage risk but differ in its application.[22] This is because the principle does not have a universally accepted definition. It is meant to be a tool for situations where action or inaction appears warranted based on scientific uncertainty and the threat of serious or irreversible damage.[23] Therefore, the policy frameworks and risk assessment methods adopted in the application of the precautionary principle vary.

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[18] Elizabeth Golberg, 'Regulatory Cooperation – A Reality Check' (2019) M-RCBG Associate Working Paper No. 115; Lucas Bergkamp and Lawrence Kogan, 'Trade, the Precautionary Principle and Post-Modern Regulatory Process' (2013) 04 European Journal of Risk Regulation 493; Alberto Alemanno, 'The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences' (2015) 18 Journal of International Economic Law 625.

[19] See previous chapter, section 4.

[20] See David J. Hornsby (ed), *Risk Regulation, Science, and Interests in Transatlantic Trade Conflicts* (Palgrave Macmillan 2014).

[21] CETA, arts 21.3(a)(i), 21.3(a)(ii) and 21.4(a)(iv); Angeline Couvreur, 'New Generation Regional Trade Agreements and the Precautionary Principle: Focus on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union' (2015) 15 Asper Review of International Business and Trade Law 265.

[22] Jonathan B Wiener and Michael D Rogers, 'Comparing Precaution in the United States and Europe' (2002) 5 Journal of Risk Research 317.

[23] Markus Wagner, 'Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law' (2012) 20 Cardozo Journal of International and Comparative Law 713, 718.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[24] endorses the precautionary principle[25] in the context of trade related risk regulation.[26] Support for the principle, however, remains limited. The brief discussion below illustrates the instances wherein the EU has found itself opposed by the US and Canada when it has sought to further the application of the precautionary principle at the WTO level.

The SPS Agreement sets out that members may impose measures for protection of human or animal life or health from risks in food, pests or diseases carried by plants or animals. It includes 'ecological and environmental conditions' within its criteria for a risk assessment and requires governments to consider 'ecosystems' as one factor in determining pest or disease free areas.[27] As the *EC-Hormones*[28] case has demonstrated, the WTO does not accord the precautionary principle the status of customary international law and allows its application only provisionally.[29] The EU (then European Communities (EC)) had contended such status for the precautionary principle whereas the US argued, followed by Canadian acquiescence, that the precautionary principle is only an 'approach' to policy.[30] The *EC-Hormones* case demonstrates the restrictive approach of the WTO to principles formulated in

[24] 1867 UNTS 493.
[25] SPS Agreement, arts 3.3 and 5.7.
[26] SPS Agreement, art 5.7; Akawat Laowonsiri, 'Application of The Precautionary Principle in SPS Agreement' (2010) 14 Max Planck Yearbook of United Nations Law 565, 569.
[27] SPS Agreement, arts 5.2, 6.2.
[28] *EC Measures Concerning Meat and Meat Products* (*EC-Hormones*), WT/DS26/AB/R, WT/DS48/AB/R World Trade Organization Appellate Body, 16 January 1998.
[29] ibid. Paragraphs 16, 43 and 60.
[30] *EC Measures Concerning Meat and Meat Products* (*EC-Hormones*) (n 28).

other domains of international law or a lack of will to institutionalise them.[31]

Nonetheless, the principle can be applied provisionally under Article 5.7 when relevant scientific evidence is insufficient because it does not override the requirement of risk assessment as per Article 5.1 of the SPS Agreement. In conducting risk assessment, a member may adopt techniques developed by relevant international organisations.[32] On the one hand, WTO members are free to choose their risk assessment method while on the other, since there is no need for uniformity, it leads to divergences.

In the *EC-Biotech* case,[33] the WTO's decision was similar to the one in *EC-Hormones*. In this case, the US, Canada, and Argentina filed a claim at the WTO relating to a moratorium on the approval and marketing of GMO products, which was a measure imposed by the EC on importation of such products. The key measures at issue were: (1) an alleged *de facto* moratorium imposed by the EC on the approval of new biotech products; (2) the alleged failure by the EC to approve specific biotech products, for which applications for approval had been made; and (3) "safeguard" measures taken by six EC Member States to prohibit certain biotech products that had been approved. The complainants contended that the measures were

[31] Margaret A Young and Joe McMahon, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56 International and Comparative Law Quarterly 907, 910.
[32] SPS Agreement, art 5.1.
[33] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*EC-Biotech*), WT/DS291/R WT/DS292/R WT/DS293/R, 29 September 2006.

in violation of SPS Agreement Article 5.1 for lack of a risk assessment and could not be justified under Article 5.7.[34]

In its defence, the EC relied on the precautionary principle under the Cartagena Biosafety Protocol of the Convention on Biological Diversity.[35] Furthermore, the EC advocated the application of customary norms of treaty interpretation as under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[36] to justify the application of the Cartagena Biosafety Protocol and the precautionary principle. The Panel rejected the EC's invocation of the precautionary principle as such and declined to decide on whether the principle could constitute a relevant rule of international law under the VCLT as contended by the EC. It stood bound by the SPS Agreement and stated that it carries (1) no express reference to the precautionary principle (2) mandates only provisional measures based on the precautionary principle and (3) mandates that WTO Members may adopt measures based on scientific knowledge, attained through risk assessment, in order to avoid an SPS measure from being a disguised barrier to trade.[37] For the time being, the precautionary principle lacks support at the WTO level except when applied provisionally. The EU reached a compromise with Canada and Argentina after the Panel released its report

[34] Simon Lester, 'European Communities-Measures Affecting the Approval and Marketing of Biotech Products. WT/DS291/R, WT/DS292/R, & WT/DS293/R' (2007) 101 The American Journal of International Law 453.
[35] ibid. According to the EC, the Convention on Biological Diversity was binding on the EC, Argentina and Canada and had been signed by the United States. Regarding the Biosafety Protocol, the EC pointed out that the Protocol is binding on the EC (which has obligations under it vis-à-vis third parties) and had been signed by Argentina and Canada.
[36] Vienna Convention on the Law of Treaties 1155 UNTS 331.
[37] Robert Cunningham, 'The ABC of GMOs, SPS & the WTO: An Analysis of the Application of the Agreement on Sanitary and Phytosanitary Measures within the Context of Biotechnology and International Trade' (2005) 9 Southern Cross University Law Review 19.

upholding the requirements of the SPS Agreement whereas the dispute is still unresolved with the US.[38]

A consequence of the *EC-Biotech* case is that the EU and Canada have established a Dialogue on Biotech Market Access Issues under CETA seeking better cooperation on biotechnology products.[39] Thus, historical factors have come into play in CETA.

2.1.3.Labour Standards

The precautionary principle may have become intrinsic to the field of international environmental law after the Rio Declaration[40] but it is applied in the field of labour law as well.[41] CETA reflects its endorsement of the principle in its labour chapter (Chapter 23, CETA) that states that

> The Parties acknowledge that in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a person, a Party shall not use the lack of full scientific certainty as a reason to postpone cost-effective protective measures.[42]

Additionally, the EU and Canada have more ground to cover to deepen the trade-labour linkage as progress within the WTO remains strictly limited.

On the trade-labour linkage at the WTO, the debate predominantly ensues along the north-south divide. Industrialised countries sought labour regulation through trade based on the argument that the import of low-wage products

[38] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products - Status report by the European Union – Addendum*, WT/DS291/37/Add.129, 18 January 2019.
[39] CETA, art 25.2.
[40] Rio Declaration (n 4).
[41] Wagner (n 23) 719; Benjamin O Alli, *Fundamental Principles of Occupational Health and Safety* (ILO 2008) 67.
[42] CETA, art 23.3.3.

from developing countries was the reason for job losses in the competing sectors within their economies.[43] Whereas developing countries were not in favour of the linkage because they saw it as disguised protectionism on the part of industrialised countries, hindering their comparative advantage in world trade.[44] The proposal to incorporate a social clause in WTO agreements pertains to this aspect of the trade-labour linkage.[45] As is explained in subsequent paragraphs, there have not been any significant developments in this direction at the WTO. The Singapore[46] and Doha[47] declarations did encourage WTO Members to ratify the ILO core conventions.[48] However, the debate at the WTO level does not take a complete account of the impact of globalisation on labour standards.

The eight fundamental or core conventions of the ILO[49] 'represent basic labour rights that would be inviolable and applicable to all workers'[50] and cover the four fundamental principles and rights as follows:

1) freedom of association and the effective recognition of the right to collective bargaining
2) the elimination of all forms of forced or compulsory labour
3) effective abolition of child labour
4) the elimination of discrimination in respect of employment and occupation

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[43] Eddy Lee, 'Globalization and Labour Standards: A Review of Issues' (1997) 136 International Labour Review 173, 174-176.
[44] ibid. 177.
[45] Virginia A Leary, 'The WTO and the Social Clause: Post-Singapore' (1997) 8 European Journal of International Law 118.
[46] Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996.
[47] Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.
[48] The conventions are listed in ch 1 of this thesis, section 3.1, fn 42.
[49] ibid.
[50] Mita Aggarwal, 'International Trade, Labor Standards, and Labor Market Conditions: An Evaluation of the Linkages' [1995] US International Trade Commission, Office of Economics Working Paper No 95-06-C, 4.

These principles and rights are derived from the 1998 Declaration on Fundamental Principles and Rights at Work.[51] ILO Member States are expected to promote them even if they have not ratified the core conventions. The Declaration clarifies that it has universal application i.e., it applies to all countries, regardless of the level of economic development. The relevance of the Declaration is that it brings attention to the social dimension of globalisation because it was being perceived solely in economic terms.[52] The EU and Canada extended unwavering support to the Declaration at the time.[53] Thus, the indivisible link between 'the social' with 'the economic' of globalisation was acknowledged on both sides of the Atlantic.

The very nature of labour law extends its scope across the fields of social policy on the one hand and economic policy on the other. The ILO monitors labour standards under the former and provides policy guidance for members in respect of the latter. The ILO's core conventions are envisioned as social objectives to ensure minimum standards that have materialised from basic human rights.[54] They are independent from labour market policies that ILO members consider to be the subject matter of domestic labour law because of their correlation with either national income or the respective levels of economic development such as minimum wage rate and occupational

[51] International Labour Conference, Declaration on Fundamental Principles and Rights at Work, 18 June 1998, 37 ILM 1233.
[52] Isabelle Duplessis, 'The ILO Declaration on Fundamental Principles and Rights at Work: A New and More Efficient Form of Regulation?' (2004) 59 Relations Industrielles 52.
[53] Commission of the European Communities, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation COM (2001) 416 final; Judy Fudge, '"Labour Is Not a Commodity": The Supreme Court of Canada and the Freedom of Association' (2004) 67 Saskatchewan Law Review 425, 451.
[54] Drusilla K Brown, 'Labor Standards: Where Do They Belong on the International Trade Agenda?' (2001) 15 Journal of Economic Perspectives 92.

safety and health standards.[55] They are correlated because basic labour standards induce positive economic effects leading to better working conditions and pay.[56] Moreover, the steps being taken at the ILO to elevate occupational safety and health to fundamental principles and rights at work only point to the deepening overlap between the economic and social policy objectives envisioned by labour law.[57] This also means that ILO members will need to consider the so called economic objectives holistically i.e., beyond the ambit of their domestic relevance.

It is worth noting here that developed economies, including the North American and European governments, sought the governance of labour standards under the WTO system to avoid labour market distortions in their economies.[58] However, market distortions affecting wage rates and working conditions have occurred in developing countries due to trade liberalisation. The Rana Plaza tragedy in Bangladesh,[59] the horrific exploitation of and violence against workers at sea in the fisheries industry in Thailand (with links to as many as 40 countries),[60] the violation of the rights of seafarers involved in the transport of goods around the globe[61] are some of the

[55] ibid.
[56] Drusilla K Brown (n 54).
[57] ILO, 'Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work' <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_848632.pdf> accessed 20 July 2022.
[58] Neil Smith, 'Global Seattle' (2000) 18 Environment and Planning D: Society and Space 1,3.
[59] ILO, 'The Rana Plaza Accident and Its Aftermath' <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm> accessed 20 July 2022.
[60] David Tickler and others, 'Modern Slavery and the Race to Fish' (2018) 9 Nature Communications 4643.
[61] International Maritime Organization, 'Supply Chains Firms Urged to Protect Seafarers' Rights' (2021) <https://www.imo.org/en/MediaCentre/PressBriefings/pages/Due-Diligence-Tool.aspx> accessed 20 July 2022.

examples. They signify the repercussions of declining direct employment on labour standards on account of the workforce being involved along GVCs.[62] These issues are framed as 'social dumping' and 'modern slavery'. The former occurs when an employer reduces wages and labour benefits provided to workers in lieu of reducing production costs.[63] The latter is a more complex term to define. Modern slavery has two facets: 'human trafficking' and 'slavery, servitude and forced or compulsory labour'.[64] These are derived from the UK Modern Slavery Act 2015 and the Australian Modern Slavery Act 2018, two first-time legislative responses from national governments to address modern slavery.[65] The two facets overlap, for instance in the case of trafficking for labour exploitation.[66] In the context of trade, modern slavery concerns forced labour in corporate supply chains.[67] In 2019, the WTO endorsed the view of the G20 that there is a need to foster sustainable supply chains.[68] The primary question is: how are these issues to be addressed?[69]

[62] Kevin Kolben, 'Transnational Private Labour Regulation, Consumer-Citizenship and the Consumer Imaginary' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 361.
[63] Anca Costea-Dunarintu, 'Social Dumping in the European Single Market' (2014) 6 Knowledge Horizons: Economics 147.
[64] Lisa KE Hsin, 'Modern Slavery in Law: Towards Continuums of Exploitation' (2020) 26 Australian Journal of Human Rights 165.
[65] ibid. 168.
[66] Mariyana Radeva Berket, 'Labour Exploitation and Trafficking for Labour Exploitation' (2015) 16 ERA-Forum 359.
[67] Justine Nolan and Gregory Bott, 'Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices' (2018) 24 Australian Journal of Human Rights 44.
[68] WTO, 'Azevêdo Welcomes G20 Leaders' Reaffirmation of Commitment to WTO Reform' (29 June 2019) <https://www.wto.org/english/news_e/news19_e/dgra_29jun19_e.htm> accessed 20 July 2022.
[69] This thesis proposes that CETA can play an instrumental role in this respect see ch 7.

The WTO's Singapore Ministerial Declaration stated that the WTO will not 'set and deal with' core labour standards, identifying the ILO as the competent body to promote them.[70] Michel Hansenne, the then Director-General of the ILO stated, 'The ball is now in the ILO court.'[71] However, the ILO was hesitant to face the issue of trade and workers' rights in view of opposition from governments and employers' organisations.[72] The ILO's Governing Body set up a Working Party on the Social Dimensions of the Liberalization of International Trade that was open to considering the interconnected aspects of labour standards, trade liberalisation and economic globalisation. Particularly, the Working Party discussed (i) if a specific social dimension in the multilateral trade system should be introduced and (ii) the impact of trade liberalisation on the attainment of ILO's social objectives. However, discussions initiated in 1994 were suspended shortly thereafter in 1995.[73] The cause of suspension was attributed to the complete lack of consensus on the usefulness and modalities of a possible link between labour standards and the multilateral trading system. This was because the notion of *trans-border* moral obligations for states on labour issues was not widely accepted at the time.[74]

The vehement protests by trade unionists (and environmental organisations) disrupting the subsequent WTO Seattle

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[70] It was signed at the Singapore Ministerial Conference confirming see Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996.

[71] Virginia A. Leary, 'The WTO and the Social Clause: Post-Singapore' (1997) 1 EJIL 118; Steve Hughes and Rorden Wilkinson, 'International Labour Standards and World Trade: No Role for the World Trade Organization?' (1998) 3 New Political Economy 375.

[72] 'International trade and labour standards: The ILO Director-General speaks out' (1996) 135 International Labour Review 230.

[73] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, 4th ed. (London: Routledge, 2013) 716-717.

[74] Jagdish Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 World Economy 745 (emphasis added).

Ministerial Meeting in 1999 were one of the largest against economic globalisation.[75] When civil society voiced its discontent with the neoliberal agenda of the WTO it was stark evidence about the impact of trade liberalisation on labour standards in developing countries.[76] The World Social Forum (WSF) comprising civil society organisations as its members was established soon after. The WSF sought 'emancipation'[77] from the current form of globalisation as led by global economic governance institutions – the World Bank, International Monetary Fund and WTO.

Noting the protests in Seattle, taking lead from his predecessor Michel Hansenne, the then Director-General of the ILO, Juan Somavia stated that there was a need for *fair globalisation* that reduces inequality within and between developed and developing countries.[78] Accordingly, the ILO sought to influence change that happened in two steps starting with the adoption of the 1998 Declaration of Fundamental Principles and Rights at Work and then with the adoption of the Decent Work Agenda.

The 1998 Declaration sought to promote the implementation of the core labour standards in all ILO members but not without protecting the interests of the less developed countries as is evident from the following excerpt

[75] Tony Clarke, 'Taking on the WTO: Lessons from the Battle of Seattle' (2000) 62 Studies in Political Economy 7.
[76] John D French and Kristin Wintersteen, 'Crafting an International Legal Regime for Worker Rights: Assessing the Literature Since the 1999 Seattle WTO Protests' [2009] International Labor and Working Class History 145.
[77] Giuseppe Caruso, 'Open Cosmopolitanism and the World Social Forum: Global Resistance, Emancipation, and the Activists' Vision of a Better World' (2017) 14 Globalizations 504.
[78] ILO, 'ILO Calls for New Multilateral Initiative to Address Social Implications of Globalization' (1999) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007962/lang--en/index.htm> accessed 12 July 2022 (emphasis added).

> […] labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

While the ILO may have been able to respond to the immediate pressures of globalisation at the time, it also wanted to avoid the misunderstanding that there was a normative hierarchy between those conventions referred to as core/fundamental and others or the shrinkage of its mandate on labour standards.[79] In 1999, the ILO released a report on Decent Work calling it its primary objective and defining it as 'the converging focus of all [of ILO's] four strategic objectives: the promotion of rights at work; employment; social protection; and social dialogue [which] must guide [the ILO's] policies and define its international role in the near future.'[80] The 2008 ILO Declaration on Social Justice for a Fair Globalization institutionalised the Decent Work concept requiring ILO members to pursue policies based on its objectives.[81] These developments were a stepping stone in framing the labour-related sustainability objectives in the context of globalisation. The Decent Work Agenda, was adopted by the UN as SDG 8 in 2015 encompassing a 10-point criteria sought to guide national governments on both statistical (quantitative) and legal (qualitative) framework indicators.[82]

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[79] Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 487-488.

[80] ILO, 'Decent Work, Report of the Director-General, International Labour Conference, 87th Session' (1999) 3.

[81] See Preface, *ILO Declaration on Social Justice for a Fair Globalization* (International Labour Organization 2008).

[82] (1) Employment opportunities (2) Adequate earnings and productive work (3) Decent working time (4) Combining work, family and personal life

The criteria are 'aimed at preventing or alleviating poverty, vulnerability and social exclusion'.[83] In other words, as an arm of sustainable development the Decent Work Agenda marks a shift in the normative basis for regulating work wherein labour law's traditional role was to address unequal bargaining power and subordination in employment relationships under national laws. The operative nomenclature in labour law is now work (and not labour); regulation (and not law); and global economy (and not the nation state).[84]

The WTO's exclusion of labour standards may be justified on two counts. First, that it was never intended as a ''constitutional' regime designed to impose a particular substantive normative vision'.[85] Second, the WTO has responded to regulatory diversity and pluralism of the legal systems of its members. These justifications make use of interpretative approaches to WTO law presenting it as one of 'accommodation and deference'.[86] From this perspective, the decisions in *EC-Hormones, EC-Asbestos,* and *US-Shrimp*, discussed above, can be read differently as allowing members to employ their distinct regulatory approaches.[87] Nevertheless, WTO jurisprudence has not directly addressed the trade and labour relationship.[88] It

(5) Work that should be abolished (6) Stability and security of work (7) Equal opportunity and treatment in employment (8) Safe work environment (9) Social security (10) Social dialogue, employers' and workers' representation see Madhavi Venkatesan and Giuliano Luongo, *SDG8 - Sustainable Economic Growth and Decent Work for All* (Emerald Publishing 2019) 72.

[83] ibid. 27-28, 72.

[84] Judy Fudge, 'Regulating for Decent Work in a Global Economy' (2018) 43 New Zealand Journal of Employment Relations 10, 11-13.

[85] Joanna Langille, 'The Trade-Labour Relationship in the Light of the WTO Appellate Body's Embrace of Pluralism' (2020) 159 International Labour Review 569, 578.

[86] ibid.

[87] Joanna Langille (n 85) 580-583.

[88] ibid. 588.

came close once in *EC-Tariff Preferences,*[89] but India withdrew its complaint on labour linkage in the GSP Scheme of the then EC.[90] If core labour standards (not market-related labour policies) were argued as legitimate policy objectives on the grounds of public morals,[91] then trade-labour linkage may have developed further at the WTO level. However, labour provisions of CETA are not subject to dispute settlement.[92] Nonetheless, in addressing labour standards as a dimension of social sustainability, agreements like CETA may help transform the transactional side of trade, as opposed to its contentious side, by making it 'responsive, inclusive, participatory and representative' – objectives common to SDG 8 on Decent Work[93] and the concept of regulatory governance, as explained later in this chapter. In doing so, CETA may contribute to two aspects of social sustainability, namely 'just transition' and 'green jobs'[94] as they lie at the intersection of labour, environmental and trade laws.

2.1.4. Towards 'Greener' Trade

For the most part the discussion on environmental regulation in this thesis combines what scholars describe as two separate but interdependent fields of environmental and climate change law.[95] One differentiation is made on a temporal basis where environmental law originated in the early 1970s with the

[89] European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004.
[90] Thomas Cottier, 'The Implications of EC – Seal Products for the Protection of Core Labour Standards in WTO Law' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 74.
[91] ibid. 89.
[92] CETA, art 23.11.
[93] Tonia Novitz, 'Engagement with Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice' (2020) 159 International Labour Review 463, 467.
[94] ibid.
[95] Chris Hilson, 'It's All About Climate Change, Stupid! Exploring the Relationship between Environmental Law and Climate Law' (2013) 25 Journal of Environmental Law 359.

Stockholm Conference and climate change law almost two decades later with the UNFCCC.[96] Another is the 'object' divide where environmental law regulations protect the components of the ecosystem and climate change law protects the global atmosphere.[97] It is, however, accepted that regulatory frameworks on climate change are derived from international environmental law.[98] Nonetheless, a third difference may be drawn on the basis of the end-goals sought in the sense that environmental law seeks protection and conservation of nature and natural resources whereas climate change law focuses on transitions to low-carbon economy.

The motivation to delve into climate change here also lies in the fact that the objective of decarbonising the economy embodies a labour driven dimension to climate change action in the idea of 'just transitions'[99] that necessitates linkages between the two fields that are otherwise known to operate 'in silos'.[100] Just

[96] Stockholm Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/ CONF.48/14/Rev.1 (1973) 3; United Nations Framework Convention Climate Change 1771 UNTS 107 (UNFCCC). See also Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (3rd Editio, OUP 2009) 48 and Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32 Melbourne University Law Review 922, 924-927.

[97] Cinnamon Carlarne, 'Delinking International Environmental Law and Climate Change' (2014) 4 Michigan Journal of Environmental & Administrative Law 1.

[98] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 11; Rowena Maguire, 'Incorporating International Environmental Legal Principles into Future Climate Change Instruments' (2012) 6 Carbon & Climate Law Review 101 and Daniel Bodansky, 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' (2011) 43 Arizona State Law Journal 697 (Montreal Protocol's regulatory approach discussed for future climate change regulation).

[99] Ann M Eisenberg, 'Just Transitions' (2019) 92 Southern California Law Review 273, 285.

[100] Sara L Seck, 'Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker' (2018) 33 Canadian Journal of Law and Society 137 and David J Doorey, 'A Transnational Law of Just Transitions for Climate Change and Labour' in A Blackett and A Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing, Incorporated 2015) 555, 556.

transitions has its origins in occupational health and safety related issues faced by workers but gradually attained its meaning in the context of sustainable development.[101] It is in the call for climate justice that this idea overlaps with climate change action. The predominant demand (and challenge) is that the interests of workers be protected in the move towards decarbonisation i.e., creating pathways to shift the workforce to 'green jobs'.[102]

An aspect of climate action that has a direct bearing on the trade-labour-environment linkage is subsidies. The WTO rules do not prohibit subsidies *per se* but assess whether the effects of subsidies are trade restrictive.[103] In other words, a financial contribution to benefit a domestic industry that impacts trade is prohibited.[104] Subsidies may be extremely vital in supporting the development of domestic industries but are also important for international environmental rulemaking insofar as enabling climate transitions is concerned. In disciplining the use of subsidies, WTO law may be creating hurdles in both these respects.

One case to demonstrate this is *Canada–Renewable Energy*[105] wherein a scheme introduced in 2009 (feed in tariff (FIT)),[106] to

[101] Eisenberg (n 99), 286.
[102] Kees van der Ree, 'Promoting Green Jobs: Decent Work in the Transition to Low-Carbon, Green Economies' (2019) 11 International Development Policy | Revue Internationale de Politique de Développement 248.
[103] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14 (SCM Agreement).
[104] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th Edition, Routledge 2013), 368.
[105] *Canada- Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program* WT/DS412/AB/R and WT/DS426/AB/R, adopted 24 May 2013.
[106] A FIT is a long-term contract by a government agency to secure wholesale electricity at a set price that reflects a rate of return attractive to investors and developers. The price in the contract is generally above the wholesale

incentivise the production of electricity from wind or solar generators, was called into question by Japan and the EU.[107] The goal of the scheme was also to 'enable new green industries' locally and therefore, a local content requirement (LCR) was used to earmark the preferential treatment toward installing locally manufactured equipment.[108] On the LCR, the panel and AB concluded that it constituted a WTO violation because it was discriminatory against foreign equipment. However, both the Panel and the AB doubted whether FIT constituted a subsidy. It was recognised that FIT was a financial contribution but whether it provided benefit was not certain. The dispute settlement process avoided the bigger question of whether WTO law poses obstacles for socially-merited environmental policies.

Apart from the point that this case underlines the existence of a tension between international climate change mitigation goals and WTO law,[109] there are also implications for labour because subsidies can help generate employment.[110] Whether the WTO Agreement on Subsidies and Countervailing Measures[111] prohibits environmental subsidies is unresolved for now but there is a positive probability that '*non-discriminatory* clean

price of power in the region (otherwise, there would be no incentive) see Steve Charnovitz and Carolyn Fischer, 'Canada-Renewable Energy: Implications for WTO Law on Green and Not-So Green Subsidies' Resources for the Future Discussion Paper 14-38.

[107] The EU, US and Mexico, Canada's key trade partners in the North Atlantic joined as third parties.

[108] The scheme thereby created two instruments, the FIT and LCR under the larger scheme to promote renewable energy production.

[109] Ilaria Espa and Gracia Marín Durán, 'Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada – Renewable Energy/Fit Program' (2018) 21 Journal of International Economic Law 621.

[110] Maria Teresa García-Alvarez and Rosa María Mariz-Pérez, 'Analysis of the Success of Feed-in Tariff for Renewable Energy Promotion Mechanism in the EU: Lessons from Germany and Spain' (2012) 65 Procedia - Social and Behavioral Sciences 52.

[111] SCM Agreement (n 103).

energy subsidies could survive a WTO challenge.'[112] However, the discriminatory part of the FIT scheme, namely the LCR, has consequences for a domestic industrial policy seeking to generate employment in a specific sector[113] and comes into conflict with the idea of just transitions. Environmental degradation and climate change require enterprises and labour markets to react and adjust. To achieve the goal of environmentally sustainable economies, there needs to be regulatory stimulation which is disincentivised at the WTO level.

Discussions on 'green jobs' have typically been conducted by international organisations such as the United Nations Environment Programme (UNEP) and ILO, based on dialogue and discourse-building techniques on green work.[114] The emerging challenges of advancing freer trade to enhance the world economy and not losing sight of environmental and social urgencies instigates a new 'WTO Think'[115] but developments in this respect are most likely to progress outside the purview of the WTO.

3. Reconciling The Trade-Labour-Environment Interactions

The previous section discussed the facets of the trade-labour-environment conflict. This section proposes that CETA may play a role in developing rules in this direction by utilising the concept of regulatory governance. However, it will require a key

[112] Bradly J Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (OUP 2013) 61 (emphasis in original). Although there is suggestion to exercise caution in the absence of an express environmental exception in the SCM Agreement see Aaron Cosbey and Petros C Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' [2014] EUI Working Paper RSCAS 2014/17.
[113] ibid. Cosbey and Mavroidis.
[114] See generally *Green Jobs* (UNEP 2008).
[115] Thomas J Bollyky and Petros C Mavroidis, 'Trade, Social Preferences and Regulatory Cooperation The New WTO-Think' (2017) 20 Journal of International Economic Law 1.

adjustment in the way we perceive TSD and therefore, we need to view the trade-labour-environment linkage through the lens of transnational law.

3.1. Transnational Law

Transnational law comprises '*all law* which regulates actions or events that transcend national frontiers'[116] resulting from the engagement of 'individuals, corporations, states, organizations of states, or other groups'[117] in the regulatory process. International law stands transformed by transnational law to make both states as well as corporations as its subjects and objects.[118] Sometimes used interchangeably,[119] this thesis maintains that 'international law' is viewed through the lens of 'transnational law'. The primary reason for doing so is because we can no longer constrain our understanding of international trade law to the WTO system that revolves around interstate trade relations and does not throw light on the role partaken by Transnational Corporations (TNCs) and civil society actors in the governance of trade. UNCTAD draws attention to the fact that trade is indeed governed along GVCs and has led to the empowerment of TNCs.[120]

We need to make this distinction also because the essence of trade law is transnational. Before the GATT or the establishment of the WTO, trade was viewed as part of 'private' transnational economic relations, integrating national and international

[116] Philip Jessup, *Transnational Law* (Yale University Press 1956) 2 (emphasis added).
[117] ibid.
[118] See Joel P Trachtman, 'The International Economic Law Revolution' (1996) 17 University of Pennsylvania Journal of International Law 33.
[119] Jessup (n 116).
[120] UNCTAD, *Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion* (UNCTAD 2018) 36.

norms.[121] Trade concerned the commerce taking place through economic non-state actors. The transatlantic economy, which is home to a substantial number of TNCs, exemplifies this position. According to EuroGroups Register, 213,146 TNC groups were registered in the EU in 2018, 150,541 of which are from the EU (i.e., their global decision centres were located in the EU member states), 10,431 from the United States and 4,956 from Canada.[122]

From the perspective of transnational law, TNCs are its subjects as well as objects. As subjects, TNCs, unlike states and international organisations, have global reach and therefore find support from states to address 'governance gaps' and 'governance failures' that governments and intergovernmental agencies are challenged by.[123] This view operates on the complementarity of public and private interest regulation. There is an argument that private authority adds an additional layer of rules for phenomena that are already embedded in complex political, legal, and regulatory orders.[124]

Another view, embedded in human rights law,[125] that presents an antagonistic relation between public and private interests,

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[121] Charles Evan, 'The New Municipal "Private" International Trade Law: The Complement to Socio-Economic Transformations' (1972) 14 Boston College Law Review 45.

[122] 'Structure of Multinational Enterprise Groups in the EU' (2020) < https://www.sipotra.it/wp-content/uploads/2020/09/Structure-of-multinational-enterprise-groups-in-the-EU.pdf> accessed 20 July 2022.

[123] John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Cambridge: Polity Press 2003) 58.

[124] Tim Hartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards' (2011) 12 Theoretical Inquiries in Law 517; Tim Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 American Journal of Sociology 297.

[125] On the relationship between human rights and international economic law see Robert Howse, *Fragmentation and Utopia: Towards an Equitable Integration of Finance, Trade, and Sustainable Development* (OUP 2012).

establishes TNCs as objects of transnational law. According to this view, in the present global legal order, TNCs carry on their activities under a 'jurisdictional spaghetti bowl' conceding a 'governance gap' in respect of their human rights violations.[126] It places an onus on states and international organisations and governments to regulate businesses activities in a global economy.

Social actors representing civil society have an assistive role in ensuring the rule of law.[127] Accordingly, they engage in transnational law to ensure transparency, accountability, and compliance by states and private economic actors. A transnational perspective on trade is also necessitated by the fact that there are instances wherein the WTO has not paid enough attention to the opinions of transnational social actors. This has not only had specific effects such as the exclusion of social science expertise in the area of risk regulation[128] but also disincentivised the participation of groups representing labour and environmental interests in trade disputes.[129] The WTO suffers from political and legal constraints when considering whether to admit contributions from non-state actors.[130]

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[126] Joshua Waleson, 'Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment' [2015] Legal Issues of Economic Integration 143; Douglas Cassell and Anita Ramasastry, 'White Paper: Options For a Treaty on Business and Human Rights' (2016) 6 Notre Dame Journal of International and Comparative Law 1.

[127] Gordon A. Christenson, 'World Civil Society and the International Rule of Law' (1997) 19 Human Rights Quarterly 724; Jessica Scott, 'From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes' (2016) 6 Michigan Journal of Environmental & Administrative Law 203.

[128] Mary E Footer, 'Post-Normal Science in the Multilateral Trading System: Social Science Expertise and the EC–Biotech Panel' (2007) 6 World Trade Review 281.

[129] Theresa Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?' (2018) 17 World Trade Review 65.

[130] ibid.

Moreover, labour and environmental movements are globally linked and increasingly transnational.

For the reasons discussed above, the trade partnership between the EU and Canada under this thesis is analysed under the public and administrative typologies of transnational law. The term 'public' in transnational law refers to the relevant frameworks covering trade, labour and environment and 'administrative' refers to the institutional arrangements therein to govern the partnership. In other words, this thesis does not delve on or analyse the role of transnational private law in transatlantic relations but they are taken as its objects. This is depicted in Figure 3.A. below that utilises the 'map of transnational law'[131] to draw attention to the highlighted areas that are being analysed subsequently in this thesis. The sub-typology of EU 'supranational law' is highlighted because by virtue of evolving in the legal space beyond member states, EU law displays a chief characteristic of transnational law.[132] Furthermore, institutional frameworks within the EU create public and hybrid forms of transnational administrative law.[133] This is explored further in the next chapter as a sub-theme of this thesis.

[131] Matej Avbelj, *The European Union under Transnational Law* (Bloomsbury 2018) 10.
[132] ibid. 11.
[133] Matej Avbelj (n 131).

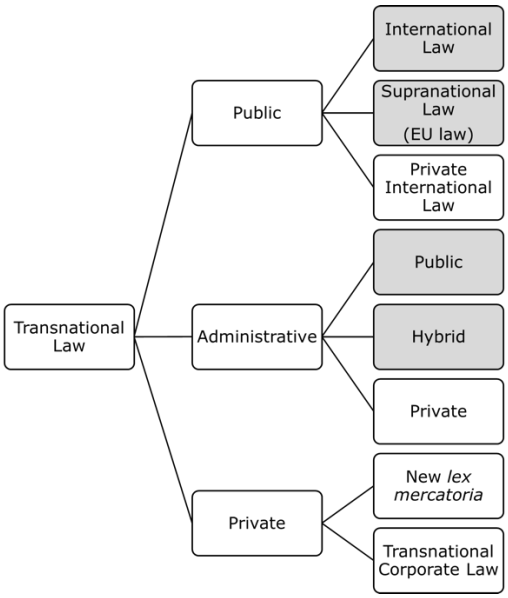


Figure 3.A. The Sub-typologies of Transnational Law Analysed in this Thesis

The rules governing a particular subject matter of law (like labour and environment) are aided by principles such as *transparency*, *accountability, efficiency, adaptability* and *coherence* developed in the field of administrative law.[134] Their significance lies in their ability to make the substantive rules more effective.[135] Upcoming chapters examine their application in the EU and Canada, respectively. It is the substantive legal and environmental rules taken together with the cross-cutting principles that are analysed under the purview of 'regulatory governance' in this thesis. Let us consider the origins and significance of this concept further for the purpose of this thesis.

[134] See Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 The European Journal of International Law 187; Donald T. Hornstein, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 Duke Law Journal 913 and Errol Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17 European Journal of International Law 47.
[135] ibid.

3.2. Regulatory Governance

This section considers the meaning of regulatory governance as within a state before we move on to consider how the concept is utilised the international or transnational levels. Regulatory structures within a legal system are characterised by delegation of power leading to four types of decentralisations: legal, administrative, economic and fiscal.[136]

The first three are implicated in the context of this thesis. Legal decentralisation concerns the constitutional foundations of decentralisation.[137] For instance, in the case of the EU, this distribution of powers takes place between national and supranational levels and in the case of Canada, federal and sub-federal. Regulatory governance in this context is defined by taking together the constitutional framework which allocates the powers, roles and responsibilities of public institutions at different levels of government and centres around the objective of strengthening democracy.[138]

Administrative decentralisation is marked by delegation of regulatory authority to institutions and agencies outside the ambit of direct control of the central administration of states. Regulatory institutions and agencies in turn are entrusted to perform administrative duties in the public interest. The need to address the threat of regulatory failures on the part of the state

[136] Jennie Litvack and Jessica Seddon (eds), *Decentralization Briefing Notes* (World Bank Institute, 2000) 3.
[137] OECD, *Making Decentralisation Work: A Handbook for Policy Makers* (OECD Publishing, Paris 2019) 31.
[138] Delia Rodrigo, Lorenzo Allio and Pedro Andres-Amo, 'Multi-Level Regulatory Governance: Policies, Institutions and Tools for Regulatory Quality and Policy Coherence' [2009] OECD Working Papers on Public Governance No. 13, 11.

and/or capture of regulatory agencies by private interests led to the development of the field of administrative law.[139]

Administrative law seeks (i) *public participation* to improve administrative rationality and judicial review; (ii) *accountability* to control the 'discretion' of regulatory agencies and (iii) *effectiveness* in the implementation of regulation.[140] With the aim of ensuring transparency, participation and accountability, administrative law effected the move towards regulatory governance in the US[141] and Canada.[142] In the EU, the governance frameworks for the internal market as well as social policy instruments internationalise administrative law principles at supranational level.[143] Individuals and organisations representing social interests make use of constitutional and administrative law provisions to foster *democratic* regulatory governance.[144]

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[139] The 'capture' and 'enforcement' theories of regulation are a result of the critique of the public interest theory see Andrei Shleifer, 'Understanding Regulation' (2005) 11 European Financial Management 439.

[140] For the American perspective see Gregory A Caldeira and others, 'Administrative Law', *The Oxford Handbook of Law and Politics* (OUP 2008) 341 (emphasis added). These principles reflect in EU law as well as Canadian law see Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, 'General Principles Framing European Union Administrative Law', *Administrative Law and Policy of the European Union* (OUP 2011) 145 and David Phillip Jones and Anne S. de Villars, 'Constitutional Aspects of Canadian Administrative Law', *Principles of Administrative Law* (Carswell 1985) 21 (discussed in chs 4 and 5 of this thesis).

[141] Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 Indiana Journal of Global Legal Studies 369.

[142] Sirota Léonid, 'Canadian Administrative Law and Good Governance' (2018) 31 Canadian Journal of Administrative Law & Practice 285.

[143] Rainer Nickel, 'Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order' [2006] EUI Working Papers LAW No. 2006/26.

[144] Susan D. Phillips and Steven Rathgeb Smith, 'Between Governance and Regulation' in Susan Philips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector* (Routledge 2011) (emphasis added) 23.

Economic decentralisation takes place on account of privatisation and deregulation.[145] This results in patterns of regulatory governance that either *control* economic activities or result in the *sharing* of authority between the state and private economic actors. In the former case, economic actors operate under economic liberalisation and development policies.[146] Whereas in the latter, the delegation of power to the private sector blurs boundaries between the public and private forms of authority.[147] On the one hand, we see states regulating the ebbs and flows of economic activity by employing laws and frameworks such as corporate governance while on the other, they rely on economic actors to implement market-related regulation. Therefore, privatisation and deregulation at national level is a reason why transnational governance is necessary.

Decentralisation within states has given rise to the notion of 'governance without government'.[148] Irrespective of whether the realm of authority is public, private or shared, the delegation of power signifies the separation of the act of 'governing' from the 'government' which leads us to the concept of 'governance'. Governance could be 'a *new* process of governing; or a *changed* condition of ordered rule; or the *new* method by which society is governed'.[149] These observations (rightly) give the impression that governance is a broader concept than government but also make it equally challenging to ascertain a concrete meaning of the term.

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[145] Daniel Drache (ed), *The Market or the Public Domain?* (Routledge 2001) 37-66.
[146] Litvack and Seddon (n 136) 4.
[147] Gerry Stoker, 'Governance as Theory: Five Propositions' 50 International Social Science Journal 17.
[148] James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government : Order and Change in World Politics* (CUP 1992) 5, 7, 131.
[149] Rod AW Rhodes, 'The New Governance: Governing without Government' 44 Political Studies 652, 653 (emphasis in original).

The meaning of governance is marked by subjective expressions. However, it refers to the 'patterns of interaction' or the 'network' between the public (governmental, hierarchical), private (markets) and voluntary (non-governmental, social) actors.[150]

Regulation is utilised by governments as a tool to intervene in markets for ensuring resource efficiency, compliance and accountability of the state and economic actors.[151] 'Regulatory rationale' explains *why* states regulate. For instance, regulation is directed at correcting *market failures* arising from an anti-competitive behaviour of businesses which gives rise to externalities such as environmental degradation and violation of labour standards. The state-centred perspective on regulation views governments as the central pillar of regulation. However, governments utilise governance networks to engage with private actors to regulate leading to public-private regulation.[152] Governments may also set the agenda for business conduct and leave economic actors to self-regulate.[153] The application of governance to regulation in these contexts is understood to constitute the meaning of 'regulatory governance' in this thesis.

[150] ibid., 658.
[151] Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004) 89, 99, 111-117. Regulators are institutions that hold the power of policy-formation, law-making, adjudication, and enforcement; Alberto Pera, 'Deregulation and Privatisation in an Economy-Wide Context' [1989] OECD Journal: Economic Studies 159.
[152] Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation: Mapping the Labyrinth' [2012] CEPS Working Document No 32/ October 2012.
[153] Arno Kourula and others, 'New Roles of Government in the Governance of Business Conduct: Implications for Management and Organizational Research' (2019) 40 Organization Studies 1101.

3.3. International and Transnational Regulatory Governance

The internationalisation of economic activity, particularly within the EU and US,[154] led to international regulatory regimes which refer to the principles, norms, rules, and decision-making procedures around which actors' expectations converge.[155] These regimes challenge Westphalian sovereignty and 'reflect the emergence of new forms of international law' which are no longer the domain of unitary states.[156] Therefore, two factors: the interdependence between economies and the need for operating the (resultant) global economy, necessitate regulatory governance in international relations. The process comprises multiple state and non-state actors i.e., different levels of government and public agencies and private national and international stakeholders with regulatory powers.[157] The term 'transnational regulatory governance' is used to suggest that regulation is lifted beyond the nation-state and that states are only one type of actor in the process of rulemaking.[158] Transnational regulatory governance comprises the interaction between *states*, *international organisations* such as the UN, the WTO and the ILO, as well as *TNCs* and *civil society*.[159] The field

[154] See generally William W Bratton and others, *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press 1996).
[155] Robert O Keohane, 'The Demand for International Regimes' (1982) 36 International Organization 325.
[156] Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6 Indiana Journal of Global Legal Studies 425, 429.
[157] OECD, *International Regulatory Co-Operation: Addressing Global Challenges* (OECD Publishing, Paris 2013).
[158] Peer Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13 German Law Journal 1269.
[159] Stepan Wood and others, 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory' (2015) 6 Transnational Legal Theory 333, 337.

of private authority in which non-state actors participate contributes to the development of transnational regulation.

At times, there is preponderance of state-led regulatory governance across national boundaries is referred to as international regulatory cooperation.[160] Regulatory cooperation frameworks in EU-Canada relations, as discussed in the previous chapter, are one such example wherein the public institutions on both sides of the Atlantic participate in pursuing regulatory agendas. However, if such regulatory cooperation engages non-state actors such as CETA does through consultations,[161] it is a medium for pursuing transnational regulatory governance. In other words, regulatory cooperation in CETA can be utilised as a technique[162] for managing actors' interests and transatlantic economic activity, making it synonymous with regulatory governance. Based on this understanding, the subsequent section presents some more ideas on the significance of CETA for labour and environment.

3.4. The Role of CETA: Fostering Transnational Regulatory Governance

The relevant rules on the trade-labour-environment nexus are scattered across three clusters of international legal frameworks that signify *elemental regimes:*[163] international trade law, international labour law and international environmental law. Mapping a field of a 'sustainable development law', legal

[160] OECD, *International Regulatory Co-Operation: Addressing Global Challenges* (OECD Publishing, Paris 2013), 23-25.
[161] CETA, art 21.8.
[162] Poul F Kjaer and Antje Vetterlein, 'Regulatory Governance : Rules , Resistance and Responsibility' (2018) 24 Contemporary Politics 497; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 137.
[163] Kal Raustiala and David Victor G, 'The Regime Complex for Plant Genetic Resources' (2004) 58 International Organization 277, 279 (emphasis in original).

academics have expressed the need for integrating or reconciling economic, social and environmental laws.[164] The main task in the course of CETA's implementation is thus paving the way for linking trade, labour and environment in a manner that resolves the 'gaps, duplicated efforts, and conflict' marking the interaction between fragmented legal regimes.[165] In analysing the frictions between international regimes, CETA as an instrument of transnational regulatory governance offers to be '[…] a *methodological* perspective […] to perceive the argumentative parallels between the impasses, roadblocks and 'impossibilities' of law that recur both 'inside' and 'outside' of the nation state.'[166]

The previous chapter explained that CETA carries a transformative approach to addressing labour and environmental standards. This means that there is an inherent intention in CETA's relevant provisions to spur changes in the relations of the state with private actors, provisions of substantive law, and the institutional and normative frameworks governing the trade-labour-environment linkage.

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[164] Although the field of social laws is approached in a broad sense, not focussed on labour standards. In the context of international law see Marie-Claire Cordonier Segger, 'Significant Developments in Sustainable Development Law and Governance: A Proposal' (2004) 28 Natural Resources Forum 61; in the context of the US see J Wiliam Futrell, 'Defining Sustainable Development Law Defining Sustainable Development Law' (2004) 19 Natural Resources & Environment 9; and in the context of the UK see Andrea Ross, *Sustainable Development Law in the UK: From Rhetoric to Reality* (Abingdon, Oxon 2012).

[165] Erika J Techera, 'Good Environmental Governance: Overcoming Fragmentation in International Law for Shark Conservation and Management' (2011) 105 Proceedings of the Annual Meeting (American Society of International Law) 103, 107; International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

[166] Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 Transnational Legal Theory 141, 148 (emphasis in original); see also chapter 1 of this thesis, section 2 (Research Questions).

Since CETA is in the process of being implemented, what is needed is an assessment of the transnational legal process that supports it. Herein lies the crux of the methodology applied in this thesis of assessing CETA as a 'living agreement' in its social context.[167] Transnational legal process is defined as

> '[…] the theory and practice of how public and private [actors] interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.'[168]

In the areas of labour and environment, the EU-Canada partnership is non-statist, dynamic and normative and signifies a transnational legal process.[169] The role of state actors is to govern this transnational legal process wherein regulatory powers stand displaced from governmental bodies. The EU and Canadian legal systems are no strangers to the fragmentation of regulatory power at the respective supranational and federal levels. Both have witnessed changes in the 'nature of state intervention' and 'shift towards regulatory styles of governance'.[170] Under CETA, the EU and Canada seek to engage on bilateral discussions on regulatory governance, related reform, and the manner in which it impacts their partnership.[171] The parties have thus identified that their approaches to regulatory governance have bearing on their relationship. The question that arises is: what would be the nature of the legal rules governing the transatlantic partnership in this respect? To

[167] Ch 1 of this thesis, section 4 (Methodology).
[168] Harold Hongju Koh, 'Transnational Legal Process' (1996) 72 Nebrasksa Law Review 181, 183-184.
[169] ibid.
[170] Colin Scott, 'Regulating in Global Regimes' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 563.
[171] CETA, art 21.4(a)(i).

this end, there are two kinds of legalisation that determine the nature of obligations, namely hard and soft.

3.5. Legalisation of Labour and Environmental Standards

Law is characterised as 'hard' or 'soft' depending on its degree of *legalisation.*[172] Soft law is characterised as such because it falls short on prescribing legally binding *obligations* (that subject the behaviour of states and other actors to scrutiny under international/national laws), may not be *precise* (in the sense that it defines the required, authorised, or proscribed conduct) and may not *delegate* the authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.[173] Soft law facilitates compromise and cooperation between sovereign states, defensive of their legal autonomy, for reaching a focal point between having an agreement and no agreement at all.[174]

Regimes combine hard and soft law. For example, the WTO agreements are characterised by binding obligations that are precise and delegate the authority to the Dispute Settlement Body (DSB) to interpret them.[175] At the same time, the WTO reflects a soft law approach within what is called its first order of compliance.[176] The scope of the first order is broad because it comprises all forms of interactions within the organisational setup of the WTO. The Trade Policy Review Mechanism as the 'instrument for surveillance'[177] of members' trade policies may

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[172] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421.
[173] ibid. (emphasis added).
[174] Abbott and Snidal (n 172) 423.
[175] Kenneth W. Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 421.
[176] Gregory Shaffer, 'How the World Trade Organization Shapes Regulatory Governance' (2014) 9 Regulation & Governance 1.
[177] Mary E Footer, *An Institutional and Normative Analysis of the World Trade Organization* (BRILL 2005) see fn 63, 24.

be the most formalised of the soft law mechanisms. Whereas, the DSB has utilised soft law for the purposes of 'greater harmonisation of members' regulatory systems on food standards[178] under the SPS Agreement[179] or referred to rules defined by a soft law instrument because it was considered as an industry benchmark.[180]

As is discussed later in this thesis, Canada and the EU employ hard and soft law in their respective internal frameworks. Therefore, such legalisation is not exclusive to the domain of international relations. This section aims to present hard and soft law in the context of transnational law as utilised by international labour and environmental regimes. This is done because (i) the sustainable development provisions of CETA reiterate the Parties' obligations on labour and environment based on international legal frameworks[181] and (ii) seek to engage non-state actors in their governance.[182]

The international labour and environmental regimes are receptive to transnational trade-labour and trade-environment linkages. Both the regimes seek to promote their respective objectives through trade. For instance, the ILO acknowledges trade affects the level and conditions of employment[183] and supports the promotion of labour standards through FTAs.[184]

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[178] Mary E Footer, 'The (Re)Turn to "Soft Law" in Reconciling the Antinomies in WTO Law' (2010) 11 Melbourne Journal of International Law 241, 246.
[179] For instance, the Codex Alimentarius developed on the science-based approach supported by WTO jurisprudence see *Trade and Food Standards* (FAO, WTO 2017), v.
[180] *Brazil — Aircraft*, WTO Doc WT/DS46/AB/R, paras 180-182 see Footer (n 177) 29-30.
[181] See generally CETA, art 22.1. On labour see CETA, arts 23.1 and 23.2. On environment see CETA, arts 24.2 and 24.4.
[182] CETA, art 22.3.3.
[183] Christian Barry and Sanjay G Reddy, *International Trade and Labor Standards* (Columbia University Press 2008) 10-11.
[184] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (ILO 2017) 8, 128, 166.

The deterritorialisation of labour advocacy has received impetus from the adoption of the ILO's Decent Work Agenda catering to 'problems in global production networks, such as work time, health and safety, pay or maternity leave'[185] but still requires mainstreaming through legal frameworks that aid ILO objectives[186] to exercise governance over production networks to safeguard and enhance labour standards. This is another aspect wherein the ILO may view trade-labour linkage in FTAs positively.

For international environmental law, the advancement of standards through trade helps overcome deep rooted challenges. With specific areas subject to different frameworks, there is 'treaty congestion' in international environmental law.[187] Despite the need for efficiency in environmental governance, the number of multilateral environmental agreements (MEAs) has only grown, highlighting the ongoing fragmentation of international environmental law.[188] The UNEP and the Intergovernmental Panel on Climate Change recognise the potential of FTAs in strengthening MEA commitments.[189] This is reflective of the opinion that environmental law needs to

[185] Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains* (Springer 2021) 193.
[186] Francis Maupain, 'New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization' (2009) 20 The European Journal of International Law 823.
[187] Edith Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 Japanese Yearbook of International Law 1, 7.
[188] At present there are at least 1300 MEAs see Ronald B. Mitchell. 2002-2018. *International Environmental Agreements Database Project a*vailable at <http://iea.uoregon.edu/> accessed 20 July 2022.
[189] UNEP, 'Governance at Trade and Environment Nexus' <https://www.unep.org/explore-topics/green-economy/what-we-do/environment-and-trade-hub/our-work/governance-trade-and> accessed 20 July 2022; Heleen de Coninck and others, 'Strengthening and Implementing the Global Response', *Global Warming of 1.5°C* (IPCC Upcoming) 353.

utilise FTAs as frameworks for its own effectiveness and to influence the conduct of TNCs in economic activities.[190]

As the section below demonstrates, labour and environmental regimes make use of mechanisms along the hard and soft continuum. Consequently, CETA may lead to the development of transnational hard and soft law by drawing on the approaches offered by labour and environmental regimes.

3.5.1. Insight from the Field of International Environmental Law

The field of 'global environmental law'[191] takes cognisance 'of the governing principles of national, international, and transnational environmental law'.[192] The field of transnational environmental law is wide-ranging as it covers an expansive range of objects (human and non-human environment) as well as subjects (all of us).[193] The 1972 Stockholm Conference laid the foundation for sustainable development and established the UNEP as the first international intergovernmental organisation focused on environmental protection.[194] Ever since, there has been a growth in MEAs which set up independent secretariats to administer and monitor their implementation. As a result, 'environmental regimes'[195] cover inter alia transboundary air

[190] Michael Ewing-Chow and Darryl Soh, 'Pain, Gain, or Shame: The Evolution of Environmental Law and the Role of Multinational Corporations' (2009) 16 Indiana Journal of Global Legal Studies 195.
[191] Tseming Yang and Robert V Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology Law Quarterly 615; Louis Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32 Journal of Energy & Natural Resources Law 121.
[192] ibid. Yang and V Percival.
[193] Yang and V Percival (n 191) 623.
[194] UNEP established by U.N. General Assembly Resolution 2997 (XXVII) of December 15, 1972, and reaffirmed by U.N. General Assembly Resolution U.N. Doc. A/RES/31/112 16 December 1976.
[195] Tobias Böhmelt and Ulrich H Pilster, 'International Environmental Regimes: Legalisation, Flexibility and Effectiveness' (2010) 45 Australian Journal of Political Science 245.

pollution,[196] protection of the ozone layer,[197] climate change,[198] maritime pollution,[199] wildlife[200] and biodiversity.[201] Additionally, the Aarhus Convention covers individuals' and associations' right to seek transparency and accountability in environmental decision-making undertaken by public actors.[202] The gamut of international environmental law is too vast to explore in depth on its engagement with hard and soft law, TNCs and civil society. However, in alignment with the themes of this research, some observations can be made.

On hard and soft law, its form and content varies across the fields of environmental law rendering it heterogeneous.[203] Environmental conventions create obligations such as responsibility/liability for environmental damage, and precaution;[204] define precision through objectives such as integration of environmental concerns in regulation and policy and/or intergenerational equity and delegated responsibility to

[196] Convention on Long-Range Transboundary Air Pollution 1302 UNTS 217.
[197] Vienna Convention for the Protection of the Ozone Layer 513 UNTS 323; The Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3.
[198] The Kyoto Protocol to the United Nations Framework Convention on Climate Change 2302 UNTS 162; Paris Agreement on Climate Change UN Doc FCCC/CP/2015/L.9/Rev/1 (December 12, 2015).
[199] International Maritime Organization Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120; International Convention for the Prevention of Pollution from Ships 1340 UNTS 184.
[200] Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 993 UNTS 243.
[201] Convention on Biological Diversity 1760 UNTS 79; Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2226 UNTS 208.
[202] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, 2161 UNTS 447.
[203] Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12 Michigan Journal of International Law 420.
[204] Rio Declaration and the UN Convention on Climate Change see Principle 15, Rio Declaration on Environment and Development (n 4); United Nations Framework Convention on Climate Change 1771 UNTS 107 art 3.3.

bodies formed under MEAs for rulemaking and monitoring.[205] For instance, in defining the regulatory functions of states in global climate governance, the Paris Agreement of 2016, carries a combination of hard and soft law norms.[206]

In its transnational form, international environmental law plays on the subject-object dichotomy in its relationship with TNCs. On the one hand, TNCs are regarded as the primary actors in globalisation.[207] This makes it imperative to regulate them. Environmental hard and soft law instruments thus try to impact their operations at national and international levels. On the other, they can affect transnational governance because they are capable of setting their own standards which, in turn, are capable of overcoming the rifts in international regimes.[208] Civil society's role is predominantly focussed on the enforcement aspect of environmental commitments made by states and demands for transparency and accountability in governance.[209]

3.5.2.Insight from the Field of International Labour Law

International labour law encompasses the labour conventions and the soft law recommendations of the ILO.[210] The ILO, as a specialised agency of the UN on labour matters, acts as the global forum for 'tripartite' participation of public (government),

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[205] Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law Policies, Principles, and Rules' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 425.
[206] Jonathan Pickering and others, 'Global Climate Governance between Hard and Soft Law: Can the Paris Agreement's "Crème Brûlée" Approach Enhance Ecological Reflexivity?' (2019) 31 Journal of Environmental Law 1.
[207] Ewing-Chow and Soh (n 190) 207.
[208] ibid.
[209] Linda A Malone and Scott Pasternack, *Defending the Environment* (Island Press 2005) 242, 254, 268.
[210] Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Hart Publishing 2004) 253; Brian A Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16 The European Journal of International Law 409.

private (employers) and social or voluntary (trade union) representatives on labour standards. Its central function is to adopt labour standards and monitor their implementation in the legal systems of the members.[211] Looking at the WTO from the standpoint of labour standards, trade unions have called for building inter-institutional coherence with the ILO or a comprehensive WTO reform.[212] While this is an ongoing exercise, the ILO urges trade unions to come together for transnational cooperation on labour standards.[213]

The idea of denationalising labour[214] gained attention because globalisation continues to transform the 'character of employment and consequently, labour law'.[215] Consequently, workplace must set patterns of normativity so that any negative consequences of globalisation for national development can be avoided.[216] In this respect, apart from the ILO, the UN and OECD have developed soft public policy initiatives that rely on states and TNCs for implementation.[217] In other words, TNCs, as the primary actors in international economic liberalisation, have the responsibility to protect labour standards. The ILO[218]

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[211] 'ILO Supervisory System/Mechanism' (*ilo.org*, 2018) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> accessed 20 July 2022.

[212] International Confederation of Free Trade Unions, 'Globalisation, Decent Work and Sustainable Development' (2004) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---wcsdg/documents/event/wcms_080296.pdf> accessed 20 July 2022, paragraph 5.

[213] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (ILO 2017) 81.

[214] Doorey (n 100) 555.

[215] Harry W Arthurs, 'Labour Law without the State?' (1996) 46 The University of Toronto Law Journal 1, 44.

[216] Roger Blanpain, 'The Globalisation of Labour Standards: The Soft Law Track' (2007) 14 Tilburg Law Review 10.

[217] Doorey (n 100) 555; Blanpain (n 216) 19.

[218] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (International Labour Office, Geneva 2017).

and the OECD[219] address this directly through their respective frameworks on TNCs. The UN does so under a broader framework of 'business and human rights',[220] approaching labour laws indirectly. The UN Guiding Principles on Business and Human Rights seek to address the relationship between states, business, nongovernmental actors, and international organisations. States have the primary obligation to enforce, whereas TNCs have the primary responsibility to respect the international standards on human rights.[221] Instances where States have been able to undertake 'increased stakeholder engagements, transparency, and bilateral agreements'[222] on these frameworks demonstrate effective implementation of these instruments.

4. Conclusions

This chapter has demonstrated that the connection of environmental and labour standards with trade is multifaceted but so are the *constraints* in the way of their positive linkage. Some constraints, such as those in the area of risk regulation, are on account of distinct understandings of risk in the EU and North America. Whereas some, such as those in the areas of domestic environmental policy, climate protection and labour standards are account of the constitutive nature of the WTO system.

In the meantime, the trade-labour-environment linkage has progressed in the realm of transnational law along the hard-soft continuum. It represents the *opportunity* for advancing better

[219] *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011).
[220] United Nations Human Rights, *UN Guiding Principles on Business and Human Rights* (United Nations 2011).
[221] Noura Barakat, 'The U.N. Guiding Principles: Beyond Soft Law' (2016) 12 Hastings Business Law Journal 591.
[222] ibid. 603.

regulatory governance of environmental and labour standards through trade agreements. International environmental and labour regimes tend to play a greater role in manifesting this shift firstly by putting soft law to greater use and secondly by utilising private actors in the process. This is demonstrated when institutions overseeing the implementation of international environmental and labour standards validate dependency on trade as a tool and instrument for their promotion. In this manner, transnational law has a less constraining effect on the linkage and also tends to reflect the choices of *all actors* involved.

CETA's significance lies in its capacity to leverage this trend of transnationalising labour and environmental standards. The scope provided by the agreement corresponds with elements of regulatory governance. CETA can draw on examples from the fields of labour and environmental law because they make use of a combination of hard and soft rules, and a network of actors engaging in transnational interactions to shrink the rift between trade on the one hand and sustainable development objectives on the other.

As the EU and Canada are the primary actors in CETA's implementation, it is imperative to investigate the overarching research question, from their respective perspectives. This brings us to the analysis of the internal factors affecting international cooperation. Starting with the EU's perspective, the next chapter begins the inquiry in this direction.

CHAPTER 4: THE EU PERSPECTIVE ON REGULATORY GOVERNANCE IN THE TRADE-LABOUR-ENVIRONMENT LINKAGE

1. The EU's Approach to 'Trade and Sustainable Development': Motivations and Objectives

The EU is an effective international trade negotiator[1] and seen as a 'key player', 'crucial and pivotal' 'superpower' by industrialised and developing countries.[2] It purports to promote labour and environmental standards as part of its 'trade and sustainable development' (TSD) agenda.[3] In framing a socially oriented, value-based *identity* while steering its *economic interests* the EU invites assessment of this ambitious objective. As the previous chapter of this thesis explained, balancing economic objectives with the policy areas that trade impacts, such as labour,[4] environment[5] and climate change[6] is an ongoing challenge at the multilateral level. The EU's aspiration plays on this challenge.

The focus on sustainable development in the EUs FTAs establishes that the bloc is concerned with governance *through* trade embedded in the idea of promotion of a values-based trade agenda with sustainable development as one of its

[1] Frank Hoffmeister, 'The European Union as an International Trade Negotiator' in Joachim A Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan UK 2015) 138-154.
[2] Ole Elgström, 'Outsiders' Perceptions of the European Union in International Trade Negotiations' (2007) 45 Journal of Common Market Studies 949.
[3] Commission, The European Green Deal COM(2019) 640 final.
[4] Matthew J Slaughter, 'International Trade and Labour-Market Outcomes: Results, Questions, and Policy Options' (1998) 108 The Economic Journal 1452; Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015).
[5] Brian R Copeland, 'Trade and Environment' (2000) 5 Environment and Development Economics 405.
[6] Tracey Epps and Andrew James Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Edward Elgar 2010).

objectives.[7] In doing so, the EU takes on the task of constructing issue-linkages which targets 'coupling interconnected issues' such as 'Trade and Labour' and 'Trade and Environment' and 'Trade and Sustainable Development' into 'a comprehensive agenda'.[8] The EU's primary motivation to do so is its constitutional mandate that states that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation […]'.[9] This chapter identifies these principles in the context of the EU's labour and environmental policies and examines the extent of issue-linkage internally within the Union. In the light of the commitments made under CETA, this chapter advances the assessment in this thesis into the scope and limitations of the EU's actorness by identifying the constraints and opportunities presented by its constitutional and regulatory environment.[10]

2. Regulatory Governance in the EU

Constitutional and regulatory frameworks are in a state of constant interaction within the EU. EU constitutionalism is a result of the adoption of successive EC and EU treaties and the Charter of Fundamental Rights and has continued to evolve from this primary law.[11] The Union is directed to define and implement adequate social protection in a manner that generates employment and social inclusion.[12] This is a cross-

[7] Axel Marx and others, 'Global Governance Through Trade: An Introduction' in Jan Wouters and others (eds), *Global Governance through Trade* (Edward Elgar 2015) (emphasis added) 15.
[8] Peter M Haas, 'Issue Linkage and the Prospects for SDGs' Contribution to Sustainability' in François Mancebo and Ignacy Sachs (eds), *Transitions to Sustainability* (Springer 2015) 78.
[9] TEU, art 21(1).
[10] See ch 1 of this thesis, section 2 (Research Questions) and section 3 (The Relevance of this Thesis).
[11] JHH Weiler and Joel P Trachtman, 'European Constitutionalism and Its Discontents' (1997) 17 Northwestern Journal of International Law & Business 354, 356.
[12] TFEU, art 9.

cutting provision within a broader field of social policy but can be applied in the context of labour standards. Article 151, TFEU is more specific to labour standards as it sets the objective of 'improved living and working conditions'. Environmental protection is a cross-cutting objective and must be integrated into all policies of the Union to promote sustainable development.[13] Article 21 of the TEU makes sustainable development as a cross-cutting objective in EU external action and trade policy. The design and implementation of these policies depends on the employment of regulatory governance entailing cooperation between the EU's institutions and member states.

2.1. Constitutional Underpinnings: Mixed Agreements and Sincere Cooperation

European integration has resulted in the sharing of policy-making powers across subnational, national, and supranational levels rendering the EU its identity as a multilevel polity.[14] The powers exercised at the EU and member state levels are constitutionally determined in accordance with the principle of conferral[15] and are characteristic of *vertical decentralisation*.[16] The responsibilities to legislate, delegate, and implement EU policies are shared between the Commission, the Council and the European Parliament (EP) at EU-level resulting in *horizontal decentralisation*.[17] These two threads of decentralisation are implicated in the negotiation, conclusion and implementation of

[13] TFEU, art 11.
[14] Paul Craig and Gráinne de Búrca, 'Introduction' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 22.
[15] TEU, art 5(1).
[16] Udo di Fabio, 'Some Remarks on the Allocation of Competences Between the European Union and Its Member States' (2002) 39 Common Market Law Review 1289 (emphasis added).
[17] Herwig Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 European Law Journal 482 (emphasis added).

FTAs such as CETA but before these are discussed further, we consider the treaty provisions that govern CETA and their implications for the EU and its member states.

According to Article 216 TFEU, the EU's FTAs are treaties under international law and generate rights and obligations for the Union and its member states. Under Article 218 TFEU, EU member states have, under the Treaties, delegated the authority to the Commission to negotiate FTAs with third countries while the Council and Parliament hold the power to conclude them. Article 207 TFEU governs the EU's trade policy. The EU is capable of entering into trade agreements as a subject of international law because it has legal personality under Article 47 TEU. However, the Union cannot act outside the limits of its competences[18] i.e., if the subject matter of an FTA falls outside the exclusive competence of the EU, then EU member states will also need to sign it. Such an FTA comes under the purview of agreements that are classified as 'mixed'.[19] Mixity is not defined in EU primary law, but the Court of Justice of the European Union (CJEU) has established its status as a fundamental practice through case law.[20] When the EU practices mixity, the EU conducts its external relations simultaneously with its member states.[21]

We see that there is preference for mixity in EU FTAs on the part of member states because they want to constrain and/or

[18] TFEU, art 3 (exclusive competence) and TFEU, art 4 (shared competence).
[19] Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals' in Robert Schütze and Takis Tridimas (eds), *Mixed Agreements: The EU Law Fundamentals* (OUP 2018) 1174.
[20] For the discussion on key CJEU decisions see Merijn Chamon, 'Constitutional Limits to the Political Choice for Mixity' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 139.
[21] JHH Weiler, *The Constitution of Europe* (CUP 1999) 184-187.

retain influence over the operation of FTAs as 'co-sovereigns'.[22] CETA has been concluded as a mixed agreement and therefore, substantial questions arise related to its conclusion and implementation as one.

According to Article 4 TFEU, shared competences means that the EU and its member states enjoy the competence to legislate and adopt legally binding acts in stipulated areas. The areas of inter alia internal market, social policy, and environment fall under shared competences. Article 3 TFEU states that the Union has exclusive competence inter alia in the sphere of Common Commercial Policy (CCP) enshrined in Article 207. It is when the EU's agreement with a third country covers the domain of shared competence, that as a characteristic of supranationalism, the principle of conferral manifests as mixity in the EU's external relations.

Even within an area of exclusive competence, the EU may cover areas of shared competence in its external agreements because it has implied external competence[23] in areas where it is necessary to attain its objectives,[24] where the adoption of a legally binding act necessitates external competence[25] and where the common rules of the internal market are to be maintained.[26] FTAs may be concluded as mixed agreements based on their objective i.e., when they aim to go beyond market access.[27] The CCP has been expanding and covers the

[22] Heliskoski (n 19) 1175.
[23] In accordance with TFEU, art 216(1).
[24] Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32, [1971] ECR 263.
[25] *Opinion 1/94* [1994] ECR I-5416.
[26] Case C-467/98 *Commission v Denmark* ECLI:EU:C:2002:625 [2002], ECR I-9519.
[27] Paola Conconi, Cristina Herghelegiu and Laura Puccio, 'EU Trade Agreements : To Mix or Not to Mix, That Is the Question' (2021) 55 Journal of World Trade Law 231.

fields of labour and environment as part of the EU's broad competence for external action. This expansion is attributable to Article 21 TEU that stipulates that the Union should utilise its trade policy to pursue 'high degree of cooperation in all fields of international relations' to inter alia safeguard its values, support democracy, rule of law, human rights and the principles of international law.[28] The Union is thus entrusted to ensure consistency between its trade policy and its other policies requiring the cooperation of EU institutions[29] and member states.[30] However, in fulfilling its obligations under FTAs, the Union cannot act outside the limits of its competences that are to be exercised in accordance with (i) the principle of subsidiarity that mandates that EU-level action should be taken only if action at the member state level will produce insufficient results to achieve the EU's objectives[31] and (ii) the principle of proportionality that prescribes that EU level action taken for the areas that fall under its competence should be in accordance with the principle of proportionality which states that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the treaties'.[32] The TFEU introduces a 'safeguard' by stating that the CCP 'shall not affect the delimitation of competences between the Union and the Member States' nor shall it 'lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.[33] In doing so, however, the provision indirectly implicates the duty of sincere

[28] TEU, arts 21(2) and 21(3).
[29] TEU, art 21(3) second para.
[30] TEU, art 4(3); TEU, art 22(1), second para.
[31] TEU, art 5(3) and TFEU, arts 2-4; Michael Schneider, 'Europe Must Deliver at the Level Closest to the Citizens Subsidiarity: Past, Present and Future' (2019) 18 European View 16.
[32] TEU, art 5(4).
[33] TFEU, art 207(6).

cooperation to 'resolve externally driven difficulties in managing shared competence'.[34] In other words, the requirement of unity in the international representation of the Union buttresses the need for sincere cooperation in mixed agreements.

The duty of 'sincere cooperation' or the 'loyalty principle' lies at the heart of 'federal balance' in the EU and is regarded as the 'constitutional principle governing the decentralized enforcement of European law'.[35] It has dual significance as follows:

Vertical: in accordance with Article 4(3) TEU, it is the duty of the EU and its Member States to 'assist each other in carrying out tasks which flow from the Treaties'. Sincere cooperation requires the exercise of *mutual trust* between member states and the EU for the *effectiveness* of EU law.[36]

Horizontal: in accordance with Article 13(2) TEU, it is the foundation of the inter-institutional relationship at the EU-level. Sincere cooperation in the institutional context has implications for EU-level regulatory strategy aimed at coordinating policies between the EU and member states based on inter-institutional relations.[37] Before the development of case law on the

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[34] Marise Cremona, 'Defending the Community Interest' in Marise Cremona and Bruno De Witte (eds), *EU Foreign Relations Law* (Hart 2008) 157.
[35] Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Sincere Cooperation and Respect for National Identities* (OUP 2018) 351. Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 11, 33.
[36] C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* ECLI:EU:C:1996:205, [1996] ECR 1 2553; Damein Gerard, 'Mutual Trust as Constitutionalism?' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (European University Institute 2016) 75 (emphasis added); Koen Lenaerts, '"In the Union We Trust": Trust-Enhancing Principles of Community Law' (2004) 41 Common Market Law Review 317.
[37] Loïc Azoulai, 'Structural Principles in EU Law: Internal and External' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 54.

institutional relevance of sincere cooperation, it had received some academic attention.[38] In this context, sincere cooperation is the 'duty of cooperation as owed mutually by the institutions to each other'[39] and applies to the institutions acting 'within the limits of the powers conferred upon them' by the EU treaties.[40]

Therefore, the areas of labour and environment linked as part of trade policy demonstrate the wide scope of the EU's trade powers,[41] but coherence in FTA implementation depends on sincere cooperation.

2.2. Regulatory Objectives

Decentralisation of legal authority within the EU demands legitimacy of EU supranational institutions.[42] As a result, EU institutions, bodies, offices, and agencies aim to function in an open, efficient, and independent manner.[43] Until this point in this thesis, we have not considered regulatory governance against the backdrop of a constitutional framework or its correlation. The trend towards delegation of power to departments, agencies and private actors has led to discussions questioning the constitutional implications of a regulatory state.[44] Critiques contend that the regulatory governance

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[38] Giandomenico Majone, 'Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market' [1995] EUI Working Paper RSC No. 95/1.
[39] Marise Cremona, 'EU Treaty-Making after the Lisbon Treaty – A Test Case for Mutual Sincere Cooperation?' in Jenő Czuczai and Frederik Naert (eds), *The EU as a Global Actor* (Brill Nijhoff 2017) 428.
[40] TEU, art 13(2).
[41] Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the CCP' (2010) 15 European Foreign Affairs Review 153, 163.
[42] Thomas Christiansen, 'Legitimacy Dilemmas of Supranational Governance: The European Commission between Accountability and Independence' [1997] EUI Working Paper RSC No 97/74.
[43] TFEU, art 298(1).
[44] Fabrizio Cafaggi, 'Private Law-making and European Integration: Where Do They Meet, When Do they Conflict?' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (OUP 2010) 201.

approach 'undermine[s] the effectiveness of the limitations placed on legislative and executive power' and, moreover, the assumption of regulatory powers by non-state actors and institutions has taken governance farther away from the government.[45] For the EU, however, its identity as a regulatory state[46] has gone hand in hand with constitutionalism and therefore, subsidiarity within a multilevel legal order.

In fact, it may be only in the case of the EU that we can question the constitutional implications of the regulatory state considering the revision of its constitutional framework over the years resulting in greater competences being allocated at the supranational level as follows:

Treaty of Rome, 1957: Common Agricultural Policy, Common Commercial Policy, Common Market, Common Transport Policy, Competition, Coordination of Economic Policies, Customs Union, European Investment Bank, European Social Fund, Free Movement of Goods, Free Movement of Persons, Services and Capital
Single European Act, 1986: Environment, Single Market
Maastricht Treaty, 1992: Common Foreign and Security Policy, Cooperation and Development Culture, Economic and Monetary Union, Education, Justice and Home Affairs
Amsterdam Treaty, 1997: Discrimination, Employment, Social policy
Lisbon Treaty, 2007: Civil Protection, Data Protection, Energy, Space, Sport

Figure 4.A: Evolution of EU Competences[47]

Increased competences at the Union level are, however, not the sole reason and motivation for the EU to assume regulatory authority.[48] They are linked of course, but it is regulatory

[45] ibid. 16.
[46] Giandomenico Majone, *Regulating Europe* (Routledge 2003).
[47] This Figure is adapted from 'Review of the Balance of Competences between the United Kingdom and the European Union' (2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf> accessed 20 July 2022 16. It mentions the first time the competences were mentioned, but does not take note of their subsequent development.
[48] R. Daniel Kelemen, 'Regulation in the European Union' in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation* (Edward Elgar 2016) 78.

failures at the member state or EU levels that trigger regulatory responses.[49] This is in line with the expected role of a regulatory state.[50] Therefore, based on the OECD's framework,[51] the objectives that the EU's institutions aim to achieve are as follows:

a. Transparency: branching upwards from administrative law principles set in member states, transparency appears as a ubiquitous element of EU law.[52] The treaty directs the Union to ensure that decisions are taken 'as openly and as closely as possible to the citizen'[53] and entrusts the Commission for making way for 'an open, transparent and regular dialogue with representative associations and civil society'.[54]

b. Accountability: Transparency goes hand in hand with accountability. EU institutions are subject to judicial oversight by the CJEU.[55] In the regulatory context, accountability is defined by the extent of open decision making in the EU[56] and transparency in the process for instance, by granting access to documents.[57] EU citizens may also file complaints with the European Ombudsmen in case of maladministration by any of the Union's institutions except the CJEU.[58] However, transparency and accountability may

[49] S Breyer, 'Typical Justifications for Regulation' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 77-98.
[50] Bignami and Zaring (n 48).
[51] OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD 2002).
[52] Rob JGM Widdershoven, 'Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?' (2014) 7 Review of European Administrative Law 5 and Paul Craig, *EU Administrative Law* (OUP 2018) 25.
[53] TEU, art 10(3).
[54] TEU arts 11(2) and 11(3).
[55] TFEU, art 263.
[56] TEU, art 10(3); TFEU, arts 15(1) and 15(2).
[57] TEU, art 11(1); TFEU, art 15(3).
[58] TFEU, art 228(1).

be accorded restrictively. For instance, in the respect of CETA, a complaint was filed with the Ombudsmen by a non-profit organisation on the ground that it sought access to all documentation prepared by CETA committees but was granted access to only a few. The Commission justified its action based on its assessment of the documents and stated that those identified as falling under the scope of the access-request were released to the complainant.[59] The explanation provided by the Commission was that disclosing other documents could undermine the EU's international relations. After conducting an inquiry, the Ombudsmen clarified that there had been no oversight in the conduct of the Commission as

> '[…] EU institutions enjoy a wide margin of discretion when determining whether disclosing a document could undermine any of the public interests […] including the protection of international relations.'[60]

Under the Interinstitutional Agreement on the Transparency Register,[61] EU institutions have an obligation towards citizens to disclose who influences law-making within the Union, the interests that these actors represent, and how they are funded. However, the requirement for registering is not mandatory for private actors and therefore, it is hard to determine the extent of lobbying by organisations representing business interests in FTAs.

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[59] European Ombudsmen, 'Decision on the European Commission's Refusal to Grant Full Public Access to Documents Related to Meetings of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Committees (Case 1264/2021/ABZ)' (2022) <https://www.ombudsman.europa.eu/en/decision/en/152812> accessed 22 March 2022.

[60] ibid.

[61] Agreement between the European Parliament and the European Commission on the Transparency Register for Organisations and Self-employed Individuals Engaged in EU Policy-Making and Policy Implementation [2014] OJ L277/11.

c. Efficiency: pertains to the requirement that EU institutions carry out their obligations in a manner that delivers on the common policy objectives of the Union. To this end, the EU seeks to improve institutional oversight, stakeholder engagement, regulatory impact assessments and ex-post review of laws and regulations across the Union.[62] The regulatory cooperation provisions of CETA, refer to these elements.[63] It is likely that they have been incorporated at the behest of the EU as these aspects have come to be recognised as the 'Tools for Better Law-Making' within the Union.[64] These tools have evolved from the Lisbon Strategy[65] (replaced by Europe 2020 Strategy[66] that defined policy goals from 2010 to 2020) and previous work of the Commission[67] which laid the foundation of 'Better Regulation Agenda' in the EU. The objectives of better regulation are to:[68] (i) improve legislation within the EU[69] through transparency, (iii) anchor sustainable development in the Union's policymaking[70] and (iii) utilise it to influence changes

[62] OECD, *Better Regulation Practices across the European Union* (OECD Publishing, Paris 2019).
[63] CETA, arts 21.2-21.4.
[64] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1.
[65] Commission of the European Communities, 'The Lisbon Strategy - Making Change Happen' COM(2002)14 Final.
[66] Commission, 'Europe 2020 - A Strategy for Smart, Sustainable and Inclusive Growth' COM(2010) 2020.
[67] Commission of the European Communities, 'European Governance: A White Paper COM(2001) 428.
[68] Commission, 'Better Regulation for Better Results - An EU Agenda' COM/2015/0215 final.
[69] In accordance with TFEU, arts 290 and 291.
[70] Commission of the European Communities, Communication from the Commission on Impact Assessment COM(2002) 276 Final.

in global governance at the international level based on the European experience,[71] furthering the actorness of the EU.[72]

d. Adaptability: traditionally meant to shape the legal system in a way that facilitates economic development.[73] It has however, evolved to mean that 'the law *responds* quickly and effectively' and is reflected from either the readiness of law-making institutions to change deficient legal frameworks or aid the efficiency of legal rules in a manner that is value-enhancing.[74] Regulation that is 'responsive'[75] 'really responsive',[76] 'smart',[77] 'reflexive'[78] builds further on the concept of adaptive regulation. Responsiveness is embedded in networks of public and private actors and necessitated by the decentralisation of regulatory power in legal systems.[79] Therefore, responsive regulation is a '[…] civic-republican model [featuring the] direct participation of public interest groups, civil society organizations, and citizens'.[80] Explored in the next section, the EU uses this mechanism extensively in the fields of labour and environment that are shared competences of the EU and member states. Their relevance

[71] Commission White Paper on European Governance (n 67) 26.
[72] See ch 1 of this thesis, section 2 (Research Questions).
[73] Andreas Engert and D Gordon Smith, 'Unpacking Adaptability' (2009) 2009 Bringham Young University Law Review 1553, 1554.
[74] ibid. 1560-1561 (emphasis added).
[75] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation* (Second, OUP 2012) 259.
[76] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 Modern Law Review 59.
[77] Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017) 133.
[78] Peter H Feindt and Sabine Weiland, 'Reflexive Governance: Exploring the Concept and Assessing Its Critical Potential for Sustainable Development' (2018) 20 Journal of Environmental Policy & Planning 661.
[79] John Braithwaite, 'Types of Responsiveness' in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017) 15, 117.
[80] Claudio M Radaelli and Anne CM Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' (2009) 87 Public Administration 639, 650.

stems from the fact that the same groups/actors undertake a role in the context of trade policy and within the institutional frameworks of FTAs. For instance, in CETA, the European Economic and Social Committee (EESC)[81] that works with EU institutions in advisory capacity, also participates in CETA's implementation within EU Domestic Advisory Group (DAG).[82]

e. Coherence: is defined as 'a quest for synergy and added value in the different components of EU policies'.[83] The word 'consistency' is used in the English version of the EU treaties instead of 'coherence' as used in the French and German versions (*cohérence* and *Kohärenz*, respectively).[84] Coherent regulation is also meant to ensure 'harmony between corporate and social ends'[85] and is the primary responsibility of the EU's institutions in market regulation. The Lisbon Treaty identifies the EU's institutions for ensuring the 'consistency, effectiveness and continuity of its policies and actions.'[86] It is linked to the engagement of citizens, representative organisations, and other civil society actors as per Articles 10 and 11, TEU on transparency. Coherence is a requirement in the context of mixed agreements implicated albeit indirectly by Article 12, TEU that states that

[81] Composed of employees, employers and other societal organisations representing member state interests in the functioning of the internal market and EU external relations see TEU art 13(4); TFEU arts 300, 301 and 305.
[82] CETA, art 23.8.4.
[83] Christophe Hillion, 'Tous Pour Un, Un Pour Tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 15.
[84] ibid. 12. See also Mireia Estrada Canamares, ''Building Coherent EU Responses': Coherence as a Structural Principle in EU External Relations' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (n 37) 243.
[85] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation* (OUP 2012) 154.
[86] TEU, art 13.

the national parliaments of Member States need to ensure the respect for principle of subsidiarity.

2.3. Utilising the Lens of Transnational Law

How do we understand and arrange the diverse actors and interests that partake in the EU's multilevel legal structure? i.e., the legal pluralism that exists within the EU.[87] The EU regards itself as an autonomous legal order.[88] Neither does it fit in the classical state nor international law paradigms. The description of the EU as a 'network of networks',[89] however, does inform us about the tendency of EU law to demonstrate characteristics of transnational law[90] or engage with it.[91] This viewpoint aptly presents the dynamic transnational legal process[92] that shapes regulatory governance within the EU along the hard law – soft law[93] continuum. The section that follows analyses labour and environmental governance within the EU from this perspective.

3. Transnational Regulatory Governance in the EU Between Hard and Soft Law

3.1. Labour Standards

The EU social *acquis*, under which inter alia labour standards are addressed, comprises treaty provisions,[94] rights and principles in the EU Charter of Fundamental Rights,[95] the case

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[87] Mireille Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (CUP 2002) 195.
[88] Case C–402/05 P and C–415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351.
[89] Karl-Heinz Ladeur, 'European Law as Transnational Law' (2009) 10 German Law Journal 1357.
[90] ibid.
[91] Matej Avbelj, *The European Union under Transnational Law* (Bloomsbury 2018).
[92] For definition see ch 3 of this thesis, section 3.4.
[93] For definitions see ch 3 of this thesis, section 3.5.
[94] TFEU, arts 151-161.
[95] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

law of the CJEU, hard law in the form of directives[96] and soft law instruments that assist in policy coordination under frameworks such as the Europe 2020 Strategy.[97]

3.1.1. Social Policy

The promotion of employment, improvement of living and working conditions, social protection and inclusion, and social dialogue are some of the main objectives on labour standards in EU social policy.[98] To this end, Article 153(2) TFEU states that the EP and Council may encourage cooperative activities between member states and adopt directives in select fields as listed under Article 153 (1).[99] Article 156 TFEU stipulates that the Commission act as linking pin between member states and coordinate with international organisations to encourage cooperation on labour and employment-related matters. Under Article 157, each member state undertakes the responsibility to ensure equal pay for equal work. As such, these provisions are instrumental in achieving minimum harmonisation on labour standards within the Union on inter alia health and safety[100] and

[96] TFEU, art 153. For an overview of key directives see European Commission, The EU Social Acquis SWD(2016) 50 final, 6-12.
[97] ibid. 12-13.
[98] TFEU, art 151.
[99] TFEU, art 153(1)(a)-(i).
[100] Council Directive 89/391/EEC of 19 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work [1989] OJ L183/1.

equality[101] at work. There are developments underway on minimum wage[102] and rights of platform workers.[103]

Coordination on labour-related issues was undertaken under the Open Method of Coordination (OMC) covering all areas falling under social policy.[104] Conceived as part of the Lisbon Strategy[105] and inspired by the working of the OECD,[106] the OMC now operates as part of the European Semester (the Semester).[107] Cooperative frameworks on labour are a manifestation of the principle of subsidiarity and have facilitated the growth of soft law across all areas of EU labour policy since their conception under treaty provisions.[108] The idea being that harmonisation between member states' standards can occur eventually.[109] However, some areas are categorically omitted

[101] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast) [2006] OJ L204/23.
[102] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union' COM (2020) 682 final.
[103] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work' COM (2021) 762 final.
[104] TFEU, art 153(2). Martina Prpic, 'The Open Method of Coordination' (*European Parliamentary Research Service*, 2014) <https://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf> accessed 20 July 2022.
[105] The Lisbon Strategy (n 65).
[106] Bart Vanhercke, 'From the Lisbon Strategy to the European Pillar of Social Rights: The Many Lives of the Social Open Method of Coordination' in Bart Vanhercke and others (eds), *Social Policy in the European Union 1999-2019: The Long and Winding Road* (European Trade Union Institute and European Social Observatory 2020) 101.
[107] ibid. 111-113. For further discussion on the Semester see section 3.1.4. below.
[108] Jeff Kenner, 'The EC Employment Title and the "Third Way": Making Soft Law Work?' (1999) 15 The International Journal of Comparative Labour Law and Industrial Relations 33; Jeff Kenner, 'EC Labour Law: The Softly, Softly Approach' [1995] International Journal of Comparative Labour Law and Industrial Relations 307.
[109] Jeff Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing 2003) 5-7, 24.

from the purview of EU labour policy. Article 153(5) excludes pay, the right of association, the right to strike and the right to impose lock-outs from the legislative competence of the EU. There is a preference for the economic freedoms of free movement of workers, free movement of goods, free movement of services and freedom of establishment to prevail over industrial action within the Union.[110] This is seen as an 'imbalance' or 'asymmetry' within the EU in favour of economic governance.[111] Existing case law laid down by the CJEU confirms this asymmetry.

The cases of *Viking*[112] and *Laval*[113] concerned on the one hand, the employees' right to take collective action, underpinned by Article 28 of the Charter, while on the other, they concerned, respectively, the employers' right to freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU) in the internal market. The CJEU gave priority to the latter based on the reasoning that employees' rights cannot be exercised in a manner that restricts the economic freedoms guaranteed by the (then) EC treaty. There are nuances to the reasoning of the Court to arrive at its findings.[114] However, the decisions in *Viking* and *Laval* are deemed unsustainable from the inside-out and outside-in perspectives on the EU. Analysis on the decisions in the context of the EU's legal order caution

[110] Tonia Novitz, 'The EU and the Right to Strike: Regulation through the Back Door and Its Impact on Social Dialogue' (2016) 27 King's Law Journal 46, 47.
[111] Sacha Garben, 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union' (2017) 13 European Constitutional Law Review 23, 32.
[112] Case C-438/05 *International Transport Workers Federation v Viking Line ABP* ECLI:EU:C:2007:772.
[113] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809.
[114] Such as inter alia application of the principle of proportionality to the cases see Alicia Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' (2008) 8 Human Rights Law Review 714, 718, 720.

that they establish a hierarchy wherein economic freedoms 'are placed higher than the right to collective action'[115] and may even promote social dumping (based on an analysis of *Laval*).[116] From the perspective of the ILO, there is *no* permissible scope for balancing the right to strike against market freedoms.[117] The ILO expressed *serious concern* about the limitations placed on the effective exercise of the right to strike in a manner contrary to the Freedom of Association and Protection of the Right to Organise Convention.[118] Similarly, economic freedoms were favoured over labour rights in the cases of *Alemo-Herron*[119] (concerning limitations on employees' rights in the event of a transfer of undertaking) and *AGET-Iraklis*[120] (concerning limitations on workers' rights in the event of collective redundancies). Whereas, by contrast, cases such as *Albany*[121] (concerning the scope of EU competition law in the context of collective bargaining agreements) and *Defrenne II*[122] (equal pay for men and women workers), establish that social rights have a standalone status in EU law, protecting them *from the impact*

[115] ibid. 728; Emilios Christodoulidis and Ruth Dukes, 'Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot' (2010) 19 Social & Legal Studies 217, 229-230; ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 Industrial Law Journal 126.
[116] Jeff Kenner, 'The Enterprise, Labour and the Court of Justice' in Adalberto Perulli and Tiziano Treu (eds), *Enterprise and Social Rights* (Wolters Kluwer 2017) 199. For definition of social dumping see ch 3 of this thesis, section 2.1.3 (Labour Standards).
[117] Alan Bogg, 'Viking and Laval: The International Labour Law Perspective' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014) 41 (emphasis in original).
[118] International Labour Office, 'Report of the Committee of Experts on the Application of Conventions and Recommendations' (2010) 209 (emphasis in original).
[119] C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.
[120] C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972.
[121] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430.
[122] C-43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (1976)* ECLI:EU:C:1976:56.

of economic rights.[123] The CJEU also sought to address social dumping as seen in the *Regiopost*[124] case wherein the court upheld the requirement of minimum wage as a condition that may be imposed in the award of public contracts.[125]

3.1.2. Social Dialogue

Social dialogue is facilitated between employers' and employees' organisations by the Commission.[126] Treaty provisions establish that social dialogue between management and labour at EU and national or sectoral level is meant to cement the relationship between employers and trade unions in social policy and be a vehicle for the adoption and implementation of labour standards within the EU.[127] At the behest of the employers' and employees' organisations, the dialogue may result in Social Partners' Framework Agreements implemented at EU level through Council decisions or autonomously in the Member States by the social partners i.e., EU-level organisations representing employers and the employees, in the design and implementation of economic, employment and social policies.[128] When representatives of EU institutions and member state governments participate, the

[123] Frans Pennings, 'How Do Social and Economic Rights Relate to Each Other in the Social Market Economy' (2019) 15 Utrecht Law Review 1, 13 (emphasis added).
[124] C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* ECLI:EU:C:2015:760.
[125] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services [1996] OJ L18/1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L134/114 (now repealed).
[126] TFEU, art 154(1).
[127] TFEU, art 152, arts 154-155; Jo Carby-Hall, 'The Evolving Nature of the Social Dialogue in an Enlarged European Union: From Little Acorns to Mighty Oak Trees?' (2003) 45 Managerial Law 49, 56, 70.
[128] TFEU, art 152. European Trade Union Confederation, 'Social Partners' Framework Agreements' (2021) <https://www.etuc.org/en/social-partners-framework-agreements> accessed 22 July 2022.

dialogue becomes a tripartite process.[129] The social dialogue complements the OMC, in achieving soft outcomes on labour standards.[130] However, the relevance of the social dialogue is questionable against the backdrop of *Viking* and *Laval* and the express exclusion of the rights that strengthen trade unions in Article 153(5). Two explanations are advanced in this respect: (i) strengthening member states' unions through the social dialogue process can lead to coordination in bargaining at the EU-level and promote upward vertical convergence with ILO standards[131] and (ii) since social partners are a part of the wider civil society, they play a key role in advancing participatory democracy and regulatory governance techniques of smart regulation and better law-making within the Union.[132]

3.1.3. European Employment Strategy

EU level frameworks on labour are based on the economic and social priorities that shape labour market policies affecting levels of employment and labour standards, respectively.[133] As a result, besides labour standards,[134] EU labour law comprises an employment strategy.[135] Labour related measures are primarily directed at reforming and better matching labour supply and demand levels.[136]

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[129] TFEU, art 154; Lutz Michael Buchner and Liubov Ilieva, 'European Social Dialogue, a Hidden Phenomena of the Intercultural Dialogue in Europe' (2017) 22 Scientific Journal of Polonia University 130.
[130] Thomas Prosser, 'Economic Union Without Social Union: The Strange Case of the European Social Dialogue' (2016) 26 Journal of European Social Policy 460, 464.
[131] Novitz (n 110) 50.
[132] Marco Peruzzi, 'Autonomy in European Social Dialogue' (2011) 27 The International Journal of Comparative Labour Law and Industrial Relations 3, 11.
[133] On the scope of labour law see ch 3 of this thesis, section 2.1.3.
[134] TFEU, arts 151-161.
[135] TFEU, art 145.
[136] Europe 2020 (n 66) 6.

The EU seeks coordination with member states on their employment strategies under the European Employment Strategy (EES)[137] to achieve full employment within the Union.[138] The EES is the 'central element of the 'European social model' since its inception.[139] The competences of member states are left untouched but cooperation on market policies is sought as a matter of common concern.[140] The Council issues broad guidelines[141] meant to operate as soft law mechanisms for member states' employment policies. The EES is embedded in adaptability because it requires the Commission to develop its legislative frameworks based on 'smart' regulation[142] at the time of making proposals on employment policies to the Council. The EES is implemented through an intergovernmental process, which takes place between the EU institutions and member states. Earlier this was overseen under the OMC but is now a prerogative of the Semester approach.

3.1.4. European Pillar of Social Rights

European Pillar of Social Rights in 2017 (the 'Pillar') has its origins in the European Semester.[143] The European Semester was introduced in 2010 by the Europe 2020 Strategy in the aftermath of the financial and economic crises[144] and has three

[137] Europe 2020 (n 66).
[138] See TFEU, art 145 which refers to TEU, art 3 (emphasis added).
[139] Michael Gold, Peter Cressey and Evelyne Léonard, 'Whatever Happened to Social Dialogue? From Partnership to Managerialism in the EU Employment Agenda' (2007) 13 European Journal of Industrial Relations 7.
[140] TFEU, art 147(1) and art 146(2).
[141] TFEU, art 146(1).
[142] Europe 2020 (n 66) 17.
[143] [2017] OJ C428/10.
[144] Commission, 'The European Semester' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en> accessed 20 July 2022.

pillars: 1) macroeconomic surveillance[145] 2) fiscal surveillance[146] and 3) thematic coordination and structural reform (for areas such as employment).[147] The Semester approach builds on the third pillar. It involves making country-specific recommendations and utilises an annual process to review and promote close policy coordination between EU institutions and member states.[148] Over the period of its implementation, the Semester system received criticism for side-lining social objectives in the EU's post-crisis governance architecture and being non-receptive of the voices of social and employment actors.[149] Thus began the process of 'socialising' the Semester system. To give full effect to this ambition,[150] the European Pillar of Social Rights was adopted in 2017.[151]

The Pillar is a soft law instrument and comprises twenty principles and rights covering labour market and social protection.[152] It makes 'use of the entire EU regulatory and

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[145] Commission, 'Macroeconomic Imbalances Procedure' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macroeconomic-imbalances-procedure_en> accessed 20 July 2022.

[146] Commission, 'Stability and Growth Pact' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact_en> accessed 20 July 2022.

[147] Bart Vanhercke and others (n 106) 110; Amy Verdun and Jonathan Zeitlin, 'Introduction: The European Semester as a New Architecture of EU Socioeconomic Governance in Theory and Practice' (2018) 25 Journal of European Public Policy 137.

[148] Council of the EU and the European Council, 'European Semester' (2021) <https://www.consilium.europa.eu/en/policies/european-semester/> accessed 20 July 2022.

[149] Jonathan Zeitlin and Bart Vanhercke, 'Socializing the European Semester: EU Social and Economic Policy Co-Ordination in Crisis and Beyond' (2018) 25 Journal of European Public Policy 149, 150-151.

[150] European Parliament, 'What Is "Social Triple A"?' (2016) < https://www.europarl.europa.eu/doceo/document/O-8-2016-000034_EN.html> accessed 20 July 2022.

[151] [2017] OJ C428/10.

[152] Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 European Constitutional Law Review 210.

governance arsenal' namely, 'regulations and directives, recommendations and communications, the creation of new institutions, funding actions, and country-specific recommendations'.[153] Principle 8 of the Pillar underscores the importance of social dialogue and the involvement of social partners.[154] The Pillar is thus directed at supporting the EU social *acquis* and furthering its implementation.[155] In accordance with the UN SDGs, the Pillar underpins aspects of the EES by stipulating that the Union should foster gender equality and equal opportunities (regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation) in the labour market.[156]

There are several legal and policy instruments concerning labour standards in EU law that cannot be discussed and detailed here. The paragraphs above provide an overview on social policy, social dialogue, the EES and the Pillar because their subject matter is relevant to the labour provisions of CETA.[157] CETA's labour provisions identify 'full and productive employment and decent work' as a means to address the challenges resulting from globalisation.[158] They also emphasise the role of social dialogue for greater policy coherence in decent

[153] Sacha Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance' (2019) 21 The Cambridge Yearbook of European Legal Studies 101, 102, 118.
[154] TFEU, art 152.
[155] Ane Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights: Shielding "The Social" from "The Economic" in EU Policymaking' (2018) 20 European Journal of Social Security 341, 348.
[156] Commission, 'The European Pillar of Social Rights Action Plan' (2017) <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/> accessed 21 December 2021; Commission, 'The European Pillar of Social Rights in 20 Principles' (2017) <https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en> accessed 22 July 2022.
[157] CETA, Chapter 23.
[158] CETA, art 23.1.1.

work and core labour standards.[159] Despite having internal frameworks that should aid the EU in fulfilling these obligations some constraints lie in the path of the Union for achieving them.

A primary criticism of the EU's labour policy is the contention that the existing economic imperatives framed after the onset of the global financial and eurozone crises,[160] contribute to increasing the 'social deficit' within the Union.[161] The Pillar, albeit an example of 'reflexive learning and creative adaptation' on social policy within the Semester system is considered 'high-level' for being led by EU-level institutions and for its limited representation of member states.[162] Case law upholding economic freedoms in their interface with the labour rights (as discussed above), the lack of emphasis on social dialogue and role of social partners in policy development,[163] the sectoral issues pertaining to the follow up and implementation of the social dialogue process;[164] and the subordination of the EES to

[159] CETA, art 23.1.2.
[160] Marc De Vos, 'Internal Market and Euro Crisis: Labour Law under the Gun of the European Union?' (2013) 14 ERA-Forum 335, 358.
[161] Paul Copeland, 'The European Union and the "Social Deficit"' (2015) 51 Representation 93; Eftychia Achtsioglou and Michael Doherty, 'There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm' (2014) 20 European Law Journal 219; WA Janssen, A Gerbrandy and Lea Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How "Social" Is Public Economic Law?' (2019) 15 Utrecht Law Review 32; Paolo Graziano and Miriam Hartlapp, 'The End of Social Europe? Understanding EU Social Policy Change' (2019) 26 Journal of European Public Policy 1484.
[162] Zeitlin J and Vanhercke (n 149); Adina Maricut and Uwe Puetter, 'Deciding on the European Semester: The European Council, the Council and the Enduring Asymmetry between Economic and Social Policy Issues' (2017) 25 Journal of European Public Policy 193.
[163] Gold, Cressey and Léonard (n 139) 12.
[164] Sabrina Weber, 'Sectoral Social Dialogue at EU Level - Recent Results and Implementation Challenges' (2010) 16 Transfer 489; Berndt Keller and Sabrina Weber, 'Sectoral Social Dialogue at EU Level: Problems and Prospects of Implementation' (2011) 17 European Journal of Industrial Relations 227; Krzysztof Bandasz, 'A Framework Agreement in the Hairdressing Sector: The European Social Dialogue at a Crossroads' (2014) 20 Transfer 505; Barbara Bechter and others, 'Opening the Black Box: Actors and Interactions Shaping European Sectoral Social Dialogue' (2021) 27 European Journal of Industrial Relations 269.

economic objectives within the EU[165] feed into the negative evaluation of labour standards within the Union. These factors sum up the impediments to the advancement of the interdependent[166] horizontal and vertical relationships between the EU, member states and public and private actors in the areas of labour and employment.

3.2. Environmental Law

EU environmental law has evolved extensively since the Treaty of Rome that contained no reference to environmental protection. Sustainable development was accorded the status of a principle later by the Treaty of Amsterdam, 1997. Environment and climate change have come to attain a central position on the EU's regulatory agenda. Environmental policy has a firmer constitutional basis after the Treaty of Lisbon[167] with a mandate to combat climate change at the EU and international level.[168]

Article 191 TFEU states that the Union policy on the environment should be directed at ensuring the quality of the environment, protection of human health, rational utilisation of natural resources (effectively linking environmental policy to energy policy) and international action for environmental protection and combating climate change. Read with Article 11 TFEU that states that 'Environmental protection requirements must be integrated into the definition of the Union's policies and activities, in particular with a view to promoting sustainable

[165] Mikkel Mailand, 'Commission Entrepreneurship and EU Employment Policy – The Fate of a Former Darling' (2021) 27 European Journal of Industrial Relations 249, 250.
[166] Maarten Keune and Paul Marginson, 'Transnational Industrial Relations as Multi-Level Governance: Interdependencies in European Social Dialogue' (2013) 51 British Journal of Industrial Relations 473.
[167] TFEU, art 11 and arts 191-193.
[168] TFEU, art 191(1).

development', environmental and climate change considerations come to enjoy a certain level of omnipresence in EU-level policy-making.

In developing its policy on the environment, the Union is directed to take into account the economic and social development of the Union as a whole and the balanced development of its regions.[169] With due regard to the competence of the Union and member states, Article 191(4) also envisages international cooperation and environmental agreements with third countries and international organisations.

The EU has identified climate change as the other key challenge alongside the economic crisis. Resource efficiency and a greener economy were identified as priorities under the Europe 2020 Strategy.[170] The EU has also adopted and/or updated directives pertaining to the emissions trading system,[171] renewable energy,[172] energy efficiency,[173] and fuel quality.[174] The European Green Deal is the latest framework that elaborates on the EU's objective to achieve carbon neutrality by 2050.[175] It

[169] CETA, art 191(3).
[170] Europe 2020 (n 66) 8.
[171] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to Enhance Cost-Effective Emission Reductions and Low-Carbon Investments, and Decision (EU) 2015/1814 [2018] OJ L76/3.
[172] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources [2018] OJ L328/82.
[173] Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on Energy Efficiency [2018] OJ L328/210.
[174] Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC Relating to the Quality of Petrol and Diesel Fuels and amending Directive 2009/28/EC on the Promotion of the Use of Energy from Renewable Sources [2015] OJ L239/1.
[175] Commission, 'The European Green Deal' COM(2019) 640 final.

has now been written into hard law in the form of the European Climate Law.[176]

Soft instruments such as the European Climate Pact[177] and the Strategy on Adaptation to Climate Change[178] are designed to achieve the regulatory objectives introduced earlier in this chapter i.e., transparency, stakeholder participation through dialogue between the Commission, civil society, and business (including TNCs and small and medium enterprises (SMEs)), building institutional capacity within the EU and in partner countries; and conducting impact assessments.[179] In accordance with the European Green Deal, better regulation for ensuring policy coherence requires that climate adaptation is integrated in regulatory guidelines.[180] This entails revisiting the Better Regulation guidelines and tools for their systematic improvement.

The Biodiversity Strategy for 2030 ('Biodiversity Strategy')[181] and the New EU Forest Strategy ('Forest Strategy')[182] build on the European Green Deal. The respective biodiversity and forest monitoring frameworks are based on relevant indicators. These frameworks fulfil the tasks of (i) assimilating scattered EU-level monitoring and reporting mechanisms and linking them to the European Semester (ii) identifying actions for vertical policy coordination between EU institutions and member states on

[176] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the Framework for Achieving Climate Neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L243/1.
[177] Commission, 'European Climate Pact' COM(2020) 788 final.
[178] Commission, 'Forging a Climate-Resilient Europe - The New EU Strategy on Adaptation to Climate Change' COM(2021) 82 final.
[179] ibid. see also Commission, 'European Climate Pact' (n 177).
[180] Commission, 'Forging a Climate-Resilient Europe - The New EU Strategy on Adaptation to Climate Change' (n 178) 8.
[181] Commission, 'EU Biodiversity Strategy for 2030' COM(2020) 380 final.
[182] Commission, 'New EU Forest Strategy for 2030' COM(2021) 572 final.

account of the division of competences and the principle of subsidiarity.[183] The Biodiversity Strategy foresees the implementation and enforcement of EU legislation by engaging the new governance[184] framework that assigns 'co-responsibility' and 'co-ownership' to all actors.[185] The strategy highlights the EU's external ambition and the intention of utilising trade policy to promote biodiversity conservation and ecological transition. In this direction, the EU seeks to eradicate illegal, unreported and unregulated fishing, and illegal wildlife trade as well as promote forest-friendly imports and value chains.[186]

The Forest Strategy is focussed on building coherence through dialogue between all actors such as 'Member States, forest owners and managers, industry, academia and civil society' so as to avoid overlapping governance structures.[187] The Forest Strategy is a form of soft law meant to aid EU institutions in the application of EU law.[188] It reiterates that 'implementation and enforcement of the EU acquis of relevance for forests and forest management issues needs to be stepped up' by the Commission in coordination with member states for improving compliance.[189] In this connection, the Commission is reviewing two regulations of significance to trade:[190] the EU Timber

[183] ibid. 13,20; Commission, 'EU Biodiversity Strategy for 2030' (n 181) 15.
[184] Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation: Mapping the Labyrinth' [2012] CEPS Working Document No 32/ October 2012; Vassilis Hatzopoulos, 'From Hard to Soft: Governance in the EU Internal Market' (2013) 15 Cambridge Yearbook of European Legal Studies 101.
[185] Commission, 'EU Biodiversity Strategy for 2030' (n 181) 15.
[186] ibid. 21.
[187] Commission, 'New EU Forest Strategy for 2030' (n 182) 23.
[188] Danai Petropoulou Ionescu and Mariolina Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective' (2021) 17 Journal of Contemporary European Research 44, 47.
[189] For an overview of specific Directives and Regulations see Commission, 'New EU Forest Strategy for 2030' (n 182) 24.
[190] ibid. 24-25.

Regulation[191] that lays down the obligations of operators who place timber and timber products on the market; and the Forest Law Enforcement Governance and Trade Regulation (FLEGT)[192] that lays the foundation for a voluntary scheme (the FLEGT Action plan) to ensure that only legally harvested timber is imported into the EU. The EP expects the Commission to utilise trade and investment policy, particularly the TSD chapters of its FTAs, to prevent climate change, deforestation, ecosystem degradation and promote responsible business conduct (RBC) and sustainable supply chains.[193]

For cross-cutting governance objectives such as transparency and accountability, in 2006, the EU adopted the Aarhus Regulation which applies the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to the EU's institutions.[194] At the time of writing, the Commission's legislative proposal amending the Aarhus Regulation to improve access to justice in environmental matters in the EU and its Member States is with the European Parliament and the Council.[195] The Aarhus Convention lies at the heart of transnational civil society networks seeking accountability in EU environmental policy.[196]

[191] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010.
[192] Council Regulation (EC) No 2173/2005 of 20 December 2005 (the FLEGT Regulation) and Commission Implementing Regulation (EC) No 1024/2008 of 17 October 2008.
[193] European Parliament, European Parliament Resolution of 22 October 2020 with Recommendations to the Commission on an EU Legal Framework to Halt and Reverse EU-Driven Global Deforestation P9_TA(2020)0285.
[194] Regulation (EC) No 1367/2006 [2006] OJ L256/13.
[195] COM(2020) 642 final.
[196] Sonja Bugdahn, 'Travelling to Brussels via Aarhus: Can Transnational NGO Networks Impact on EU Policy?' (2008) 15 Journal of European Public Policy 588.

EU environmental law is expansive, and the paragraphs above do not cover all of its legal frameworks. The areas discussed above are selected because they correspond to the obligations covered under CETA's environmental provisions.[197] The agreement refers to the need for 'trade and investment in environmental goods and services'[198] and 'the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation'.[199] The CETA Joint Committee adopted a recommendation on Trade, Climate Action and the Paris Agreement integrating climate-related multilateral obligations with the EU-Canada partnership. Trade in forest products is a matter of sustainable forest management and the effective use of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[200] and identified as an area for inter-governmental bilateral dialogue.[201] The parties also undertake to monitor illegal, unreported, and unregulated (IUU) fishing and eliminate trade in IUU products.[202] Similarly, transparency is defined as an obligation in the respect of sustainable development.[203] The observation that the EU 'tends to demand the use of a [multilateral environmental agreements] to address international environmental problems'[204] explains their incorporation in CETA.[205] The EU is also known to export its environmental standards through market forces.[206] Furthermore, the Union's

[197] CETA, ch 24.
[198] CETA, art 24.9.1.
[199] CETA, art 24.9.2.
[200] CETA, art 24.10.
[201] CETA, art 25.3.
[202] CETA, art 24.11.2(b).
[203] CETA, art 22.2.
[204] Camilla Adelle, Katja Biedenkopf and Diarmuid Torney (eds), *European Union External Environmental Policy* (Palgrave Macmillan 2018) 21.
[205] CETA, art 24.4.
[206] Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' (2014) 42 International Review of Law and

environmental measures on biofuels, climate, timber, fish and fishery products have an exterritorial reach.[207] FTAs with environmental provisions are one of the channels to promote EU standards abroad.[208] The EU does not exhibit the same tendency in the respect of labour standards. It pursues them as normative objectives in its trade partnerships.[209] This is better understood by unpacking the two perceptions of the EU: 'market power' and 'normative power'.

4. Normative Power Europe and Market Power Europe

The EU is a 'normative power' when it attempts to define conceptions of norms in international relations.[210] The normative basis of the EU comprises its core values and principles (peace, liberty, democracy, rule of law and human rights) and what Ian Manners describes as 'minor' norms,[211] policies which are relevant to international relations (social solidarity, anti-discrimination, sustainable development, and good governance). Manners depends on the historical context for this categorisation. For instance, sustainable development was included in the Treaty of Amsterdam, following the Rio summit. The classification of norms is based on the argument that minor norms are more contested within the constitution and practices of the EU.[212]

Ecoonomics 158, 165; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) 207-231.

[207] Ioanna Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) 2 European Papers 519, 523-524.

[208] Anu Bradford, *The Brussels Effect* (OUP 2020) 207.

[209] Jan Orbie, 'Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?' in Richard G Whitman (ed), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan 2011) 163.

[210] TEU, art 3(3).

[211] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 Journal of Common Market Studies 235, 239, 242-243.

[212] ibid.

According to Chad Damro, the EU is a 'market power' when its identity is derived from its internal market and the extent to which it externalises 'its market-related policies and regulatory measures'[213] in its trade policies. According to this view, economic and social regulations result in different type of incentives for different interest groups.[214] Businesses and NGOs comprise the conflicting components of these interest groups with businesses often more successful in exerting influence.[215] Furthermore, this influence over regulatory outcomes not only determines the regulations of the internal market but also 'externalises' the EU's market power when businesses or governments in exporting countries adopt them.[216] The view of the EU as a market power does not oppose the view that it is a normative power[217] because the EU relies on both to externalise the internal market.[218] It is, however, the 'various actors—including all those that are active parts of the regulatory state—also help to determine whether and which internal regulations

[213] Chad Damro, 'Market Power Europe' (2012) 19 Journal of European Public Policy 682, 697.
[214] ibid. 688-689. I discuss only business groups or associations and NGOs here when referring to interest groups. Interest groups are non-state actors that possess the features of organisation, political interests, and private status see Jan Beyers, Rainer Eising and William Maloney, 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' (2008) 31 West European Politics 1103.
[215] Heike Klüver, 'Introduction', *Lobbying in the European Union* (Oxford University Press 2013); Andreas Dür and Dirk De Bièvre, 'Inclusion without Influence? NGOs in European Trade Policy' (2007) 1 Journal of Public Policy 79.
[216] Explained as 'de facto' and 'de jure' Brussels effect respectively see Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1, 6.
[217] Damro (n 213).
[218] 'Market power' is granted by the very size of the internal market (measured in terms of GDP) which is a favourable condition for facilitating rule exportation. While the EU's value-based agenda is indicative of its normative power. On the analysis of the EU's unilateral influence across a number of areas of law contrary to the preferences of its trading powers see Bradford (n 208) 66.

the EU will attempt to externalise'.[219] Labour standards are promoted predominantly under the normative identity of the EU whereas environmental standards fall in both, normative and market domains.

There may be instances wherein the interaction between the normative power and the market power causes tension in the EU's external relations. In such instances, labour and environmental standards, as the respective social and environmental pillars of sustainable development, run the risk of being subordinated to economic objectives.[220] On the one hand, the EU acts like a regulatory state within its areas of competence,[221] while, on the other, its institutions constantly face the challenge of choosing between liberalising or restricting market forces. External coherence i.e., the consistency with which the EU presents itself in its external relations depends on the extent to which the EU is united internally in policy areas.[222] We now consider the constitutional and regulatory constraints within the EU implicating its trade relations with third countries.

[219] Chad Damro, 'Market Power Europe: EU Externalisation of Market-related Policies' [2010] MERCURY E-Paper No. 5 <http://mercury.uni-koeln.de/fileadmin/user_upload/E-paper_no5_r2010.pdf>.
[220] Stefan Renckens, Grace Skogstad and Matthieu Mondou, 'When Normative and Market Power Interact: The European Union and Global Biofuels Governance' (2017) 55 Journal of Common Market Studies 1432; Jan Orbie and Sangeeta Khorana, 'Normative versus Market Power Europe? The EU-India Trade Agreement' (2015) 13 Asia Europe Journal 253.
[221] Giandomenico Majone, 'The Rise of the Regulatory State in Europe' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (OUP 1998) 192.
[222] Eugénia da Conceição-Heldt and Sophie Meunier, 'Speaking with a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance' (2014) 21 Journal of European Public Policy 961, 964-965.

5. The Constitutional and Regulatory Factors Influencing External Coherence

5.1. The Constitutional Aspect: TSD Provisions in Context

In the beginning of this chapter, we were introduced to the practice of mixity in the EU's agreements with third countries. CETA is a mixed agreement to which both the EU and its 27 member states will be parties once it has been formally ratified.

CETA has undergone the scrutiny of the CJEU as a mixed agreement. The sub-national government of Wallonia in Belgium initially blocked the ratification of CETA contending the incompatibility of its investment provisions with EU law, [223] this led to Belgium seeking an opinion from the CJEU under Article 218(11) TFEU. In its submissions before the CJEU in the case, *Opinion 1/17*,[224] Belgium challenged the validity of the investment court system (ICS) under CETA. The Court ruled that CETA is compatible with EU law, but since the area of non-direct investments falls under shared competence, CETA should be concluded as a mixed agreement. At the time of writing, the provisions concerning the ICS have not entered into force as CETA's ratification from all member states is a prerequisite in this respect. Moving on from *Opinion 1/17*, we now consider mixity in the context of the labour and environmental provisions of the agreement.

The scope of the CCP has continued to expand in relation to the extent to which internal and external policies are inextricably linked in the area of trade.[225] The CCP must be conducted in the

[223] 'Hot-Air Walloons' (2016) 421 The Economist 34.
[224] *Opinion 1/17* ECLI:EU:C:2019:341.
[225] Bart Van Vooren and Ramses A Wessel, *EU External Relations Law* (CUP 2014) 276.

context of the *principles and objectives* of the EU's external action covering inter alia sustainable development.[226]

According to the CJEU in *Opinion 2/15*,[227] the TSD provisions of the EU-Singapore FTA (EUSFTA) fall under the exclusive competence of the EU since the objective of sustainable development is an integral part of the CCP.[228] However, in the same opinion, Advocate General (AG) Sharpston stated that only those TSD provisions that address issues of disguised restrictions on trade have a *direct and immediate* link with regulation of trade and fall under the CCP. Whereas another category of provisions is aimed at achieving, in the EU and the partner country, 'minimum standards of (respectively) labour protection and environmental protection, *in isolation* from their possible effects on trade'.[229] These include the multilateral environmental agreements and ILO conventions that the TSD chapters enlist. The incorporation of these *indirectly related* international obligations on labour and environment has the *effect* of incorporating these commitments into the FTA, resulting in the creation of 'a new obligation for the Parties, enforceable in accordance with the [FTA]'.[230] According to the AG's analysis, labour and environmental provisions except the provisions on (i) avoiding disguised protectionism and (ii) the conservation of fisheries (falling under the exclusive competence on marine biological resources[231]) fall under shared competence. Therefore, according to the AG, the TSD provisions

[226] TFEU, art 207(1) referring to TEU, arts 21 and 3(5) (emphasis added).
[227] *Opinion 2/15* ECLI:EU:C:2017:376.
[228] 'The conduct of trade in accordance with the objective of sustainable development — as has been stated in paragraph 147 of this opinion — forms an integral part of that policy.' *Opinion 2/15* (n 227), para 163.
[229] *Opinion 2/15* (n 227), Opinion of AG Sharpston, para 491 (emphasis in original).
[230] ibid., para 498 (emphasis in original).
[231] TFEU, art 3(d).

of EUSFTA should have been part of the reason the agreement was considered as a mixed agreement.

In *Opinion 2/15* neither the CJEU nor AG Sharpston expressly considered whether TSD provisions would have *regulatory implications* for labour and environmental standards of the EU. The Commission's request for the opinion was restricted to the question of competence and consequently, the Court omitted any question as to substantive compatibility.[232] Looking at the analysis of AG Sharpston, a case for a mixed agreement emerges based on inter alia the components of the TSD provisions. The CJEU reasoned differently and did not unpack the components of the TSD provisions because 'Article 3(1)(e) TFEU cannot be exercised in order to regulate the levels of social and environmental protection in the Parties' respective territory.'[233] The Court simply determined whether a norm in an area of its external relations was confirmed on the part of the EU. The Court held that the EUSFTA is a mixed agreement (and cannot be entered into by the EU alone) because it covers shared competences with respect to only: (i) non-direct foreign investment, (ii) investor-state dispute settlement (ISDS), and (iii) state-to-state dispute settlement relating to provisions regarding portfolio investments and ISDS. Although *Opinion 2/15* concerned the division of competences as regards the conclusion of FTAs by the EU, it provides two approaches of the Court and AG Sharpston, respectively to 'trade and sustainable development'. The Court's findings in this Opinion are only valid for the EUSFTA but possess authoritative value for the interpretation of similar trade agreements. However, the

[232] Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231.
[233] *Opinion 2/15* (n 227) para 164.

reasoning of the CJEU cannot apply to CETA because it differs from the EUSFTA in what is termed as its 'normative content'.

New generation trade agreements may belong to the same typology of EU FTAs but their provisions are not homogenous. CETA is a valid example in this respect because unlike EUSFTA,[234] the agreement contains a chapter on regulatory co-operation which expressly applies to the TSD Chapters of CETA[235] in 'the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities' covered by inter alia chapters Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment) [236] (collectively referred to as the TSD provisions in the context of CETA). CETA seeks regulatory cooperation of the Parties on labour and environmental objectives '[…] in light of the mutual interests in order to […] enhance the climate for competitiveness and innovation, including by pursuing regulatory *compatibility*, […] and *convergence*…'.[237]

There are references to 'avoid[ing] unnecessary regulatory differences',[238] 'minimis[ing] unnecessary divergences in regulations'[239] and '[…] minimis[ing] unnecessary differences in new regulatory proposals while more effectively improving health, safety and environmental protection'.[240] Thus, based on

[234] The EUSFTA does not have a dedicated chapter on Regulatory Cooperation and envisages a limited scope for it. Regulatory Cooperation appears as an objective only in respect of aspects related to technical barriers to trade and on electronic commerce see EUSFTA, art 4.4.2 and art 8.61.
[235] CETA, ch 21.
[236] CETA, art 21.1.
[237] CETA, art 21.2.4(b) (emphasis added).
[238] To 'build trust, deepen mutual understanding of regulatory governance and obtain from each other the benefit of expertise and perspectives…' CETA, art 21.3(b)(vi).
[239] CETA, art 21.4(g).
[240] CETA, art 21.4(n)(vi).

these provisions CETA has a different 'normative content' than other new generation FTAs directed at reducing regulatory divergences.[241] Therefore, insofar as CETA is concerned, it should be considered a mixed agreement because of its TSD provisions. However, this understanding seems to have been overlooked in the EU for the time being.

The French Constitutional Council has touched upon these aspects while analysing CETA to ascertain the broader question of whether national sovereignty in areas of shared competences is preserved by the agreement.[242] From the discussion on CETA's chapter on Regulatory Cooperation and the TSD provisions in its judgement, it emerges that the French court followed the reasoning of the CJEU in *Opinion 2/15* regarding TSD provisions falling under the exclusive competence of the EU. The court stated that even though the chapter on regulatory cooperation contains text relating to establishing standards of national law, it respects the essential conditions for exercising national sovereignty.

We should consider the reasoning employed by the French court to arrive at its decision. The finding that regulatory cooperation does not threaten national sovereignty was made essentially because according to Article 21.2.6 of CETA, regulatory cooperation is to be carried out on a *voluntary* basis.[243] In other words, the court acknowledged the employment of soft law[244] and saw no sovereignty cost as is foreseen in hard law

[241] Charlotte Beaucillon, 'Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy' (2017) 2 European Papers 819-828, 821.
[242] French Constitutional Council, Judgment of 31 July 2017, No. 2017-749 DC available at < https://www.conseil-constitutionnel.fr/en/decision/2017/2017749DC.htm>.
[243] ibid. paras 47 and 53 (emphasis added).
[244] For definition of soft law see ch 3 of this thesis, section 2.2.2.

commitments[245] for EU member states in accepting obligations that may stem from it.

Insofar as EU law is concerned, soft law arrangements need to respect the interlinked principles of conferral, institutional balance defined in *Meroni v High Authority*[246] as 'the balance of powers which is characteristic of the institutional structure of the Community',[247] sincere cooperation and rule of law.[248] These principles are fundamental when it comes to ascertaining the legality of soft international arrangements.[249]

As outlined earlier in this chapter, sincere cooperation is not limited to the internal affairs of the EU and manifests in its external relations as well. It ensures that the EU has 'unity of international representation' for achieving coherence as mandated by its constitutional treaties in its external relations.[250] A consequence of the incorporation of TSD in CETA is that their implementation will require the EU and its member states to extensively apply sincere cooperation vertically as well as horizontally as its institutions and member states have undertaken to *perform*[251] the stipulated obligations under mixed agreements. While the role of sincere cooperation is clearly relevant to the implementation of mixed agreements, there is some uncertainty as regards the use of soft law. In the 2002

[245] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421, 437.
[246] [1957/1958] ECR 133.
[247] ibid. 152; TFEU, art 218.
[248] Ramses A Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2021) 44 West European Politics 72, 81; Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39 Yearbook of European Law 569, 580.
[249] ibid.
[250] Klamert (n 35) 181.
[251] Weiler (n 21) (emphasis added).

case of *France v Commission*, [252] the CJEU did not clearly enunciate whether the Commission or the Council had the power to conclude an international soft law agreement. Therefore, soft law in the domain of EU external relations is likely to reflect the principles that lie at the foundation of its legal order.

5.2. Regulatory Aspects

In the incorporation of provisions on labour and environment, CETA (i) defines transparency as an obligation of the parties[253] (ii) promotes accountability and efficiency in regulatory governance through IAs and stakeholder consultations[254] (iii) incorporates approaches that are adaptive in the sense that they cover not only inter-governmental cooperation but also voluntary frameworks[255] and (iv) seeks coherence between economic objectives and sustainable development.[256]

The internal market is the EU's pathway to participate and influence economic globalisation. In utilising FTAs as tools to further trade and sustainable development, the EU's construct is '[…] an attempt […] to develop an entirely new logic […] that puts paradoxes and contradictions right at the centre of inquiry'.[257] This is apparent in relation to the EU's labour and environmental policies discussed above. With an agreement like CETA, the EU finds itself functioning between the 'capability-

[252] C-233/02 *France v Commission* ECLI:EU:C:2004:173; Paula García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' (2016) 2016 1 European Papers 115, 116-117.
[253] CETA, art 21.3(b)(ii), art 22.2, art 22.4.
[254] CETA, art 22.1.3(d).
[255] CETA, art 22.3.1, art 22.3.2, art 23.1.
[256] CETA, art 22.1.3.
[257] Oliver Kessler, 'On Logic, Intersubjectivity, and Meaning: Is Reality an Assumption We Just Don't Need?' (2012) 38 Review of international Studies 253, 261.

expectations gap'.[258] For regulatory governance to deliver optimum results, the implementation of regulatory objectives is as important as their initial development.[259] Some examples of cross-cutting relevance that can be highlighted with reference to the challenges to the EU's capability to make CETA function effectively are as follows:

(a) The obligation of the Commission to deliver on ensuring complete 'flow of information' to the EP[260] applies in the case of CETA. Institutional transparency is a facet of democracy and rule of law that the EU seeks to promote at the international level as well.[261] One mechanism that the Commission does this through is the Better Regulation Agenda (discussed under section 2.2(c) above) that makes use of evidence and consultations-based decision making. Since CETA contains provisions for cooperation on these aspects as part of regulatory cooperation and the implementation of TSD provisions, the EU may be keen promoting its own approach in these areas. However, analysis points to the deficiencies of Better Regulation. A specific observation is the lack of transparency in selecting and presenting evidence[262] but there is also no framework with optimum qualitative and quantitative

[258] Christopher Hill, 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role' (1993) 31 Journal of Common Market Studies 305.
[259] OECD, *Regulatory Policy and Governance* (OECD 2011) 74.
[260] Axel Marx and Guillaume Van der Loo, 'Transparency in EU Trade Policy: A Comprehensive Assessment of Current Achievements' (2021) 9 Politics and Governance 261, 263.
[261] TEU, art 21(1).
[262] Giulia Listorti and others, 'Towards an Evidence-Based and Integrated Policy Cycle in the EU: A Review of the Debate on the Better Regulation Agenda' (2020) 58 Journal of Common Market Studies 1558, 1565.

indicators to demonstrate or convey the results achieved through Better Regulation.[263]

A greater role for the EP in the negotiations, conclusion and implementation of FTAs was introduced by the Lisbon Treaty because the increase in the scope of the CCP meant the need for more transparency in the Union.[264] However, there is non-engagement of the EP with the Committees and other bodies set up under EU FTAs, contributing to the existing 'democratic deficit' in the Union that remains unaddressed.[265]

Furthermore, in the light of the backlash from TTIP, the European Ombudsmen took several initiatives to ensure transparency in negotiations but there is little progress made so far when it comes to the implementation phase of FTAs.[266]

These evaluations on transparency conducted with a focus on the Commission and EP indicate that regulatory governance within the EU has not attained complete maturity for now.

(b) For the trade-environment-labour linkage to be effectively promoted under CETA input from the social partners and civil society is essential. However, the Europe 2020 Strategy did not mention social partners at all, raising

[263] Elizabeth Golberg, '"Better Regulation": European Union Style' [2018] M-RCBG Associate Working Paper Series | No. 98, 62.
[264] Marx and Van der Loo (n 260).
[265] Wolfgang Weiss, 'Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament' (2018) 14 European Constitutional Law Review 532.
[266] Marx and Van der Loo (n 260) 268.

concerns about their overall significance in institutional thinking.[267] There are two more issues of further concern (i) the EU's framework of transnational governance,[268] gives rise to questions of accountability for all the actors[269] and (ii) in engaging civil society in trade policy, the Commission tends to favour corporate actors over actors representing non-economic, social interests such as NGOs.[270] These issues go to the heart of the transnational legal process within the EU wherein it cannot be concluded that soft law has been instrumental in overcoming the constraints of hard law without leading to further complications regarding the rule of law in the Union.

(c) Three distinct factors affecting decision-making i.e., competitiveness, sustainable development, and governance drive risk assessment in the EU.[271] They are not, however, given equal importance in developing regulation. There are instances where better regulation has been utilised to avoid 'over-regulation' of labour and a precautionary approach to environment, health and safety regulation.[272] In other words, the Better Regulation

[267] Ruth Dukes and Catriona Cannon, 'The Role of Social Partners' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar 2016), 99.
[268] Dagmar Schiek, 'The EU Constitution of Social Governance in an Economic Crisis in Defence of a Transnational Dimension to Social Europe' (2013) 20 Maastricht Journal of European and Comparative Law 185.
[269] Stefano Giubboni, 'The Rise and Fall of EU Labour Law' (2018) 24 European Law Journal 7, 11.
[270] David Bailey and Fabienne Bossuyt, 'The European Union as a Conveniently-Conflicted Counter-Hegemon through Trade' (2013) 9 Journal of Contemporary European Research 561, 570.
[271] Ragnar Löfstedt, 'The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis' (2004) 28 The Journal of Risk and Uncertainty 237.
[272] Sacha Garben, 'An 'Impact Assessment' of EU Better Regulation' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 228, 229.

agenda adopts risk-based regulation (on the basis of identified risks) alongside uncertainty-based regulation in accordance with the precautionary principle.[273] This may not be expressly undermining the sustainable development and governance-related rationales that underlie the trade-environment-labour linkage in CETA but may favour competitiveness as the deciding factor shaping regulatory outcomes.

These examples illustrate the internal conflict of the EU between its own guiding principles and objectives and how this may be problematic in the promotion of environmental and labour standards through FTAs.[274] The basis for this ambition is constitutional[275] but the EU runs the risk, in its external policies, of reproducing its internal role as a market-enhancing regulatory entity based on its historical internal market focus and experience.[276] Nevertheless, the EU increasingly pursues a values based agenda in its external actions. The Union sets 'an example for others to follow' by predominantly relying on the two mechanisms of 'activation of international norms' and

[273] René von Schomberg, 'The Precautionary Principle and Its Normative Challenges' in Elizabeth Fisher, Judith Jones and René von Schomberg (eds), *Implementing the Precautionary Principle* (Edward Elgar 2006) 34; Jacopo Torriti and Ragnar Löfstedt, 'The First Five Years of the EU Impact Assessment System: A Risk Economics Perspective on Gaps between Rationale and Practice' (2012) 15 Journal of Risk Research 169, 172.
[274] Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 Journal of European Public Policy 906, 907.
[275] In the form of the obligation to 'contribute' to the development of world trade as per Article 206, TFEU see Marise Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (2017) <https://www.sieps.se/en/publications/2017/a-quiet-revolution-the-common-commercial-policy-six-years-after-the-treaty-of-lisbon-20172/sieps2017_2?> 32.
[276] Bailey and Bossuyt (n 270) 569.

'shaping the discourse of what is normal'.[277] From this perspective, trade policy objectives are not meant to mirror the policy measures of the EU's internal market.[278] By any means, there are significant strategic differences between facilitating regional market integration on the one hand and facilitating bilateral and multilateral trade relations on the other.[279] Trade policy should, therefore, simply reflect the same principles for the purpose of consistency.[280] The subsequent section explores this further.

6. Trade and Sustainable Development: Outside In and Inside Out

The EU's internal market is an innovative regulatory model in the sense that it exemplifies the deepest form of regional economic integration.[281] At the same time, the EU accords it the status of a 'highly competitive social market economy'[282] emphasising that the internal market is a means to an end. Based on the belief that 'acting at home will provide international leadership', the EU's strategy on sustainable development emphasises developing policies at the EU and member state levels first.[283] In this direction, sustainable

[277] Tuomas Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' (2011) 49 Journal of Common Market Studies 1183, 1197.
[278] Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (n 275).
[279] Jan Orbie And Lisa Tortell, 'From The Social Clause To The Social Dimension Of Globalization' in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization* (Routledge 2009) 39.
[280] Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (n 275) 33.
[281] On EU as a laboratory and model on regional integration see Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 Common Market Law Review 553; Stefano Micossi, '30 Years of the Single European Market' [2016] Bruges European Economic Policy Briefings 41/2016.
[282] 'Completing the Internal Market, White Paper from the Commission to the European Council' COM(85)310 Final paras 20 and 221.
[283] COM (2001) 264.

development operates in two contexts in the internal market:[284] one focussed on the principle's economic dimension[285] and the other, an environmental objective that must be integrated across all EU policies.[286] Subsequently, the Commission has recognised 'the challenge of integrating markets, governance and internal policies through a global partnership' and emphasised that '[b]ilateral and regional agreements [of the EU] must underpin *sustainable development* […]'.[287] Therefore, a characteristic shared by the internal market and EU trade policy is that they are linked by the normative agenda of sustainable development that refers to international norms time and again.

6.1. Invoking International Norms

Sustainable development is regarded as a concept under international law that has an intrinsically evolutive nature.[288] At the beginning of the millennium, sustainable development was an aspiration for developing countries and countries with economies in transition.[289] Accordingly, the Millennium Development Goals (MDGs)[290] adopted in 2000 were regarded

[284] TEU, art 2.
[285] As in 'sustainable economic development' see TEU, art 21(1) second para.
[286] TFEU, art 11; see also reference to the principle of integration in EU law Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development* (OUP 2021) 91.
[287] Labour standards were recognised under social development needs see COM (2002) 82 (emphasis added) sub-para 3.1.
[288] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 European Journal of International Law 377, 382.
[289] UNGA 'United Nations Millennium Declaration' (18 September 2002) 55th session UN Doc A/RES/55/2.
[290] The eight MDGs: (1) Eradicate extreme poverty and hunger; (2) Achieve universal primary education; (3) Promote gender equality and empower women; (4) Reduce child mortality; (5) Improve maternal health; (6) Combat HIV/AIDS, malaria and other diseases; (7) Ensure environmental sustainability; and (8) Develop a global partnership for development; 'Millennium Development Goals' (*UNDP*) <https://www.undp.org/tag/millennium-development-goals> accessed 20 July 2022.

as a global partnership to reduce extreme poverty in a time-bound manner by 2015. However, it was clarified that '[…] pursuit of sustainable development requires changes in the domestic and international policies of *every nation*.'[291]

The succeeding SDGs build further on this aspect through a set of 17 goals and 169 targets said to be integrated, indivisible and *global* in nature requiring developed countries to transform the ways in which they operate.[292] The 'essence' of sustainable development was defined previously as '[…] a process of change in which the exploitation of resources, […] and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.'[293] Due to its intrinsic relation to resource use, trade's impact on ecological and social aspects of development are profound.[294] The discussions on 'harnessing trade for',[295] 'mainstreaming trade to attain',[296] utilising 'trade in the service of'[297] sustainable development are therefore about reorienting the goals of economic liberalisation. Therefore, the EU's internal market and its external dimension i.e., the EU's trade policy, allude to the

[291] World Commission on Environment and Development, *Our Common Future* (OUP 1987) 41 (emphasis added).
[292] Maria Lee, *EU Environmental Law, Governance and Decision-Making* (Hart Publishing 2014) 61 (emphasis added); Derek Osborn and Farooq Ullah, 'Universal SDGs – Implementing the Goals in Rich Countries' (*sustainablegoals.org.uk*, 2017). <https://www.sustainablegoals.org.uk/universal-sdgs-implementing-the-goals-in-rich-countries/> accessed 20 July 2022.
[293] World Commission on Environment and Development (n 291) 46.
[294] This relationship is viewed from the perspectives of rules on trade in natural resources as well as the threat of environmental degradation on account of resource use see 'World Trade Report 2010: Trade in Natural Resources' (WTO, 2010) 10.
[295] *Harnessing Trade for Sustainable Development and a Green Economy* (WTO 2011).
[296] *Mainstreaming Trade to Attain the Sustainable Development Goals* (WTO 2018).
[297] Olivier De Schutter, *Trade in the Service of Sustainable Development* (Hart 2015).

objective of sustainable development directed at international labour and environmental standards.

In 2006, two instruments for internal and external policy purposes were released: the European Consensus on Development directed at partnerships with developing countries[298] (now revised and aligned with the 2030 Agenda and the Paris Agreement)[299]; and the Commission Communication: 'Global Europe'[300] which (i) indicated a shift towards bilateralism and (ii) is based on three domestic considerations for the launch of new FTA negotiations: commercial interests, the lock-in of the open market model domestically, and linkage issues concerning the social acceptance of trade policy.[301] 'Trade and Sustainable Development' in FTAs is pursued as part of the third aspect. Eventually, as previously outlined, the 2009 Lisbon Treaty provided a constitutional mandate to the EU to pursue sustainable development in its external relations.[302] EU FTAs such as CETA are thus representative of the need for balance between the internal and external dimensions of EU trade.

As for the actorness of the EU at the global level, the EU has substantiated on its role in shaping the 2030 Agenda regarding it as the world's blueprint for global sustainable development for 2016-2030.[303] On labour, it partnered with the ILO on the

[298] First adopted in 2005 [2006] OJ C46/1 revised in 2017 see The New European Consensus on Development 'Our World, Our Dignity, Our Future' 7th June 2017, Brussels.
[299] Commission, 'European Consensus on Development' (2017) <https://ec.europa.eu/international-partnerships/european-consensus-development_en> accessed 20 July 2022.
[300] Commission, 'Global Europe: Competing in the World', (Commission Staff Working Document) COM (2006) 567 final 16.
[301] Boris Rigod, '"Global Europe": The EU's New Trade Policy in Its Legal Context' (2012) 18 Columbia Journal of European Law 1-30, 6.
[302] art 21(3) referring to TEU, art 21(2)(d).
[303] *60 Years of The EU in The World* (EU 2017) <https://cdn5.euraxess.org/sites/default/files/60_years_eu_in_the_world_v5.pdf> accessed 20 July 2022.

pretext of achieving the MDGs,[304] through regular policy dialogue on development issues, enhanced cooperation at regional and country level and financial cooperation in the ILO's operational activities.[305] This partnership was updated for the 2030 Agenda wherein the EU seeks to work with the ILO on the '[…] Promotion of the international labour standards and decent work through […] trade policy […]' in accordance with the 2030 Agenda and the SDGs.[306] Accordingly, sustainable development is reinforced simultaneously, in the EU internal market and trade policy, focussing on international labour and environmental standards.

6.2. Shaping the Discourse on 'Trade and Sustainable Development': The EU's Constructivism

The EU's *discourse*[307] on 'Trade and Sustainable Development' unfolds at three basic levels of activity: ideational, behavioural and organisational.[308] The first (ideational) level refers to the objectives that the participants (the actors) in international relations seek within a world order. The *shared values* that they intend to pursue together are a component of this level. Ideational factors are said to have normative dimensions.[309] The

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[304] ILO, 'Response to the EC Consultation Paper' <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_189917.pdf> accessed 20 July 2022.

[305] See 'Memorandum of Understanding concerning the establishment of a strategic partnership between the International Labour Organization and the Commission of the European Communities in the field of Development' (ilo.org) < https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_169299.pdf> accessed 20 July 2022.

[306] Nicolas Schmit and Guy Ryder, 'Exchange of Letters between the European Commission and the ILO Dated 04 February 2021' <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_769069.pdf> accessed 20 July 2022.

[307] For a discussion on Constructivism see ch 1 of this thesis, section 4 (Methodology).

[308] James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government : Order and Change in World Politics* (CUP 1992) 14.

[309] John Gerard Ruggie, *Constructing the World Polity* (Routledge 1998) 33.

'ideational impact of the EU's international identity/role represent[s] normative power.[310] The second (behavioural) level is concerned with what the participants do to give expression to their ideational understanding. For instance, the legal processes to develop a set of rules on trade may form a component of this level. The third (organisational) level is related to the more formal and institutional dimension of the prevailing order. It refers to those institutions and mechanisms that the actors devise to manifest their ideational and behavioural aspirations.[311] This is reflected, for instance, the TSD provisions in EU FTAs create institutionalised mechanisms to provide for the participation of state as well as non-state actors.[312] An 'original and distinctively European approach'[313] to labour and environment, these mechanisms reflect the EU's ideational and behavioural aspirations in its trade agreements. It is at the ideational level that the EU frames issue-linkages between trade, labour and environment in the context of sustainable development.

Post-Lisbon, the EU has utilised issue linkage in its trade policy to establish cooperative mechanisms in its FTAs aimed at developing 'cross-regime'[314] normative and institutional

[310] Manners (n 211) 238.
[311] Rosenau and Czempiel (n 308) 14-15.
[312] For an overview of the EU's engagement of non-state social and economic actors in monitoring the implementation of the TSD chapters see Axel Marx and Guillaume Van der Loo, 'Democratic Legitimacy in EU Trade Policy' (*European Commission*, 2020) <https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5d0838363&appId=PPGMS> accessed 20 July 2022.
[313] Jan Orbie, Deborah Martens, Myriam Oehri and Lore Van den Putte, 'Promoting Sustainable Development or Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements' in Mark Langan and Sophia Price (eds), *Sustainable Development in Africa-EU Relations* (Routledge 2018) 96-116.
[314] Oren Perez, 'Multiple Regimes, Issue Linkage, and International Cooperation: Exploring the Role of the WTO' (2006) 26 University of Pennsylvania Journal of International Economic Law 735, 740, 770.

linkages between the regimes on trade, labour and environment.

The 'trade and sustainable development' agenda is covered across a typology of FTAs such as the (i) Deep and Comprehensive Free Trade Agreements[315] signed by the EU as part of its European neighbourhood policy,[316] (ii) Economic Partnership Agreements meant to facilitate the integration of developing economies into the world economy.[317] For instance, the EU-CARIFORUM agreement mentions sustainable development as an overarching objective, linking it specifically to environmental provisions and underscoring its importance in the respect of 'social cohesion policies and measures to promote decent work at regional level';[318] and (iii) New-Generation EU FTAs such as CETA that carry specific chapters on TSD.

In connection with the research question posed by this thesis, it is important to mention here that the EU advances its strategic partnership with a third country such as Canada because it enjoys a degree of 'common knowledge' which is prerequisite for international cooperation in any field.[319] This is to say that the EU and Canada 'share a set of beliefs and ideas and *know* that they share them'[320] explaining why they seek to develop a

[315] EU-Ukraine Association Agreement [2014] OJ L 161/3, ch 13.
[316] TEU, art 8 is not clear on the sort of relationship that can be pursued under the European Neighbourhood Policy (ENP) but this is interpreted as providing it a broad scope see Nariné Ghazaryan, 'The Law and Political Objectives of the European Neighbourhood Policy in the East: A Difficult Marriage or Singing in Unison?' (2013) 15 Cambridge Yearbook of European Legal Studies 619, 637.
[317] Jeff Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?', *The EU's Role in Global Governance* (OUP 2012), 317.
[318] The Caribbean Forum of African, Caribbean and Pacific States i.e., 'CARIFORUM' see Article 194, EU-CARIFORUM Agreement [2008] OJ L289/I/3.
[319] A Burcu Bayram and Vivian Ta, 'Measuring Common Knowledge: Latent Semantic Analysis, Linguistic Synchrony, and Common Knowledge in International Relations' (2020) 34 International Relations 180, 182.
[320] ibid.

transatlantic response[321] in the first place. In order for their partnership to succeed in this context, the EU and Canada must be able to promote it as an intersubjective idea.

Intersubjectivity, in this context, refers to shared meanings that are socially constructed and shape ideas and behaviours in international relations.[322] These ideas and behaviours cannot be reduced to individual preferences and are reproduced within social structures through collective practices.[323] Ideas, when held intersubjectively between people in a particular domain attain a quality of permanency.[324] It is this pursuit of 'principled and shared understandings of desirable and acceptable forms of social behavio[u]r'[325] that entrenches the trade-labour-environment linkage in EU trade policy. Normative outcomes depend on intersubjectivity that is in turn mediated by the structures that individuals share to mobilise their collective will.[326] In other words, intersubjectivity encompasses self-interpretation and second-order interpretations.[327] In the context of this thesis, this is to say that the individuals are all the actors involved in regulatory governance in the EU-Canada partnership *first* at the respective EU and Canadian levels and *second* at the CETA level. The evolution of the trade-labour-

[321] See ch 2 of this thesis, section 2 (EU and Canada as Allies on Trade and Sustainable Development).
[322] Dale C Copeland, 'The Constructivist Challenge to Structural Realism: A Review Essay' in Stefano Guzzini and Anna Leander (eds), *Contructivism and International Relations* (Routledge 2006) 3.
[323] Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 European Journal of International Relations 147, 164.
[324] Timothy J Sinclair, *Global Governance* (Polity Press 2012) 72.
[325] Friedrich V Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 International Organization 753, 764.
[326] Paulo Barozzo, 'Law in Time: Legal Theory and Legal History' (2021) 31 Yale Journal of Law & the Humanities 316, 343-344.
[327] Guzzini (n 323) 162; Benjamin Herborth, 'Denying the International' [2021] Cambridge Review of International Affairs 1; Thomas Christiansen, Knud Erik Jørgensen and Antje Wiener, 'Introduction' in Thomas Christiansen, Knud Erik Jørgensen and Antje Wiener (eds), *The Social Construction of Europe* (SAGE Publications 2001) 7.

environment linkage thus depends on the actors and institutions that partake in its implementation at the two levels.[328]

The lack of intersubjectivity in the assessment on the extent to which SDGs are to be achieved has been highlighted.[329] For instance, it is suggested that values be incorporated as quantitative indicators that measure the progress on SDGs.[330] This should entail taking a stock of the 'interaction' between actors (social, economic, states and international organisations) in international relations through which they establish shared understandings at different levels (national, international and transnational).[331] Institutions are utilised by actors to affect values in international relations[332] mobilising state cooperation as well as transnational social movements.[333] From this perspective, TNCs are members of social and discursive communities and their interests must be endogenous to norms and law.[334] This suggests that increased attention to the sustainability impacts of business activities can change the

[328] Although as a mixed agreement CETA will also be operative at a third level of the member states but there are limitations to discussing this here.
[329] Gemma Burford and others, 'Bringing the "Missing Pillar" into Sustainable Development Goals: Towards Intersubjective Values-Based Indicators' (2013) 5 Sustainability 3035.
[330] ibid.
[331] Oliver Kessler, 'The Contingency of Constructivism: On Norms, the Social, and the Third' (2016) 45 Journal of International Studies 43, 46, 50, 54, 55, 57; Jutta Brunnée and Stephen J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Columbia Journal of Transnational Law 19, 29; Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law* (CUP 2010) 13.
[332] Alexander Wendt, *Social Theory in International Politics* (CUP 1999) 160; Robert O. Keohane, 'International Institutions: Two Approaches' (1988) 32 International Studies Quarterly 379, 380.
[333] In the context of international organisations see Charles T. Call, 'A Human Rights Practitioner's Perspective' in Sanjeev Khagram, James V Riker and Kathryn Sikkink (eds), *Restructuring World Politics* (Press, University of Minnesota 2002) 14, 127.
[334] Milton C Regan Jr. and Kath Hall, 'Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights' (2016) 84 Fordham Law Review 2032-2033.

interests and identities of business corporations.[335] 'Trade and sustainable development' is thus an idea which if accepted by the range of the actors involved, will become an intrinsically intersubjective 'norm' between communities.[336] From this perspective, if it is stated that there is lack of issue-linkage at the WTO level as the previous chapter argued, it is another way of looking at the lack of a deep trade-labour-environmental linkage at the multilateral level.[337] Thus, the promotion of sustainable development by the EU and Canada as *shared values* should ideally lead to its intersubjectivity in international as well as transnational law. With this understanding, we will examine the 'self-interpretation' of 'trade and sustainable development' from the Canadian standpoint in the next chapter.

7. Conclusions

Regulatory governance within the EU is subsumed as a management technique owning to its federal character based on constitutional provisions on the one hand and, on the other, the need for governing the internal market in a manner that contributes to advancing the EU's social and environmental policies. The external dimension of these arrangements necessitates the sincere cooperation of member states and EU institutions for the implementation of FTAs. However, CETA may require enhanced coordination on labour and environment between EU and member states (vertical) and among EU institutions (horizontal) because of its distinct normative content wherein its regulatory cooperation objectives are intertwined with TSD.

[335] ibid.
[336] Khagram, Riker and Sikkink (n 333) 14.
[337] Perez (n 314).

We also came across the internal set-up on the EU's regulatory agendas and mechanisms that seek to advance transparency, accountability, efficiency, adaptability, and coherence applicable to all fields of its internal policy. CETA's provisions carry obligations that refer to the same objectives in EU-Canada trade relations predominantly in its chapter on regulatory cooperation but they are also reiterated in the standalone TSD chapters. We see that while the EU has expertise to share in these areas on account of its experience as a regulatory state, it also faces internal constraints owing to the shortcomings in ensuring transparency, accountability, efficiency, adaptability, and coherence.

When it comes to the EU's obligations under CETA, the challenges in implementing the commitments on labour and environmental standards are an example of the gap between 'treaty making' and 'treaty implementation'. The EU may be relying on its market power to promote sustainable development through trade but draws on the concept from international frameworks to promote labour and environmental standards internally at first but engages its trading partners in TSD as an idea. By doing so, the EU attempts to build a constructivist identity in its international relations but its success depends on the extent that it finds support from a trading partner.

There is another insight that the EU offers. When proceeding to analyse the specific fields of labour and the environment, there emerges a necessity to arrange the myriad legal and regulatory imperatives within an analytical premise. Taking EU law as a transnational legal system offers key insight into the patterns and structures of regulatory governance that can be employed to advance public policy objectives. We can see that the EU's

social and environmental policies are underpinned by transnational processes. Internally, the EU prioritises regulatory governance to bridge the gap between hard commitments demarcating competences and soft commitments seeking upward convergence of labour and environmental standards. This brings the EU's transnational legal order face to face with its constitutionalism implicating the actions that it chooses to undertake in both the fields.

CHAPTER 5: THE CANADIAN PERSPECTIVE ON REGULATORY GOVERNANCE IN THE TRADE-LABOUR-ENVIRONMENT LINKAGE

1. Shifting the Spotlight onto Canada: Giving Due consideration to 'the other' in Transatlantic Relations

The analysis in this chapter is centred around Canadian federalism which is often compared to the federal characteristics of EU law[1] because of the exercise of *shared powers* in regulation and policy making.[2] Canadian federalism is composed of sub-federal regimes and takes a unique form underscored by pluralism that makes little attempt at regulatory convergence. Compared to American federalism, which is 'essentially an upward (or regrouping) endeavour', downward delegation of political authority is the essence of Canadian federalism.[3] Historical developments provide insights into how Canadian federalism has attained its decentralised form.[4] The regulation of labour and the environment fall within the exclusive jurisdiction of provinces as these areas are deemed to be under provincial legislative power. The Constitution as such does not expressly provide for their federal allocation.[5] Provincial policy preferences show variations in areas of

[1] See ch 1 of this thesis, sections 2 and 4 (Research Questions and Methodology).
[2] Thomas Hueglin, 'Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union' (2013) 56 Canadian Public Administration 185 (emphasis added).
[3] Roderick A Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism' (1998) 15 Arizona Journal of International and Comparative Law 69, 81-82.
[4] Peter W Hogg, 'Federalism', *Constitutional Law of Canada* (Carswell 2000) 103-146.
[5] Peter W Hogg, *Constitutional Law of Canada* (4th edn, Carswell 1997) 544; James A Gardner, 'Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution' (2017) 9 Perspectives on Federalism E-1, E-11 (emphasis added).

regulation related to labour rights and the environment.[6] This exemplifies regulatory decentralisation and brings out intra-provincial differences. Informed by these insights, this chapter investigates the Canadian approach to labour and environmental standards, internal trade and finally the trade-labour-environment linkage in foreign policy in the context of CETA.

2. Regulatory Governance in Canada

Regulatory governance in Canada is multi-level with federations and provinces interacting within an intergovernmental framework with the executive central to the process. The intersection between federal and provincial powers is 'defined by the courts' in the 'legal regime' and by 'federal-provincial negotiation' in the 'political regime'.[7] The former essentially concerns constitutional federalism and the latter, executive federalism that is driven by intergovernmentalism.

The internal dimension of Canadian foreign policy is dependent on the division of constitutional powers and conducted through intergovernmentalism at the intersection of federalism and regulatory powers.[8] The shifting focus of FTAs from tariff to non-tariff and regulatory issues further implicates intergovernmentalism, as provincial subject matter is brought

[6] Éric Montpetit, Erick Lachapelle and Simon Kiss, *Does Canadian Federalism Amplify Policy Disagreements?* (Institute for Research on Public Policy 2017) 22.
[7] FL Morton, 'The Constitutional Division of Powers with Respect to the Environment in Canada' in Kenneth M Holland, Frederick Lee Morton and Brian Galligan (eds), *Federalism and the Environment* (Greenwood Publishing Group 1996) 38.
[8] Richard Schultz, *Federalism and the Regulatory Process* (Institute for Research on Public Policy 1979) xv.

within the purview of external relations.[9] Two strands of structural decentralisation shape regulation in Canada i.e. horizontal, between federal institutions, and vertical, between the federation and the provinces.[10] Their constitutional and regulatory underpinnings now need to be discussed.

2.1. The Constitutional Division of Powers

The essence of *constitutional federalism*[11] is based on the constitutional demarcation of legislative powers between the Canadian parliament and provincial legislatures.[12] The notion that *provinces are sovereigns* underlines the political and legal constraints of federal power in social and economic policies of Canada.[13] Legal disputes arising from the tussle over federal-provincial power in this respect are assigned to Federal Courts for adjudication, arranged in the ascending hierarchy of the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada. From the Canadian constitutional perspective, the allocation of power to act in policy fields is paramount in ascertaining the limits of federal authority. Consequently, intergovernmentalism i.e., the process of regulatory cooperation between sub-national governments (horizontal) and sub-national and federal governments (vertical) in Canada, lies at the heart of Canadian federal governance and is of direct

[9] David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism' (2002) 32 Publius 49. In the context of CETA see Ali Tejpar, 'The Challenges of Federalism to Canada's International Trade Relations: The Canada–European Union Comprehensive Economic and Trade Agreement' (2017) 72 International Journal 111, 112.
[10] Anthony Ogus, 'Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries' [2002] Centre on Regulation and Competition Working Paper Series Paper No 35, 8.
[11] Laurence Claus, 'Enumeration and the Silences of Constitutional Federalism' (2018) 16 International Journal of Constitutional Law 904.
[12] Constitution Act, 1867, s 91 (Federal) and ss 92 and 93 (Provincial).
[13] Patrick Monahan, 'Canadian Federalism and Its Impact on Cross-Border Trade' (2001) 27 Canada-United States Law Journal 19 (emphasis added).

relevance to the assessment of regulatory imperatives at the federal and provincial levels.

Intergovernmentalism came under widespread political attack during the time of the Conservative government headed by Prime Minister Stephen Harper, 2006-2015. The Harper government sought to replace it with 'Open Federalism' based on inter alia the ground that more provincial participation in international agreements was needed as they expanded in scope to cover areas that affect their jurisdiction.[14] It was a move towards further decentralisation based on the contention of provincial inclusion and greater autonomy. In turn, the federal government could then intervene in provincial markets or impose budget constraints on provincial governments.[15] Although there was no express focus on labour or environmental policy, the proposed reforms demonstrated that 'Open Federalism' was a method of 'market-enabling government intervention'.[16] It was thus a neoliberal approach to federalism, more likely to be supported by businesses and opposed by trade unions and social activists.[17]

The Liberal government, that has been in power since November 2015, has rejected Open Federalism and continued to work within the framework of constitutional federalism avoiding further decentralisation.

The extent to which Canadian constitutional federalism aids or obstructs Canada's foreign policy is contested. It has been

[14] Julian Castro-Rea, 'Harper's Legacy on Federalism: Open Federalism or Hidden Agenda' (2016) 21 Review of Constitutional Studies 257, 261.
[15] Especially relevant in the aftermath of the economic crisis see Christopher Dunn, 'Canada's "Open Federalism": Past, Present, and Future' in Iwan W Morgan and Philip J Davies (eds), *The Federal Nation* (Palgrave Macmillan 2008) 45.
[16] ibid.
[17] Adam Harmes, 'The Political Economy of Open Federalism' (2007) 40 Canadian Journal of Political Science 417, 423.

observed that federalism 'abolishes strict reciprocity between contracting parties to an international agreement'[18] constraining development of unified state action.

In the *Labour Conventions Reference* case[19] the Judicial Committee of the Privy Council[20] held that the division of powers enables the federal government to enter into international agreements but does not provide it with the legislative power in the areas that fall under the competence of provinces. In this case, the Canadian Parliament passed legislation to implement three international labour conventions approved by the federal government.[21] Provincial governments challenged the statutes citing that the federal legislation was a violation of their legislative jurisdiction.[22] The Judicial Committee of the Privy Council decided that labour was an exclusive jurisdiction of the provinces and the Parliament could not pass such legislation even if it meant to implement Canada's international obligations.[23] The rationale for this decision emphasised the need for 'federal balance' and in deciding that legislative power operates in 'watertight compartments'. The Judicial Committee relied on historical reasons peculiar to the formation of the

[18] JHH Weiler, *The Constitution of Europe* (CUP 1999) 160.
[19] *Canada (AG) v Ontario (AG)* [1937] UKPC 6, [1937] AC 326, 352.
[20] The Judicial Committee of the Privy Council (JCPC) is the court of final appeal for the United Kingdom's overseas territories and Crown dependencies. The JCPC received appeals from the Dominion of Canada at the time. In 1949, the Supreme Court of Canada became at last the court of final resort see Anne Roland, 'Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective' (2006) 32 Commonwealth Law Bulletin 569, 577.
[21] The Weekly Rest in Industrial Undertakings Act SC 1935, c 14; The Minimum Wages Act SC 1935, c 44; The Limitation of Hours of Work Act SC 1935, c 63 were passed in pursuance of the ILO Convention on the Hours of Work (Industry) Convention, 1919 (No. 1); Weekly Rest (Industry) Convention, 1921 (No. 14); and the Minimum Wage-Fixing Machinery Convention, 1928 (No. 131).
[22] 'Attorney-General for Canada v. Attorney-General for Ontario and Others' (1937) 31 The American Journal of International Law 348, 349.
[23] ibid. 357.

Canadian federation, detached from the context of treaty implementation.[24]

In the sphere of foreign policy, the Canadian federal parliament and provincial legislatures 'leave it to the executive branch to negotiate treaties and conduct international affairs, on the *assumption* that the conduct of international relations is an executive function'.[25] Even though the federal government has the authority to negotiate and conclude international treaties, it cannot unilaterally implement them if they deal with matters falling within provincial jurisdiction.[26] Another form of federalism i.e., executive federalism that co-exists with constitutional federalism in Canada is utilised in this direction. Its most significant aspect is that provinces are taken to be *autonomous* units that *collaborate* with the centre.[27] Executive federalism in Canada '[…] has been increasingly informed by a set of practices that we call 'collaborative federalism,' characterized more by the principle of co-determination of broad national policies […]'.[28] This definition establishes an understanding of the internal dimension of Canadian federalism. In engaging executives from the provincial level, it shares a (subsidiarity-like) characteristic similar to that of EU-level policy

[24] Robert Howse, 'Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations' (1990) 16 Canadian Business Law Journal 160, 168.
[25] Armand de Mestral and Evan Fox-Decent, 'Rethinking the Relationship Between International and Domestic Law' (2008) 53 McGill Law Journal 573, 576 (emphasis added).
[26] Gregory W Bowman, 'US and Canadian Federalism: Implications for International Trade Regulation' (2012) 114 West Virginia Law Review 1007, 1038.
[27] Jeffrey F Collins, 'Executive Federalism and the Terms of Union: A New Approach to Understanding the "Roads-for-Rails" and "Roads-for-Boats" Agreements' (2012) 27 Newfoundland and Labrador Studies -- (emphasis added).
[28] Cameron and Simeon (n 9) 49.

making which engages executives of member states.[29] It works as a partnership between federal and provincial governments on labour and environmental regulation as well as inter-provincial trade policy.[30] Administrative agencies in Canada are a part of the executive and not the judiciary as is sometimes characteristic of common law jurisdictions.[31] Due to this composition, Canadian executive federalism possesses a wider institutional network within a single branch of the government.

2.2. Regulatory Imperatives

The Cabinet Directive on Regulation[32] ('CDoR') applies to federal regulations concerning the 'health, safety, security, social and economic well-being of Canadians, and the environment' in Canada's internal affairs.[33] The CDoR establishes regulatory cooperation as the primary method to overcome regulatory divergences between provinces as well as in the context of international trade.[34] The specific regulatory imperatives that the executive pursues and the policy frameworks that they fall under are as follows.

a. Transparency and Accountability

As in the case of shared competences in the EU context, legitimacy is an objective for governments in a federation and it depends on the extent of participation, accountability, and

[29] Jessica Bulman-Pozen, 'Executive Federalism Comes to America' (2016) 102 Virginia Law Review 953, 954, 971; Herman Bakvis and Grace Skogstad, 'Canadian Federalism: Performance, Effectiveness, and Legitimacy' in Herman Bakvis and Grace Skogstad (eds), *Canadian Federalism: Performance, Effectiveness and Legitimacy* (OUP 2012) 7.
[30] Cameron and Simeon (n 9) 59-60.
[31] Lorne Sossin, 'Courts, Administrative Agencies and the Constitution' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 231, 238.
[32] Treasury Board of Canada Secretariat, *Cabinet Directive on Regulation* (Government of Canada 2018), ss 3.0 and 4.1 (CDoR).
[33] ibid. s 3.0.1.
[34] CDoR, s 4.2.

transparency maintained in regulatory decision-making.[35] For Canada, the Policy on Regulatory Transparency and Accountability sets out the framework on developing regulation in a way that is accessible and predictable and based on stakeholder engagement.[36] Citizens, indigenous peoples, governments, organisations, businesses and trading partners are considered as stakeholders. This policy has been adopted under the CDoR and applies to those areas of labour, environment and climate change that fall under federal authority as well as Canadian trade policy.

b. Efficiency

Regulatory efficiency is addressed under the CDoR. It makes reference to stakeholder engagement as a guiding principle of federal regulatory policy,[37] establishes the responsibility of the Treasury Board of Canada Secretariat (TBCS) for supporting ministerial decision-making and oversight,[38] and conducting impact analysis (IA).[39] IA in Canada is to consider regulatory impacts on consumers, businesses and governments, respectively but has a socio-economic approach. Accordingly, Canada undertakes reviews of its regulatory programmes to consider impacts on stakeholders and to assess whether regulations are achieving their stated objectives.[40] This is because Canadian departments and agencies are expected to assess the impact of regulatory proposals on the environment,

[35] OECD, 'Regulatory Reform in Canada' (2002) 33.
[36] Government of Canada, 'Policy on Regulatory Transparency and Accountability' (2018) <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-transparency-accountability.html#toc11> accessed 22 July 2022.
[37] CDoR, s 3.0 (n 32).
[38] ibid. See also Appendix: Roles and Responsibilities
[39] CDoR, s 5.2.
[40] ibid. s 7.0.

individuals (in the context of gender, race, ethnicity, religion, age, and mental or physical disability); and small businesses.[41] These aspects resemble the priorities identified under the EU's Better Regulation agenda and the European Pillar of Social Rights[42] but are derived from Canada's own Gender-based Analysis Plus (GBA+) IA method.[43] Canada's approach to IAs is applicable to its FTAs such as CETA.

c. Adaptability

Regulation in Canada is embedded in responsiveness because directives like the CDoR originate from this objective as identified by the Cabinet Directive on Regulatory Management (now replaced by the CDoR) as a principle for governments.[44] The TBCS invited stakeholder inputs to make Canadian regulation more responsive as part of an Annual Regulatory Modernization Bill.[45] The responses received were sector-specific but some stakeholders called for harmonising legislation with Canada's two major trading partners i.e., the US and the EU.[46] This demonstrates that international trade is a contributing factor towards shaping regulatory governance within Canada. This is due to the constitutional framework as well as the preponderance of executive federalism in provincial-

[41] CDoR, ss 5.2.2. – 5.2.4.
[42] See ch 4 of this thesis, section 3.1.4.
[43] Government of Canada, 'What Is Gender-Based Analysis Plus' <https://women-gender-equality.canada.ca/en/gender-based-analysis-plus/what-gender-based-analysis-plus.html> accessed 22 July 2022.
[44] Government of Canada, 'About the Cabinet Directive on Regulatory Management' <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/about-cabinet-directive-regulatory-management.html> accessed 22 July 2022.
[45] Government of Canada, 'What We Heard: Report on Regulatory Modernization' <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/regulatory-evaluation-results/what-we-heard-report-regulatory-modernization.html> accessed 22 July 2022.
[46] ibid.

federal (vertical) and inter-provincial (horizontal) regulatory governance. In section 3, we will see that the responsiveness of regulation varies between the areas of labour, environment and internal trade in Canada.

d. Coherence

For attaining internal and external coherence, Canada seeks an outward-looking approach to regulation as the CDoR directs that domestic and international regulatory cooperation should be undertaken to reduce regulatory divergences, and where a different approach is inevitable, the concerned department or agency must provide the rationale for it.[47] Furthermore, incoherence between the internal regulatory environment and international obligations is sought to be avoided in the areas of human rights, health, safety, security, international trade and the environment.[48] This means that regulatory departments and agencies are under an obligation to ensure that Canada's international obligations are met when regulatory activities are conducted. These observations reiterate the finding that Canada and the EU are similar in terms of formally providing guidance to regulatory institutions for considering the international regulatory environment in internal regulatory assessments or analysis.[49]

We now consider the Canadian perspective on the substantive aspects of labour and environmental governance and the extent to which they go hand in hand with its internal market and are aligned with the objective of sustainable development.

[47] CDoR, s 5.2.5 (n 32).
[48] ibid. s 5.2.8.
[49] OECD, *OECD Regulatory Policy Outlook 2018* (OECD 2018) 135.

3. The Canadian Approach to the Regulatory Governance of Labour, Environment, and Internal Trade

3.1. Canadian Labour Law

Federal labour standards covered by the Canada Labour Code and the Canadian Charter of Rights and Freedoms are part of an overarching Labour Program.[50] This Program has an international dimension related to the negotiation and implementation of international labour cooperation frameworks resulting from trade agreements.[51] The Program is administered by the federal department of Employment and Social Development which engages stakeholders such as business and labour organisations as well as indigenous groups and professional associations with an interest in federal labour standards.[52] The external dimension focuses on supporting democratic governance, the rule of law and human rights in north-south trade.[53] With the exception of the International Finance Corporation's (IFC) Sustainability Framework and Performance Standards,[54] the Labour Program identifies the UN Global Compact, ILO Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy, OECD Guidelines for Multinational Enterprises and ISO 26000 Social Responsibility frameworks, which are of relevance to all countries (i.e., irrespective of the level of economic

[50] 'Labour Program' <https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour.html> accessed 22 July 2022.
[51] ibid.
[52] Employment and Social Development, 'Labour Program Stakeholder Engagement' <https://ccednet-rcdec.ca/sites/ccednet-rcdec.ca/files/wd-discussionpaper-mlsregulations-eng.pdf> accessed 22 July 2022 5.
[53] 'International Affairs' <https://www.canada.ca/en/employment-social-development/services/labour-relations/international.html> accessed 22 July 2022.
[54] The IFC is a result of the Washington Consensus and a member of the World Bank group meant to contribute to the economic reform and development of the global South in the 1990s see generally Narcís Serra and Joseph E Stiglitz (eds), *Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008).

development) for the promotion of sustainable development through corporate social responsibility initiatives.[55] Policy objectives based on the 'triple bottom line' objective to integrate labour, environmental and economic objectives in Canada and abroad, place responsibility on transnational corporations in the global economy.[56] Thus, the Labour Program embodies the importance of creating synergies between the three policy areas. It also signifies that progress in this direction lies in the development of soft law as the *Labour Conventions Reference* case[57] remains a precedent in establishing that the federal government cannot extend the scope of its jurisdiction over a matter that would otherwise fall within provincial jurisdiction by entering into international agreements.[58] This is also relevant for Canadian environmental regulation.

3.2. Canadian Environmental Law

Environment is not listed in the Canadian Constitution as a subject either under federal or provincial authority. There is significant jurisdictional overlap in regulating environmental matters at the provincial and federal levels.[59] Provinces have a dual role as legislators and owners of natural resources which provides them with broad powers to deal with environmental matters concerning for instance, wildlife, fisheries and timber.[60]

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[55] 'Supporting Corporate Social Responsibility Initiatives' <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/support.html> accessed 22 July 2022.
[56] ibid.
[57] *Canada (AG) v Ontario (AG)* (n 19).
[58] Jamie Benidickson, *Environmental Law* (Irwin Law 2013) 35.
[59] For an overview see Roger Cotton and John S Zimmer, 'Canadian Environmental Law: An Overview' (1992) 18 Canada-United States Law Journal 63.
[60] Constitution Act 1867, s 92(5) see also Brenda Heelan Powell, *Environmental Assessment & The Canadian Constitution* (Environmental Law Centre 2014) 11.

Both federal and provincial governments have powers in relation to taxation to discourage pollution[61] and encourage environmental friendliness through incentives.[62] This aspect is more important for the manner in which it shapes climate change policy and of consequence to the implementation of international commitments such as those made by the federal government under the Paris Agreement.

The federal-provincial overlap has posed a challenge for the allocation of responsibility in the Canadian process of environmental adjudication as well as assessment.[63] The Supreme Court has laid down tests to justify the assertion of jurisdiction by the federal government in the case of an extraterritorial effect of a polluting act,[64] or national concern,[65] or on the basis of federal criminal power.[66] In the context of international environmental obligations '[…], within their jurisdictional spheres the provincial governments have control over how effectively Canada's international treaty obligations are fulfilled.'[67]

Federal jurisdiction in environmental matters is issue specific with sectoral implications. It is exercised in the areas where Section 91 of the Constitution Act applies i.e., navigation and shipping,[68] fisheries,[69] federal lands[70] and lands reserved for

[61] Constitution Act 1867, s 91(13).
[62] Constitution Act 1867, s 92(2).
[63] *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3, para 86 and *Quebec (AG) v Moses* 2010 SCC 17, para 36.
[64] *Interprovincial Co-operative v R* [1976] 1 SCR 477.
[65] Under POGG powers see *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401.
[66] *Canada (AG) v Hydro-Québec* [1997] 3 SCR 213.
[67] Stepan Wood, Georgia Tanner and Benjamin J Richardson, 'What Ever Happened to Canadian Environmental Law?' (2010) 37 Ecology Law Quarterly 981, 1019.
[68] Constitution Act, 1867, s 91(10).
[69] Constitution Act, 1867, s 91(12).
[70] Constitution Act, 1867, s 91 (IA).

native peoples.[71] Additionally, the federal residuary power to act for 'peace, order and good government' (POGG) may lead to legislation applicable to all provinces and regions.[72] However, Section 92(13) of the Constitution Act is the source for wider provincial environmental authority covering it as a subject matter under the purview of property and civil rights.[73] Section 92(13) is supplemented by provincial power over 'generally all matters of a merely local or private nature in the province'.[74] This provision means little because federal level action on environmental regulation has lagged behind provincial action. Furthermore, the restrictive judicial interpretation of the trade and commerce power and of POGG – the only avenues for establishing a nationwide environmental regime – have impacted federal jurisdiction.[75]

Environment and Climate Change Canada is the federal department that administers federal acts and regulations and implements governmental regulatory initiatives.[76] Under the overarching objective of ensuring ecological efficiency in resource use, the Federal Sustainable Development (FSD) Act adopted in 2008 aims to 'integrate environmental, economic and social factors in the making of all decisions by government'.[77] With this legislation, Canadian environmental law establishes participative democracy by involving non-state actors in the regulatory process. Section 8 of the Act provides

[71] Constitution Act, 1867, s 91 (24).
[72] Constitution Act, 1867, s 91, opening para.
[73] Peter W Hogg, *Constitutional Law of Canada* (n 4).
[74] Constitution Act, 1867, s 92(16); FL Morton, 'The Constitutional Division of Powers with Respect to the Environment in Canada' in Kenneth M Holland, Frederick Lee Morton and Brian Galligan (eds), *Federalism and the Environment* (Greenwood Publishing Group 1996) 40.
[75] ibid. 41.
[76] 'Environment and Climate Change Canada' <https://www.canada.ca/en/environment-climate-change.html> accessed 22 July 2022.
[77] Federal Sustainable Development Act, 2008, s 5.

for the formation of a Sustainable Development Advisory Council comprising one representative from each province and territory, and three representatives each from among aboriginal peoples, environmental NGOs, organisations representative of business and organisations representative of labour.[78]

3.3. The Disassociation of Non State Actors from the Canadian Internal Market

Supranationalism and transnationalism go hand in hand in the EU. In the context of Canada, we should investigate what can be referred to as 'trans-provincialism' to assess the extent of the interaction between the state, economic and non-economic actors in the Canadian internal market. Trade within the Canadian federation is carried out in accordance with the Canadian Free Trade Agreement (CFTA) signed between the provinces. The framework of CFTA also helps highlight the differences between the regulatory approaches of Canada and the EU in connection with their respective internal markets.

The CFTA seeks to remove barriers to the free movement of persons, goods, services, and investments within Canada.[79] In respect of regulatory barriers, the agreement utilises regulatory reconciliation[80] and regulatory cooperation[81] to address inter-provincial divergences. Regulatory reconciliation applies to regulatory measures that 'act as a barrier to trade, investment, or labour mobility within Canada'.[82] This process will result in reconciliation agreements between the Parties aimed at harmonisation, mutual recognition and equivalency of

[78] Federal Sustainable Development Act, 2008, s 8(1).
[79] CFTA, Preamble.
[80] CFTA, Part B.
[81] CFTA, Part C.
[82] CFTA, art 403.

regulatory measures.[83] By regulatory cooperation the agreement means those commitments that the Parties wish to focus on for joint development in the future.[84] To oversee both these processes, CFTA establishes a Regulatory Reconciliation and Cooperation Table.[85] Regulatory cooperation is a mechanism utilised at the international level between states that seek regulatory rapprochement.[86] The EU's internal market represents the highest level of formalism and comprehensiveness in regulatory cooperation.[87] However, regulatory cooperation is utilised at a country level in Canada owing to the existence of regulatory divergences between provinces.

A characteristic that stands out about the intergovernmentalism in Canada is its state-centric constitution. In other words, the governance of the Canadian internal market does not include non-state actors in the regulatory or decision-making process per se. The CFTA provides for stakeholder engagement in provincial policy making[88] and does not incentivise the creation of a trans-provincial floor for civil society engagement at the national level.

We see Canadian non-state actors participate at the federal level on the implementation of FTAs with third countries. The examination of the CFTA, however, reveals that their participation is not internally motivated. There is neither a mandate for facilitating trans-provincial participation of non-

[83] CFTA, para 14, annex 404.
[84] CFTA, para 17, annex 404.
[85] CFTA, art 404.
[86] See chs 2 and 3 of this thesis.
[87] ibid.
[88] CFTA, para 1(a), annex 404.

state actors nor an external dimension to the Canadian internal market.

The Canadian approach to transnational governance of the trade-labour-environment linkage has developed as a result of external influences on trade policy. It has developed in response to globalisation wherein civic engagement has stemmed from engagement in trade policy, particularly the attempts at North American integration.[89] It is marked by a 'sideways' shift in governmental functions to the market and civil society actors.[90] This has also been called political globalisation defined as

> '[…] the rise of transnational political regimes in which corporations, civil society organizations, and governments establish new norms for global trade, environment, and human rights […]'.[91]

It is only natural for non-state actors in Canada to seek participation at the federal level and press for inclusion in foreign trade policy led by Ottawa.

The primary reason for the occurrence of this phenomenon is the slow progress in internal market liberalisation in comparison to market liberalisation through FTAs. The Canadian internal market does not reflect the sophistication of the EU's internal market as internal barriers to trade remain high. This is also conveyed by the observation that foreign companies have gained better access under international FTAs to Canada than Canadian companies.[92] A key reaction to this is transnational

[89] Laura Macdonald, 'Canada Goes Global: Building Transnational Relations between Canada and the World, 1968–2017' [2018] Canadian Foreign Policy Journal 1.
[90] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (UBC Press 2010) 5.
[91] ibid. 7.
[92] Jorge Alvarez, Ivo Krznar and Trevor Tombe, 'Internal Trade in Canada: Case for Liberalization' [2019] IMF Working Paper WP/19/158 5.

social movement activism.[93] The Canadian approach to regulatory governance in the trade-labour-environment linkage is thus a result of 'outside-in' influences on areas of social regulation. Let us explore this further by examining Canada's actorness at the international level.

4. 'Canada – The Middle Power' and 'Canada – The Satellite'

Canada possesses an 'internationalist identity' that has two sides to it i.e., that of a middle power[94] and that of a satellite[95] as follows.

Canada is a middle power when it seeks to establish a separate identity for itself in global affairs for instance, by supporting multilateralism and international institutions.[96] In the same way, the negotiation and signing of CETA is reflective of the political will on the part of Canada to establish independent economic ties with the EU, and distance itself from the economic nationalism prevailing in the US.[97] Canada is a '[…] middle power that is strong enough to have some *impact* on the world beyond its borders […]'.[98] Its feminist foreign policy that also overlaps with the protection of rights of indigenous people is one of the chief examples that come to mind, demonstrating independent formation and clear departure from the US

[93] Ibid. 3.
[94] Adam Chapnick, 'The Middle Power' (1999) 7 Canadian Foreign Policy Journal 73.
[95] Michael K Hawes, *Principal Power, Middle Power, Or Satellite?* (York Research Programme in Strategic Studies 1984).
[96] Adam Chapnick, *The Middle Power Project: Canada and the Founding of the United Nations* (UBC Press 2014).
[97] Thomas J Schoenbaum and Daniel CK Chow, 'The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony' (2019) 30 Stanford Law & Policy Review 115; Amanda Connolly, 'CETA Can Play Key Role in Addressing Economic Nationalism, Say Diplomats' (*iPolitics*, 2017) <https://ipolitics.ca/2017/09/15/ceta-can-play-key-role-in-addressing-economic-nationalism-say-diplomats/> accessed 22 July 2022.
[98] Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (UBC Press 2010) 4 (emphasis added).

administration in the 2017-2021 period.[99] This contention, notwithstanding the confusion surrounding the exact definition of 'middle power' as has been explained elsewhere,[100] suggests that Canada has some influence, in global governance. In this role Canada looks outwards firstly towards multilateral and plurilateral forums such as the WTO and G7 that provide it with the platform to voice its concerns and secondly, across the Atlantic to preserve its English and French connections.[101] Canada's identity as a middle power, however, means that there are limits to its actorness in international relations 'next to the world's only super power'.[102] This notion suggests that despite Canada's attempt at independent assertiveness in international relations, there are nodes where its interests, goals and policies are defined by that of the US.

Canada's role as a satellite is linked to North American regionalism which is marked by power asymmetries[103] that influence Canadian decision making domestically and internationally. From this perspective, Canada's policy frameworks require adjustment because of transnational economic activity owing to the volume of trade taking place between Canada and the US. Accordingly, the Canadian approach to economic and social regulation encompasses those developments that have resulted from regional economic

[99] Rebecca Tiessen and Heather A. Smith, 'Canada's 'Feminist' Foreign Policy Under the Harper Conservatives (2006–2015) and Trudeau Liberals (2015–2019) in Global Perspective' in Robery W Murray and Paul Gecelovsky (eds), *The Palgrave Handbook of Canada in International Affairs* (Palgrave Macmillan 2021) 117.
[100] Eduard Jordaan, 'The Concept of a Middle Power in International Relations: Distinguishing between Emerging and Traditional Middle Powers' (2003) 30 Politikon 165; Jeffrey Robertson, 'Middle-Power Definitions: Confusion Reigns Supreme' (2017) 71 Australian Journal of International Affairs 355.
[101] Murray and Gecelovsky (n 99) 27, 71, 98, 223.
[102] ibid. 32.
[103] Robert G Finbow, *The Limits of Regionalism* (Routledge 2018) 3, 31.

integration in North America,[104] specifically the North American Free Trade Agreement (NAFTA).[105] and its revision in the form of the United States-Mexico-Canada Agreement (USMCA).[106] NAFTA did not intend harmonisation of regulation but necessitated forms of policy coordination at the intergovernmental level.[107] A clear effect is that Canadian dependency on the US economy[108] has engaged both international and transnational regulatory spaces. In this manner, Canada's identity is a result of an 'outside-in' reception of globalisation with the absence of 'inside-out' projection of values as seen in the case of the EU.

Canada's involvement in NAFTA and USMCA has contributed to the transnational development of the trade-labour-environment nexus. The North American *trade community* comprises transnational corporations that signify the 'transnational capitalist class' at the centre of the economic 'transnational processes'.[109] The transborder social movement, that is well articulated under the purview of transnational dialogue and the regulation of labour and environmental standards in trade,[110] comprises the social actors. Pervasive transborder economic

[104] Since it has influenced Canadian trade policy and regulatory imperatives see George Hoberg, 'Sleeping with an Elephant: The American Influence on Canadian Environmental Regulation' (1991) 11 Journal of Public Policy 107.
[105] North American Free Trade Agreement, 32 ILM 289 and 605 (1993).
[106] 'Agreement between the United States of America, the United Mexican States, and Canada' <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 22 July 2022.
[107] Geoffrey Hale, 'Canadian Federalism and the Challenge of North American Integration' (2004) 47 Canadian Public Administration 497.
[108] See generally Timothy B Gravelle, 'Partisanship, Border Proximity, and Canadian Attitudes toward North American Integration' (2014) 26 International Journal of Public Opinion 453.
[109] Roberto A Sanchez, 'Governance, Trade, and the Environment in the Context of NAFTA' (2002) 45 American Behavioral Scientist 1369 (emphasis in original).
[110] Iván Farías Pelcastre, 'National Governments, Transnational Actors, and Their Roles in the Creation of the North American Environmental Agreements and Institutions' (2018) 13 Norteamerica 1.

activity has contributed to building transnational links outside the governmental structures in the form of cooperation and coordination among labour unions and environmental groups.[111] These transnational economic and social phenomena characterise the 'border-crossing relations among states and *non*-state actors' in North America.[112] Thus, North American integration is the *external influence* on Canadian trade and social policies, instrumental in shaping the Canadian approach to the transnational governance of labour and environmental standards.[113]

CETA brings 'Canada – the middle power' and 'Canada - the satellite' face to face as trade takes place simultaneously with the EU and the US under CETA and USMCA, respectively. In other words, after the signing of CETA, Canadian trade policy sits squarely between EU and US approaches.[114] On the one hand, there are differences in the European and North American transnational regimes that subject Canada to 'conflicting 'behind-the-border' measures or regulatory models' raising 'unique challenges of managing multiple deep agreements'.[115] On the other hand, to some extent, CETA is the transatlantic interconnector between the US and the EU. This is because with the signing of CETA, not only do transnational corporations

[111] Geoffrey Hale, 'Transnationalism, Transgovernmentalism and Canada-US Relations in the Twenty-First Century' (2013) 43 American Review of Canadian Studies 494, 498.
[112] Peer Zumbansen, 'Transnational Law, Evolving' in Jan Smits (ed), *Encyclopedia of Comparative Law* (Edward Elgar 2012) 900.
[113] David M Trubek, Jim Mosher and Jeffrey S Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks' (2000) 25 Law & Social Inquiry 1187; Tamara Kay, 'Legal Transnationalism: The Relationship between Transnational Social Movement Building and International Law' (2011) 36 Law & Social Inquiry 419; Tamara Kay, 'New Challenges, New Alliances: Union Politicization in a Post-NAFTA Era' (2015) 56 Labor History 246.
[114] Patricia M Goff, 'Limits to Deep Integration: Canada between the EU and the US' (2017) 30 Cambridge Review of International Affairs 549.
[115] ibid. 551 and Franscesco Duina, 'Varieties of Regional Integration: The EU, NAFTA and Mercosur' (2006) 28 Journal of European Integration 247.

located in Canada gain preferential access to the EU's internal market but American companies gain *double* the market access, i.e., to the EU and the Canadian market.[116] While economic actors may benefit from CETA, the agreement is most likely to produce mixed regulatory outcomes for the EU as well as Canada.

For the EU, CETA presents an opportunity to pursue the alignment of Canada's sectoral business practices to mirror its own as is evident from the 'European Union Government Procurement Guide for Canadian Business'.[117] The intention of this Guide, which is to foster green and sustainable procurement,[118] could well be seen as the EU's attempt to utilise its normative and market power simultaneously. Whereas, in the field of environment, CETA may not be as effective because Canadian stakeholders have communicated their preference for greater harmonisation of the provisions of the Canadian Environmental Protection Act with US legislation in the respect of emissions-related repair and recall processes.[119] This demonstrates that Canada is likely to be caught between the US and EU approaches when it comes to making regulatory choices.

We do witness some European influence in the areas of transgovernmental and civil society engagements. The EU encouraged the participation of Canadian provincial representatives in the CETA negotiation process because the

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[116] Michael Darch, 'Canada's Intent to Create the World's Largest Trading Bloc' (*Area Development*, 2017) <https://www.areadevelopment.com/Canada-Investment-Guide/December-2017/CETA-comes-into-force-symbolizes-trade-ready-Canada.shtml> accessed 22 July 2022 (emphasis added).
[117] 'European Union Government Procurement Guide for Canadian Business' (2020) <https://www.tradecommissioner.gc.ca/guides/eu_procurement-guide-marches_publics_ue.aspx?lang=eng> accessed 22 July 2022.
[118] Ibid. ch 9.
[119] Government of Canada, 'What We Heard: Report on Regulatory Modernization' (n 45).

agreement focuses on provincial level regulatory domains such as labour (exclusively under provincial jurisdiction, except for industrial relations that fall under exclusive federal jurisdiction) and environment (shared).[120] Provincial *consultations* were held in previous negotiations with the US, but due to its regulatory agenda, CETA witnessed provincial *participation* albeit guided by over-arching federal objectives.[121] Nonetheless, for Canada the expanded involvement of the provinces in CETA negotiations was a process *sui generis*. Similarly, the arrangement of civil society organisations into domestic advisory groups (DAGs) in Canada to fulfil a requirement stipulated by the trade and sustainable development chapters of CETA is an example of the EU's influence. Compared to the EU, Canadian civil society has had a campaign-type, ad hoc involvement in the areas of labour and environmental policies. The establishment of DAGs in Canada indicates 'positivisation of constitutional norms' of the EU.[122] There is, however, a key difference in the constituents of the civil society between the EU and Canada.

Unlike the EU, in Canada business interests and social interests operate in silos in the sphere of foreign trade policy. Christopher J. Kukucha classifies these interests into sectoral and societal categories, respectively.[123] This is slightly different from the internal developments that took place in the EU. The Hegelian view which particularly concerns the 'voluntarist and

[120] Stéphane Paquin, 'Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA' (2013) 68 International Journal 545, 546-548.
[121] ibid. 550-551 (emphasis added).
[122] Larry Catá Backer, 'The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders' (2016) 31 Brigham Young University Journal of Public Law 1, 18; Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia 2010) 18.
[123] Christopher J Kukucha, 'The Role of the Provinces in Canadian Foreign Trade Policy: Multi-Level Governance and Sub-National Interests in the Twenty-First Century' (2004) 23 Policy and Society 113, 116.

[commercialised] association of self-interest individuals' is a characteristic of the civil society in Europe.[124] Therefore, in the initial stages of European integration, state-society relationship emerged from the public-private dichotomy[125] of interests. This underwent a change after the Cold War with the onset of globalisation as democratic legitimacy emerged as the predominant issue necessitating the inclusion of NGOs or non-economic actors in the definition of civil society.[126] As a result, civil society in the EU is now a network of business (economic actors), NGOs (non-economic actors) and governmental agencies (state actors). While the EU externalises its network model of civil society engagement, the voluntary-commercial divide is more pronounced on the Canadian side. This is to say that there is an absence of business lobby groups, such as BusinessEurope in the EU, within Canadian DAGs and industry representation is essentially through non-profit organisations. There is thus a structural discrepancy between the EU and Canadian DAGs, a reflection of the Parties' own 'constitutions of civil society'.[127] For this reason the EU's influence may be restricted to the establishment of an institutional structure as Canada maintains its composition of civil society. This has a bearing on the extent of coherence in the EU-Canada partnership on the trade-labour-environment nexus, investigated further in the next chapter. Let us now consider the internal factors that are likely to affect CETA's implementation on the Canadian side.

[124] Piotr Staszczyk, *A Legal Analysis of NGOs and European Civil Society* (Wolters Kluwer 2019) 287.
[125] Peter G Stillman, 'Hegel's Civil Society: A Locus of Freedom' (1980) 12 Polity 622.
[126] Jody Jensen and Ferenc Miszlivetz, 'The Languages of Civil Society - Europe and Beyond' [2005] EUI Working Paper SPS No 2005/2.
[127] ibid.

5. The Constitutional and Regulatory Factors Influencing External Coherence

The provincial role in the implementation of CETA has raised considerable questions for the Canadian federal system.[128] This section investigates the constitutional and regulatory frameworks in this context.

5.1. The Constitutional Aspect

In Canada, federal-provincial collaboration is exercised through intergovernmental agreements (IGAs) which are considered 'instruments of *policy-making*, *relation-building* and *constitutional engineering* in federal systems.'[129] The status of IGAs between the 'signatories' varies from one IGA to another depending on the subject matter, the kind of language used and the dispute resolution provisions.[130] These conditions have been stated in analysis sought to define the concept of legalisation[131] in the context of international law. In other words, IGAs seems to operate along the hard and soft law continuum.

It emerges that the elements used to assess the extent to which an IGA is binding correspond to the elements of obligation, precision and delegation used to conceptualise hard and soft law

[128] Anthony VanDuzer and Melanie J Mallet, 'Compliance with Canada's Trade and Investment Treaty Obligations: Addressing the Gap between Provincial Action and Federal Responsibility' (2016) 54 Alberta Law Review 89; Jeremy de Beer, 'Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA's Intellectual Property Issues' (2012) 38 Legal Issues of Economic Integration 51.

[129] The focus here is on only on federal-provincial IGAs although there are 'horizontal' IGAs between provinces and territories see Johanne Poirier, 'Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics' in Peter J Meekison, Hamish Telford and Harvey Lazar (eds), *Canada: The State of the Federation 2002* (McGill-Queen's University Press 2004) 425, 428 (emphasis added).

[130] ibid. 433.

[131] Kenneth W. Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 421.

in international governance.[132] For instance, the first element i.e., subject matter, corresponds to the element of *precision* wherein precise undertakings are more likely to be binding.[133] Similarly, the second element i.e., kind of language used, is meant as an 'indicia of legal status' helpful in ascertaining the legal *obligation* the agreement carries for the parties. Furthermore, the third element i.e., dispute resolution provisions in IGAs, *delegates* authority 'to a court of law or to arbitration'[134] (making the agreement more precise and clearer in respect of creating legal obligations).[135] Therefore, federal-provincial arrangements as established under Canadian law possess elements of inter-state relations as under international law. IGAs reiterate the identity of provinces as sovereigns[136] and at the same time are a nuanced example on the collaborative role of the provinces.

IGAs in Canada are also signed for implementing commitments made under international law. Labour and environmental obligations arising out of an FTA have previously been subjects of these agreements for institutionalising provincial involvement.[137] Although constitutional reform of federal-provincial relations has been contemplated to end 'cartel-like collusion between collaborating, empire-building governments',[138] courts have permitted citizens to challenge the

[132] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421; see also ch 3 of this thesis for related discussion.
[133] Poirier (n 129).
[134] ibid. 433 (emphasis added).
[135] Poirier (n 129) (emphasis added).
[136] Monahan (n 13).
[137] See reference to Canadian Intergovernmental Agreements on Labour and Environment signed under the North American Agreement on Labour Cooperation and the North American Agreement on Environmental Cooperation (side agreements to NAFTA) in Curtis A Bradley, *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 291 fn 88.
[138] Martin Painter, 'Intergovernmental Relations in Canada: An Institutional Analysis' (1991) 24 Canadian Journal of Political Science 269, 270, 274.

conclusion, interpretation and implementation of IGAs that affect them.[139] Immediate examples in this respect are cases on the application of federal norms at provincial levels.[140] As such, the IGAs also hold potential in rendering accountability of governmental action.

IGAs have been suggested as a way forward in the implementation of CETA 'to address the gap between provincial action and federal responsibility'.[141] Any IGAs touching upon labour and environmental matters will however possess varying degrees of legalisation. By bringing provincial implementation under federal oversight, IGAs can contribute to better regulatory enforcement of the TSD provisions of CETA concerning the national imperatives on trade-related labour and environmental standards. This oversight will apply in the case of stock taking of positive enforcement of related commitments as well as instances where provincial governments take a decision to deregulate and potentially violate CETA's TSD commitments.[142]

IGAs may have a positive outcome especially in respect of citizen action. CETA does not (i) confer rights or impose obligations on persons other than 'the Parties under public international law' or (ii) permit its *direct* invocation in the domestic legal systems of the Parties.[143] Nevertheless, on the Canadian side, citizens may be able to (indirectly) question an

[139] Poirier (n 129) 442-444.
[140] ibid. See discussion on *Re Finlay and Director of Welfare (Winnipeg South/West)* (1976), 71 DLR (3d) 597 (Man. C.A.) and *Finlay v Canada* (Minister of Finance), [1993] 1 SCR 1080 and *Canadian Environmental Law Association v Minister of the Environment*, T-337-98, FCTD.
[141] Anthony VanDuzer, 'Could an Intergovernmental Agreement Increase the Credibility of Canadian Treaty Commitments in Areas within Provincial Jurisdiction?' (2013) 68 International Journal 536, 537.
[142] See commitments on Upholding Levels of Protection under CETA, arts 23.4, 23.5, 24.5, 24.6.
[143] CETA, art 30.6.1 (emphasis added).

aspect of CETA's implementation under an IGA. If permitted, this will stand in contrast to the characteristic disenfranchisement of citizens[144] that is also associated with FTAs on the EU's side including CETA. CETA provides that each Party shall effectively enforce its labour and environmental laws to maintain related standards.[145] Where these laws are derived from international legal instruments, the enforcement of these provisions rests on the relationship of Canadian law with international law. However, federal oversight or the possibility of citizen action is subject to the scope provided by Canadian federalism which thus far has been limited. Based on its constitutional underpinnings Canadian federalism is vested with substantial provincial authority highlighting the strain between federal trade regulation on the one hand and provincial labour and environmental regulation on the other.

Provincial autonomy is protected further through the provincial power on the right to regulate. The case of *R v Comeau*[146] concerning Section 121 of the Constitution Act, 1867 is significant in this context. The section states that 'All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.' The respondent Mr. Comeau, a resident of New Brunswick, purchased a large amount of alcohol from the neighbouring state of Quebec and was fined under a provincial Act which prohibited such purchases. He argued that the constitutional provision guaranteed *free trade* across

[144] Ernst-Ulrich Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 Journal of International Economic Law 579; Elaine Fahey, 'CETA and the Global Governance Law: What Kind of Model Agreement Is It Really in Law?' (2017) 2 European Papers 292.
[145] CETA, arts 23.4, 23.5, 24.5, 24.6.
[146] *R v Comeau* 2018 SCC 15.

provincial borders. However, the Supreme Court of Canada held that the 'text, historical context, legislative context, and underlying constitutional principles' on trade and commerce between provinces cannot be interpreted in a manner to prohibit '*any and all* burdens on the passage of goods over provincial boundaries'.[147] The court protected the constitutionality of provincial law based on the reasoning that it had *incidental effect* on trade and did not, as such aim to restrict the movement of goods across provinces.[148]

> Be this as it may, the fact is that, when it comes to the [Canadian] single market and free movement, there is almost always a conflict between two heads of exclusive competence: the federal power to regulate trade and commerce, and the provincial one to regulate property and civil rights.[149]

Accordingly, Section 121 prohibits tariff barriers such as customs duties on the transit of goods across provinces.[150] With due regard to the constitutional division of powers, *R v Comeau* highlights that in Canada regulatory intervention in economic activities is exercised in accordance with provincial autonomy insofar as it covers provincial competence as stipulated under the constitution and does not interfere with the regulation of trade. In this sense, wage rates determined across provinces affect business costs too but cannot be held invalid on this ground as they are not determined 'in relation to' the regulation of trade and commerce.[151] Transferring this tension to the

[147] ibid. Fourth opening para to the judgement.
[148] ibid. para 8.
[149] Alicia Hinarejos, 'Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison' (2012) 71 Cambridge Law Journal 537.
[150] *Gold Seal Ltd v Alberta (Attorney-General)* 62 SCR 424.
[151] *Carnation Company Limited v Quebec Agricultural Marketing Board et al* [1968] SCR 238, 252.

implementation of international trade commitments that need provincial support, it is undeniable that an external pressure on provincial power is created.[152] However, this does not mean that provinces always respond to these pressures.

A foreseeable outcome in the case of CETA, which does not subject labour and environment to conditionality-based market access or the violation of standards to dispute resolution procedure, is federal-provincial cooperation on fulfilling international legal commitments. However, regional experience shows that provinces are well within their right to 'opt-out' or alternatively, choose to 'opt-in'. This has occurred in the case of the two side agreements of the NAFTA where only a handful of provinces signed the IGAs to operationalise the North American Agreement on Labor Cooperation and the North American Agreement on Environmental Cooperation.[153] Although it is purported that the IGAs 'led to the orderly implementation'[154] of these side agreements, it is a case of extremely selective coverage and fragmented implementation. Therefore 'provincial adherence'[155] is a challenge and likely to remain so in the case of a potential IGA for CETA's implementation.

[152] Michelle Egan and Maria Helena Guimarães, 'The Dynamics of Federalism, Subnational Markets and Trade Policy-Making in Canada and the US' (2019) 29 Regional & Federal Studies 459, 474.
[153] David A Gantz, 'Labor Rights and Environmental Protection under NAFTA and Other US Free Trade Agreements' (2011) 42 The University of Miami Inter-American Law Review 297, 316, 321; Robert G Finbow, *The Limits of Regionalism: NAFTA's Labour Accord* (Ashgate 2006) 168.
[154] Charles-Emmanuel Côté 'Federalism and Foregin Affairs in Canada' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 289-290.
[155] See letter dated 23 September 2003 addressed to Mr. Gustavo Alanís-Ortega, Joint Public Advisory Committee Chair for 2003, Commission for Environmental Cooperation Secretariat available at <http://www.cec.org/files/documents/ccpm_avis_conseil/3028_Canadian_Intergovernmental_Agreement_regarding_the_NAAEC.pdf>.

5.2. Regulatory Aspects

This section discusses the regulatory approaches of Canada that diverge from that of the EU and pose challenges for an effective transatlantic collaboration for better regulatory governance of labour and environmental standards.

5.2.1. Impact Assessments

Under CETA, the parties are expected to exchange experiences on regulatory tools and instruments such as impact assessments (IAs).[156] The agreement also states that the EU and Canada utilise IAs in the respect of labour and environmental standards.[157] Therefore, under CETA, the EU and Canada have an opportunity to contextualise IAs i.e., stimulate discussion on how IAs are instrumental in sustainable development. It may potentially remedy the drawbacks of de-contextualised benchmarking which does not consider the opinions of NGOs, trade unions and other social actors in the IA process.[158] However, the Canadian approach may be significantly divergent from that of the EU in this respect because socio-economic factors are likely to play a far more central role in Canadian decision-making.

Conventionally, IAs are undertaken to arrive at a cost-benefit analysis that justifies regulation on the part of the state without adding to the costs incurred by business in the process of compliance.[159] However, from their inception, IAs in Canada comprise rationale-based socio-economic impact analyses (SEIAs) of proposed regulations in the field of health and safety

[156] CETA, art 21.4(a)(iv).
[157] CETA, arts 22.1.3(d), 22.3.3.
[158] Claudio M Radaelli, 'The Diffusion of Regulatory Impact Analysis - Best Practice or Lesson-Drawing?' (2004) 43 European Journal of Political Research 723, 726.
[159] OECD, *Introductory Handbook for Undertaking Regulatory Impact Analysis* (OECD 2008).

including environmental protection regulations with the requirement to fully *disclose* the rationale behind a decision to regulate.[160] These characteristics also highlight that the process goes beyond a strict cost-benefit analysis on the part of the government.[161] The process is inclusive as well because it stipulates that queries raised by NGOs are received and addressed.[162]

In turn, Canada may be seeking to engage with the EU to promote its own approach to IAs. There are, however, limitations of SEIAs that need to be addressed so as to promote them as the better approach for IAs insofar as sustainable development-related regulatory objectives are concerned. One key challenge is effective collaboration between the industry and government to resolve labour and environmental issues may require access to sensitive economic information which rests with the industry.[163] While the industry has the resources to conduct economic analysis it is not the same with restrictedly funded environmental and social interest groups.[164] These are the factors that trigger trade-offs between policy choices at the governmental level.

By taking IAs as an example under this section, we are directed towards considering the application of the precautionary principle in different regimes by Canada and the unlikelihood of the EU and Canada converging on similar approaches related to

[160] Raymond M Robinson, 'Socio-Economic Impact Analysis: Bureaucratic Exercise or Essential Tool?' (1979) 29 Journal of Air Pollution Control Association 1026 (emphasis added).
[161] ibid.
[162] WT Stanbury and Fred Thompson, *Regulatory Reform in Canada* (Institute for Research on Public Policy 1982) 8.
[163] Robinson (n 160).
[164] ibid.

the conduct of assessments owing to distinct priorities identified internally.

5.2.2. The Precautionary Principle

The mandate of the Impact Assessment Act (IAA), which outlines the current federal policy, is that the Canadian government, the Agency, and the federal authorities apply the precautionary principle in the administration of the Act.[165] Canada's internal dimension on precaution is primarily found in federal legislation.[166] Under the IAA, Canada continues to employ its internationalist identity by relying on the precautionary principle as defined in the United Nations Rio Declaration on Environment and Development 1992 as a criterion.[167] Canada's strict employment of the principle has also been noted in the context of approving projects that have an environmental impact.[168] Countries differing in the way they treat inconclusive scientific evidence that impacts risk regulation is one challenge[169] but, it is likely that Canada may be drawing a varied interpretation of the principle under international environmental and climate change regimes on the one hand and international trade law regime on the other.

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[165] IAA, s 6(2).
[166] '[…] while the provinces and territories have hardly tested the legal waters […]' see David L VanderZwaag, Susanna D Fuller, Ransom A Myers, 'Canada and the Precautionary Principle/Approach in Ocean and Coastal Management: Wading and Wandering in Tricky Currents' in Donald R Rothwell and David L VanderZwaag (eds), *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (Routledge 2006) 163.
[167] 'Framework: Implementation of the Sustainability Guidance' <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance.html> accessed 22 July 2022, para 3.
[168] Neil Craik, *The International Law of Environmental Impact Assessment* (CUP 2008) 224.
[169] Robinson (n 160).

Chapter 3 analysed that in the field of international trade, Canada and the EU have opposing positions in respect of the precautionary principle. The EU sought to institutionalise the precautionary principle through the WTO in the *EC-Biotech* case but was unsuccessful.[170] In this case, Canada's stance substantially aligned with that of the US.[171] The (then) EC based its measures prohibiting approval of GMO products on the 'existence of scientific uncertainty' which was contended by Canada as being '[…] veiled attempts to rationali[s]e the moratorium'[172] and '[…] exaggerating the risks of biotech products […]'.[173] It is not relevant to delve into the arguments that Canada presented to support these contentions. It is more important to note that impact assessments are a means of implementing sustainable development as well. The interpretation of the precautionary principle in the IA process in a particular legal regime i.e., trade or climate action, shapes how a country will address any unforeseen adverse impacts. Canada seems to advance a different interpretation of the principle from one regime to another i.e., as a satellite in trade and a middle power in the context of environment and climate change.

5.2.3. Socio-Economic Factors

Risk assessments under national laws are conducted based on local, internal conditions. In the EU, impact assessment is a

[170] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R WT/DS292/R WT/DS293/R, 29 September 2006, paragraph 4.524 (*EC-Biotech*).
[171] Jacqueline Peel, 'A GMO by Any Other Name . . . Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement' (2007) 17 The European Journal of International Law 1009, 1010.
[172] *EC-Biotech* (n 170), paras 4.582 and 4.583.
[173] *EC-Biotech* (n 170), para 4.602.

process for improving executive decision-making[174] and ensuring internal cohesion for a *sustainable social market economy* under the European Semester.[175] In this direction, the European Semester integrates environmental as well as social impact assessments. The objectives on social protection and social inclusion have a specific focus on inter alia creating employment and ensuring workers' access to a core set of labour rights.[176] In Canada, the reference to environment under the IAA needs no further explanation but it is useful to unpack the reference to 'social and economic conditions'. In particular, the IAA seeks 'to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments',[177] affirms 'respect for the rights of the Indigenous peoples'[178]and the inclusion of indigenous knowledge in impact assessment.[179] These provisions aim to achieve intragenerational equity, reflecting on social equity requirement of sustainable development to integrate different groups of the society in a regulatory process.[180] On labour, the IAA provides for protection to an employee who prepares a voluntary report on the commission of an offence under the Act or acts in good faith under the Act.[181] There is no particular linkage of labour rights to social policy as such. Furthermore, the Act sets out socio-economic priorities in the national context.

[174] As discussed in ch 4 of this thesis, section 2.2.e (in the respect of Better Regulation in the EU).
[175] As discussed in ch 4 of this thesis, section 3.1.4 (emphasis added).
[176] ibid.
[177] IAA, s 6(1)(f).
[178] IAA, s 6(1)(g).
[179] IAA, 6(1)(j).
[180] Craik (n 168) 224.
[181] IAA, s 5. '[…] an employer must not dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, with the intent to retaliate against the employee […]'

The Canadian and EU experiences demonstrate that their respective approaches to RIAs are based on their 'institutional legacies, state traditions and the dominant legal culture'.[182] The EU and Canada should avoid the assumption of interchangeability or fungibility of practices as an outcome in the case of potential co-operation on RIAs under CETA.[183] In case Canada and EU undertake to co-operate on exchanging best practices or methodologies in RIAs, one party's approach to the process will not be completely interchangeable with that of the other.

CETA has foresight of the regulatory divergences between the EU and Canada and ensures that they are under no obligation to address them as Article 21.5 of CETA states that

> […] A Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party.

It is known that even if there is convergence on the meaning of 'sustainable development', the constitutive elements of environmental and social policies vary substantially across countries.[184] The differences between the EU and Canada detailed above set an example in this respect. Regulatory convergence between countries can foster crucial responses for

[182] Radaelli (n 158) 726.
[183] ibid.
[184] Makane Moïse Mbengue and Stéphanie de Moerloose, 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development' (2017) 10 Law and Development Review 389, 407.

sustainable development.[185] It is in this sense, however, that regulatory divergences between the EU and Canada constrain progress towards better regulatory governance of labour and environmental standards through CETA.

6. Approaches to Trade and Sustainable Development

6.1. Invoking International Norms

An explanation for the invocation of international legal frameworks by Canada lies in understanding its pursuit of 'constructive internationalism'.[186] The meaning of the term is shrouded in vagueness but it encompasses 'a constant co-operative endeavour to enhance universal values through the steady development of a more institutionalized and just international order.'[187] Canada invokes international frameworks to promote sustainable development across several policy instruments. For instance, in its Federal Sustainable Development Strategy (FSDS), discussed briefly in Chapter 2, is an instrument that helps demonstrate that the EU and Canada are allies in the area of sustainable development. Under the CDoR, Canadian departments and agencies are not only entrusted with the responsibility to address inter-provincial and international regulatory divergences but are also expected to contribute to social and environmental objectives. The CDoR seeks upward convergence with international frameworks in this respect. It states that

[185] Winston P Nagan, Craig Hammer and Maxat Akhmetkaliyeva, 'Toward a New Theory of Sustainable Development: Drawing on Insights from Developments in Modern Legal Theory' (2017) 3 Cadmus 45.
[186] Margaret Doxey, 'Constructive Internationalism' (1989) 78 The Round Table 288, 292-293.
[187] Don Munton and Tom Keating, 'Internationalism and the Canadian Public' (2001) 34 Canadian Journal of Political Science 517, 526-528.

> Canada's international commitments in areas such as […] health, safety, […] international trade and the environment may need to be implemented by regulation, or may have implications for regulatory development […]. Departments and agencies must ensure that Canada's international commitments are met when carrying out their regulatory activities.[188]

Additionally, the CDoR states that the *maintenance or enhancement* of standards of public health and safety and environmental protection is *the central pillar of regulatory cooperation*.[189] This establishes that unlike the EU, sustainable development may not be a constitutional mandate, but is made an objective in Canada's internal and external affairs. Thus internal instruments seeking such upward convergence differ in their form and structure but are similar in their intent.

6.2. The Discourse on 'Trade and Sustainable Development'

Canada's 'constructive internationalism' is also an 'idea' behind its involvement and participation internationally.[190] Although Canada's constructive internationalism is an enveloping term used for several areas of its foreign policy, it shares similarities with the EU's constructivism on 'trade and sustainable development'. This is primarily on account of the ideational and behavioural elements of Canada's constructive internationalism that pursues values in international relations.[191] There is, however, a difference in the way Canada pursues sustainability because it caters primarily to the environmental and climate dimension. Viewed from the inside-out perspective, this goes to

[188] CDoR (n 32), para 5.2.8.
[189] ibid. (emphasis added).
[190] Munton and Keating (n 187) 532.
[191] ibid. 531. On the EU's constructivism see ch 4 of this thesis, section 6.2.

the heart of framing issue-linkages for sustainable development as constructed by the EU and discussed in the previous chapter.

The CDoR, for instance, provides guidance to Canadian departments and agencies on issue identification in areas of public policy including inter alia the environment. There is no cross-sectional reference to labour laws or standards. Furthermore, even though Canada has signed CETA which refers to labour in the context of sustainable development, in its international relations, it identifies them primarily as a facet of human rights. Canada's Labour Program approaches corporate social responsibility under frameworks such as the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, and the United Nations Global Compact based on the coupling of labour rights with human rights.[192] Whether labour standards are better addressed under the human rights or sustainable development discourse is investigated elsewhere.[193] At this point, the intention is to highlight that there is firstly a divergent conception of the trade-labour linkage on the Canadian side and secondly, it affects a dimension of 'trade and sustainable development' as an intersubjective idea as promoted by the EU. The legal framework that supports the functioning of the Canadian

[192] Government of Canada, 'Representing Canada in International Forums' <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/forums.html> accessed 22 July 2022; Government of Canada, 'Supporting the Forced Labour Import Ban and Social Corporate Responsibility (CSR) Initiatives' <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/support.html> accessed 22 July 2022.

[193] Tonia Novitz, 'Labour Standards and Trade: Need We Choose Between "Human Rights" and "Sustainable Development"?' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 113.

internal market also demonstrates the lack of issue-linkage and intersubjectivity.

There is only partial linkage of trade with sustainable development in the Canadian internal market to the exclusion of labour standards. The objectives of CFTA recognise sustainable development as 'an overall approach to [inter-provincial] trade' and includes inter alia climate change mitigation and adaptation in its scope for environmental protection.[194] Sustainable development is chiefly understood in the environmental context as the Parties seek to '[promote] sustainable and environmentally sound development'.[195] Furthermore, the chapter on labour mobility does not apply to 'social policy measures including labour standards'[196] of the parties and seeks to establish freedom of movement as seen in the EU's internal market.

The CFTA pursues soft governance mechanisms on environmental protection. Its exclusion from the purview of dispute resolution under CFTA[197] indicates the asymmetry within the Canadian internal market. This is because government-to-government dispute resolution in economic subject matters may lead to a monetary penalty or retaliatory measure by one party (i.e., a provincial government) against another.[198] This asymmetry is attenuated by a provision stating that a complaint may be filed to explain measures that have 'impaired trade, investment, or labour mobility within Canada'.[199] These provisions reiterate that competitiveness of

[194] CFTA, art 601.
[195] Preamble, CFTA, Preamble.
[196] CFTA, art 701(2)(a).
[197] CFTA, ch 10, art 1001(2).
[198] CFTA, Part A, ch 10, arts 1001 and 1013.
[199] In the context of government-to-government dispute settlement and in the context of person-to-government dispute resolution see arts 1004(4)(d) and 1015, respectively, CFTA.

the internal market is the primary goal. In this connection, the focus on labour pertains to its market-related relevance concerning the quantity of employment and not its quality.

There are no imperatives to diffuse sustainable development based on its indivisible social, economic and environmental dimensions in CFTA. In comparison, the EU diffuses norms such as sustainable development in the functioning of its internal market.[200] Norm diffusion leads to non-state actors playing a key role as part of transnational advocacy networks because of a shift towards sustainable development in the market.[201] The CFTA intensifies the hinderance further in this respect by excluding environmental protection and related TBT and SPS measures from the legitimate objectives of the agreement.[202] This means that sustainable development or sustainability which have come to constitute the objectives of the state as a regulator[203] are excluded from the purview of CFTA. From this perspective, it is unlikely that imperatives to mainstream or cater to the principle of sustainable development can be developed under the CFTA framework.

7. Conclusions

The EU and Canadian systems are comparable from the perspective of federalism. Both systems exhibit division of constitutional powers and depend on the executive for the conduct of trade relations but there is one key difference. Canada applies a stricter demarcation of regulatory spheres at

[200] As discussed in ch 4 of this thesis.
[201] Susan Park, 'Norm Diffusion within International Organizations: A Case Study of the World Bank' (2005) 8 Journal of International Relations and Development 111.
[202] CFTA, art 202(1).
[203] Robert Baldwin, 'Regulatory Excellence and Lucidity' in Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press 2016) 115.

the provincial and federal levels wherein the executive has little to no obligation to involve non-state interests. Regulatory governance is thus predominantly intergovernmental.

Some characteristics of the Canadian system that will strengthen partnership with the EU can be identified such as the recognition of regulatory cooperation as a primary technique under the CDoR to reduce regulatory divergences. The Canadian policy framework reflects the presence of all principles of regulatory governance from transparency to coherence. This is on account of the decoupling of the internal market from public policy. As it is, the Canadian internal market is extremely fragmented. Even if partner countries gain better access to provincial markets under FTAs, the potential to steer regulatory governance in the areas of labour and environment is low owing to the limited federal powers in these respects. For the areas covered by federal powers, there are programs involving non-state actors under the Labour Program and the FSD Act, respectively.

CHAPTER 6: ASSESSING THE CROSS-CUTTING PRINCIPLES OF REGULATORY GOVERNANCE UNDER THE EU-CANADA COMPREHENSIVE AND ECONOMIC TRADE AGREEMENT

1. Principles of Regulatory Governance as Factors Affecting the Implementation of CETA's Labour and Environmental Provisions

This chapter establishes that in CETA's context, the achievement of better regulatory governance depends on the effectiveness with which transparency, accountability, efficiency, coherence and adaptability are applied as cross-cutting requirements[1] for the promotion of labour and environmental standards.

2. The Correlation Between Regulatory Cooperation and 'Trade and Sustainable Development' Under CETA

Chapter 21 of CETA on Regulatory Cooperation applies to its provisions on Trade and Sustainable Development (Chapter 22), Trade and Labour (Chapter 23) and Trade and Environment (Chapter 24) insofar as 'the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities' is concerned.[2] CETA owes its regulatory *comprehensiveness* to the extensive scope of regulatory cooperation under Chapter 21.[3] The Chapter directs the parties to contribute to the protection of human life, health or safety[4]

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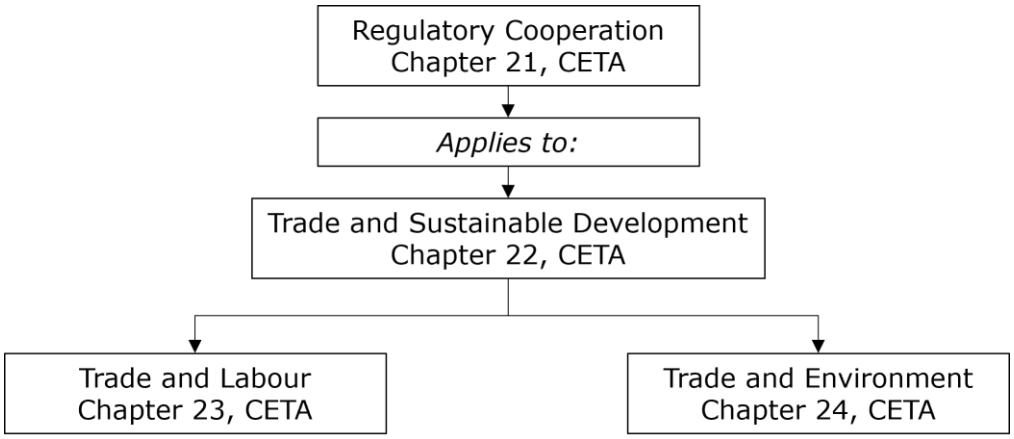
[1] Joana Mendes, 'EU Law and Global Regulatory Regimes: Hollowing Out Procedural Standards?' (2012) 10 International Journal of Constitutional Law 988; Vivien Schmidt and Matthew Woods, 'Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance' (2019) 97 Public Administration 727.

[2] CETA, art 21.1.

[3] Kurt Hübner, Anne-Sophie Deman and Tugce Balik, 'EU and Trade Policy-Making: The Contentious Case of CETA' (2017) 39 Journal of European Integration 843 (emphasis added).

[4] Although these terms are based on GATT Article XX, they are subjects of international labour standards see ILO, *Health and Life at Work: A Basic Human Right* (ILO 2009); ILO Occupational Safety and Health

and of the environment.[5] While the scope of regulatory cooperation is thus defined to cover the sustainable development provisions in Chapters 22-24, the regulatory process to achieve their objectives is embedded in the requirements for regulatory transparency,[6] efficacy,[7] and compliance.[8] Accordingly, in its regulatory governance chapter, CETA carries a springboard to the administrative frameworks for its three chapters on 'trade and sustainable development' (TSD) (see Figure 6.A. below). Recalling the observations made earlier in Chapters 2 and 3 of this thesis, this is the reason regulatory cooperation under CETA is interchangeable with regulatory governance.



Recommendation, 1981 (No. 164); 'Message by Juan Somavia, Director-General of the International Labour Office on the Occasion of World Day for Safety and Health at Work' <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/statement/wcms_110331.pdf> accessed 22 July 2022; European Parliament, 'EU and ILO: Shaping the Future of Work' (2019) <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/638407/IPOL_STU(2019)638407_EN.pdf> accessed 22 July 2022; and Lilian Miles, 'The Capabilities Approach and Worker Wellbeing' (2014) 50 The Journal of Development Studies 1043.

[5] CETA, art 21.3(a).

[6] CETA, art 21.3(b)(ii).

[7] CETA, art 21.3(b)(iii).

[8] CETA, art 21.3(b)(iv).

Figure 6.A: The Relationship between Regulatory Cooperation and TSD under CETA

Chapter 22 of CETA sets the regulatory context and institutional mechanisms of the subsequent chapters on labour and environment. It introduces the two aspects of regulatory governance: one on the cross-cutting principles and the other comprising international frameworks for guiding the promotion of substantive standards on sustainability,[9] respectively. Trade relations are sought to be transparent,[10] enhance the enforcement of the parties' labour and environmental laws[11] and promote public consultation and participation.[12] These provisions entail the application of regulatory objectives pursued by states in the process of regulatory governance. Consequently, CETA aims to improve the regulatory governance of labour and environmental standards and exemplifies the application of state-centric regulatory principles to the field of international trade law.

3. On Motivation and Methodology

The primary reason for assessing CETA's progress on the regulatory objectives stems from the fact that, presently, the issues associated with the pursuit of these objectives are being considered most actively in the implementation of the agreement. They emerged prominently during meetings organised by the EU and Canada on CETA and in my interactions with governmental, civil society and business representatives involved in the implementation of the agreement. This chapter takes the view that administrative law is regulation meant for

[9] For the UN and ILO frameworks listed see CETA, art 22.1.1.
[10] CETA, art 22.1.3 (b).
[11] CETA, 22.1.3 (c).
[12] CETA, 22.1.3 (e).

good decision-making and *rational public deliberation*[13] and signifies the regulatory approach to administrative law.[14] It is best suited to ascertain how or to what extent do institutions find the answers to normative questions. It also fulfils an objective of this thesis of undertaking a socio-legal approach to analysing CETA's implementation.

I utilise data collected from the interviews I conducted and the meetings that I attended in person on the EU's trade policy and CETA's implementation. The meetings made it possible for me to conduct participant observation. Along with the interviews the meetings are detailed in Chapter 1.[15]

4. The Two Dimensions of Regulatory Governance Under CETA In Relation to the Cross-Cutting Regulatory Objectives

This chapter conceptualises regulatory governance under CETA along two dimensions: vertical and horizontal that drive the bilateral and global regulatory governance objectives set by the agreement. The horizontal dimension refers to the institutional and procedural mandates established under CETA and the vertical dimension refers to the upward and downward implementation of measures to ensure transparency, accountability, efficiency, adaptability and coherence. The two dimensions are mutually supportive and interact in the implementation of CETA as the institutional arrangements under the *horizontal* and *vertical* dimensions are fundamental to advancing regulatory governance in the EU-Canada partnership.

[13] Peter Cane, 'Administrative Law as Regulation', *Regulating Law* (Oxford University Press 2004) 207, 214 (emphasis added).
[14] ibid. 208.
[15] Ch 1, section 4.3.2 (Empirical Observations).

The two dimensions are embedded within networks denoting the horizontal interaction between governments, business groups and NGOs in policymaking processes such as consultations and dialogues.[16] Networks support two strands of regulatory governance: transgovernmental and transnational defined as follows:[17]

(i) *transgovernmental* - denoting coordination between regulatory agencies through the process of regulatory cooperation.[18]

(ii) *transnational* - denoting the business and NGO activities to influence the instruments and mechanisms of regulatory governance through arrangements such as social dialogue on labour standards[19] as well as the encouragement of 'debate with and among non-state actors' in both labour and environmental policies.[20]

These strands are arranged along institutional frameworks in CETA. Figure 6.B below shows the institutional arrangements relevant for the implementation of the TSD chapters.

The CETA Joint Committee[21] is the overarching body responsible for the implementation of all parts of the agreement. The

[16] CETA, art 21.8 (Consultations with Private Parties); CETA, art 22.4.3; CETA, art 23.9.3 (for labour standards); and CETA, art 24.14.3 (for environmental standards); Stepan Wood and others, 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory' (2015) 6 Transnational Legal Theory 333.
[17] As have prominently developed on the international context introducing these strands of regulatory governance as triggered by globalisation see ch 3 of this thesis, sections 3.2. and 3.3. Furthermore, in the context of sustainable development, see CETA, art 22.3.1.
[18] David Bach and Abraham Newman, 'Domestic Drivers of Transgovernmental Regulatory Cooperation' (2014) 8 Regulation & Governance 395.
[19] CETA, art 23.1.2.
[20] CETA, arts 23.6 and 24.7.
[21] CETA, art 26.1.

Regulatory Cooperation Forum (RCF)[22], where the Parties meet to discuss identify, prioritise, and review regulatory policy issues, is of direct relevance to TSD provisions by way of application of the Regulatory Cooperation chapter to the TSD chapters.[23] The Trade and Sustainable Development Committee (TSD Committee)[24] is responsible for the implementation of the TSD chapters[25] in accordance with the principles of transparency and public participation.[26] The decision-making powers of the committees and the dispute settlement mechanisms under CETA are central to the principle of accountability.

There are implications along the two dimensions for policies affecting public regulation, public-private cooperation and private-sector responsibility in sustainability regulation.[27] The Civil Society Forum (CSF)[28] is the only body that allows for non-governmental participation by engaging economic and non-economic actors along the horizontal dimension. On the EU and Canadian sides, civil society groups are arranged into Domestic Advisory Groups (DAGs) representing labour and environmental interests. They participate in the CSF as and when it is held.

[22] CETA, art 21.6.
[23] CETA, art 21.1.
[24] CETA, art 22.4.
[25] CETA, art 22.4.1.
[26] CETA, art 22.4.4.
[27] Karin Buhmann, *Power, Procedure, Participation and Legitimacy in Global Sustainability Norms: A Theory of Collaborative Regulation* (Routledge 2017); Errol Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17 European Journal of International Law 47.
[28] CETA, art 22.5.

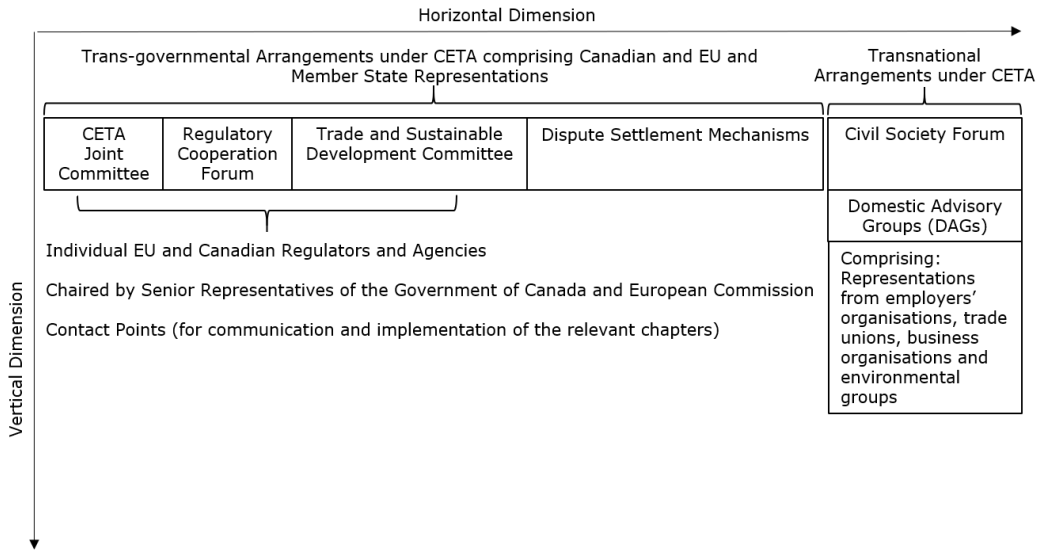


Figure 6.B: The Institutional Mechanisms on TSD under CETA

Stephen D Krasner defined principles as 'beliefs of fact, causation, and rectitude' and decision-making procedures as 'prevailing practices for making and implementing collective choice'.[29] These definitions were laid to define the wider elements of 'international regime' and 'international regulatory regime'.[30] Based on the regulatory spectrum that CETA extends over,[31] it is difficult to not attribute qualities of a regime to the agreement. For one, CETA is not a 'one-shot' arrangement[32] but often referred to and introduced in the beginning of this thesis as a 'living agreement'[33] capable of facilitating further agreements which is characteristic of a regime.[34] In any case, regulatory cooperation facilitates a form of cooperation that 'is

[29] Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 International Organization 185.
[30] David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 13.
[31] CETA liberalises trade through a negative list approach through which all goods and services, except for the ones listed, are subject to liberalisation see Hübner, Deman and Balik (n 3) 848.
[32] Krasner (n 29) 187.
[33] Günter Walzenbach, 'Procedure Over Substance? CETA and the Political Economy of Subsidiarity' (2019) 57 Commonwealth & Comparative Politics 153, 154.
[34] Krasner (n 29) 187.

more than the following of short-run self-interest'.[35] Second, the commitments to sustainable development, international labour and environmental standards under CETA, comprise 'rules that constrain immediate, short-term power maximization'[36] by providing scope for the participation of essential non-state actors.

5. Principles-led Regulatory Governance under CETA

Within governmental organisations, principles-led regulatory governance is concerned with the application of administrative law to institutional mechanisms. There is significant overlap between the principles of transparency, accountability, participation (important for adaptability of regulation) and the pursuit of efficient and coherent regulatory governance in trade partnerships.[37] They are the interrelated, interdependent procedural factors[38] affecting regulatory governance and regarded as the sub-components of legitimacy.[39] They are the means i.e., guiding principles for manoeuvring trade policy as well as the end i.e., objectives to be achieved in regulatory governance. Legitimacy as a concept has several different

[35] ibid. CETA, art 21.4 'Regulatory Cooperation Activities'. Additionally, the trade and sustainable development, trade and labour and trade and environment contain provisions to advance cooperation see CETA, arts 22.3, 23.7, 24.12.
[36] Krasner (n 29) 187.
[37] For instance, accountability is a means to establishing better transparency see Rosalyn Perkins, Mary Caroline Castaño and Condrad Montemayor, 'Analysis of Predictability and Accountability Transparency Practices and FTA on Trade Growth in Selected Countries of the Asia-Pacific Region: A Descriptive-Causal Approach' (2018) 7 Journal of Economic Structures 1.
[38] Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 326-330.
[39] Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 Journal of Law and Society 163; David Markell, 'The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability' (2010) 45 Wake Forest Law Review 425.

conceptions.[40] For instance, some social actors in the EU regard the commencement of regulatory cooperation illegitimate because CETA has not yet been ratified by all EU Member States.[41] Since CETA has been ratified by Canada, no such contention was raised by the Canadian counterparts.

5.1. Transparency

Transparency in trade seeks to (i) enhance cross-border business activity by making governments disclose regulatory requirements and internal laws and (ii) achieve accountability and legitimacy in respect of an international organisation. Transparency is one of the founding principles of FTA-driven international trade.[42] Accountability and participation are intricately linked with the effective adoption and implementation of labour and environmental standards. Additionally, there is a need to ensure transparency of business conduct. This aligns with commitments at the international level because from a sustainability perspective, Agenda 2030 requires that business and supply chain governance be made as transparent as possible.[43] In this direction, we need to examine the extent to which the regulatory objectives of transparency, accountability, efficiency, adaptability and coherence have been adopted as operating principles under CETA by the relevant committees and bodies appointed under the agreement.

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[40] For international law, international relations and political science approaches to legitimacy see Bodansky (n 38) 322-323.
[41] See submission of Friends of the Earth Sweden and the Irish Environmental Network 'Consultations on the Canada European Union Comprehensive Economic Trade Agreement' (2018) <https://open.canada.ca/data/en/dataset/c45c4cda-7134-4e65-8e99-5214eb07bcf3#wb-auto-6> accessed 22 July 2022 (RCF Consultations).
[42] Kyla Tienhaara, 'Beyond Accountability: Alternative Rationales for Transparency in Global Trade Politics' (2020) 22 Journal of Environmental Policy & Planning 112.
[43] Julia Walker, 'Transparency in the Supply Chain' in J Walker, A Pekmezovic and G Walker (eds), *Sustainable Development Goals* (2019) 275.

Trade-related transparency measures pertain to (i) institutional transparency (ii) regulatory transparency and (ii) business transparency.

On institutional transparency, the TSD provisions of CETA require downward implementation of transparency practices in the domestic regulatory environment.[44] Within CETA's horizontal dimension, the committees set up under the agreement have an obligation to maintain transparency.[45] There are persistent issues with transparency and effective participation of non-state actors. According to the civil society interviewees, in the beginning much of the opposition against CETA arose because it was negotiated in complete secrecy. This went unnoticed initially,[46] but members of civil society began pursuing 'defensive interests' contained inter alia in labour and environmental standards in the implementation phase of the agreement.[47] NGOs requested clarification on TSD-related issues from the involved governmental authorities and have continued to face difficulty in collecting information to assess progress on the labour and environmental provisions. For instance, civil society interviewees have found it difficult to obtain information on the regulatory cooperation initiatives undertaken post consultations, and even when information is disclosed, it is usually very limited and succinct.[48] Additionally, we cannot assess if and when the imperatives agreed at the bilateral level are executed internally within a national/supranational legal system. Therefore, the difficulty in

[44] CETA, art 22.2.
[45] Governnment of Canada, 'CETA Joint Committee Meeting' (2018) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2018-09-26-summary_report-rapport_sommaire.aspx?lang=eng> accessed 22 July 2022.
[46] Research Participant No. 1, EU CSO.
[47] ibid.
[48] Research Participant No. 2, EU CSO.

uncovering progress on 'the de facto implementation of trade agreement regulatory policies'[49] – the aspect that social CSOs are concerned with - currently stands unresolved.

Whereas, within the vertical dimension, an evident challenge in this connection is the limitations on the EU and Canadian sides. Even though interdepartmental consultations are a standing practice on the Canadian side,[50] 'a whole of government' approach that ensures that there is coordination between the departments heading trade policy and other departments such as environment and development is largely absent.[51] Similarly, an assessment of the EU's internal coordination mechanisms informs us about the general opaqueness pervading the relevant networks on regulatory governance.[52] In specific reference to trade policy, transparency varies across the Directorates General (DGs) of the Commission, demonstrating intra-institutional incoherence within the Commission.[53] There is no formal structure to facilitate upward inter-DG communication concerning FTAs with coordination being undertaken on an *ad hoc* basis.[54] These observations are especially relevant for the TSD linkage as governmental interactions take place in CETA's specialised committees and the

[49] James H Mathis, 'Regulatory Regionalism in the WTO: Are "Deep Integration" Processes Compatible with the Multilateral Trading System?' in Simon Lester, Brian Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements* (CUP 2015) 146.
[50] Robert Wolfe, 'Transparency and Public Participation in the Canadian Trade Policy Process' in Mark Halle and Robert Wolfe (eds), *Process Matters: Sustainable Development and Domestic Trade Transparency* (International Institute for Sustainable Development 2007) 27.
[51] Ann Weston, 'The Canadian "Model" for Public Participation in Trade Policy Formulation' (*The North-South Institute*, 2005) <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2005-The-Canadian-model-for-Public-Participation-in-Trade-and-Policy-Formulation.pdf> accessed 22 July 2022, 15.
[52] On the Open Method of Coordination see Mark Dawson, 'Transforming into What? New Governance in the EU and the "Managerial Sensibility" in Modern Law' (2010) 2010 Wisconsin Law Review 389, 410.
[53] Research Participant No. 2, EU CSO.
[54] Research Participant No. 3, EU Commission Secretariat-General.

subject matter of the TSD chapters requires, on the part of the EU, coordination between the primary group of DGs such as DG CLIMA (Climate Action), DG EMPL (Employment, Social Affairs and Inclusion), DG ENV (Environment) and DG SANTE (Health and Food Safety). Thus, within the EU, lack of transparency is an 'exogenous impediment at the domestic level' as well as one of the 'trade and investment-specific barriers'.[55] The EU is said to have made significant progress in promoting transparency in the negotiation phases of FTAs but falls short considerably in the implementation phases.[56] Therefore, there is a perpetual risk that departments and agencies may not share information or coordinate across the horizontal and vertical dimensions of CETA.

On *regulatory transparency*, CETA encompasses the more traditional understanding of transparency in the context of its informative function. Its provisions direct the parties to publish laws, regulations and procedures and administrative rulings relevant to the agreement[57] and respond to questions of the other party on an existing or proposed measure.[58] Analysis demonstrates that the agreement can surpass the potential of WTO agreements as well as previous EU and Canadian FTAs with third parties when it comes to transparency on SPS and TBT measures thereby decreasing business costs.[59] This is also to

[55] Lucian Cernat, Ana Norman-López and Ana Duch T-Figueras, 'SMEs Are More Important Than You Think! Challenges and Opportunities for EU Exporting SMEs' (*Chief Economist Notes*, 2014) <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152792.pdf> accessed 22 July 2022.
[56] Axel Marx and Guillaume Van der Loo, 'Transparency in EU Trade Policy: A Comprehensive Assessment of Current Achievements' (2021) 9 Politics and Governance 261.
[57] CETA, art 27.1.
[58] CETA, art 27.2.
[59] Ljiljana Biuković, 'Transparency Norms, The World Trade System and Free Trade Agreements: The Case of CETA' (2012) 39 Legal Issues of Economic Integration 93, 105.

say that transparency as a benchmark has a different meaning for business interests targeted at ensuring predictability and simplification[60] in trade facilitation and implementation of trade agreements.[61] With respect to the TSD provisions, the agreement directs the parties to uphold their 'environmental and labour protection objectives in a context of trade relations that are *free, open and transparent*'.[62]

If vertical agendas embedded in domestic regulatory processes are supported by the parties, then they may serve the purpose of benefitting transnational interactions under CETA in this direction. For instance, small and medium-sized enterprises (SMEs) on both sides seek to gain through increased transparency resulting in improved competitiveness of their products and services,[63] and also generating employment.[64] SMEs comprise the majority of the undertakings in the EU and Canada and stand to benefit from improved access to consumers,[65] non-public information,[66] proposed changes to regulatory requirements on TBT and SPS standards[67] and employment practices. The EU and Canada are not the only

[60] Matthias Helble, Ben Shepherd and John S. Wilson, 'Transparency and Regional Integration in the Asia Pacific' (2009) 32 The World Economy 479, 483.
[61] Bernard Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization' (2015) 18 Journal of International Economic Law 609, 219; Paloma Bernal Turnes and Ricardo Ernst, 'A Framework for Transparency in International Trade' (2015) 21 Investigaciones Europeas de Dirección y Economía de la Empresa 1.
[62] CETA, art 22.3 (b) (emphasis added).
[63] Bernard Hoekman, 'Trade Agreements and International Regulatory Cooperation in a Supply Chain World' EUI Working Paper RSCAS 2015/04.
[64] Bernard Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization' (2015) 18 Journal of International Economic Law 609.
[65] 'EU-Canada Comprehensive Economic and Trade Agreement (CETA) and Small and Medium-Sized Enterprises (SMEs)' <https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157840.pdf> accessed 22 July 2022.
[66] CETA, art 21.4(c).
[67] CETA, arts 21.4 (d) and 21.4 (e).

parties to benefit from the removal of transparency-related impediments to reducing regulatory divergences for easier business.[68] Given the export potential of SMEs as components of GVCs,[69] CETA's success will, in part, be measured by how effectively it externalises its horizontal dimension i.e., by facilitating increased participation of SMEs in transatlantic trade. The EU and Canada seem to be aware of this advantage. The CETA Joint Committee has adopted a recommendation that directs the parties to maintain a publicly accessible website containing information about CETA for SMEs.[70] It is directed at improving their competitiveness and will be instrumental in supporting the economically oriented goals (such as creation of jobs and the integration of small businesses with the global economy)[71] of sustainable development.

On *business transparency*, CETA's provisions encourage the adoption of practices that contribute to the achievement of SDGs,[72] promote voluntary sustainability initiatives and CSR,[73] and sustainable procurement and purchasing practices.[74] However, CETA's emphasis on RBC, which is a stronger obligation on businesses than CSR,[75] is negligible as the agreement carries only one mention of RBC in its preamble.

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[68] The economic benefits accruing to the parties are otherwise projected to be minimal see Hoekman (n 64) 611.
[69] ibid.
[70] 'Recommendation 003/2018 of 26 September 2018 of the CETA Joint Committee on Small and Medium-Sized Enterprises (SMEs)' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157417.pdf> accessed 22 July 2022.
[71] OECD, 'Enhancing the Contributions of SMEs in a Global and Digitalised Economy' (2017) <https://www.oecd.org/industry/C-MIN-2017-8-EN.pdf> accessed 22 July 2022.
[72] CETA, art 22.1.3(d).
[73] CETA, arts 22.3.2(a) and 22.3.2(b).
[74] CETA, 22.3.2(c).
[75] RBC goes beyond CSR as it comprises those principles and standards that emphasise the integration of sustainability considerations within core business operations see OECD, *Development Co-Operation Report* (OECD 2016) 121.

The cross-cutting principles of regulatory governance are very much part of the 2030 Agenda.[76] Transparency aids CSR and RBC which are essential for sustainable GVCs in the context of labour and environmental standards.[77] In this direction, the role of public-private partnerships in advancing these principles is directly linked to the question of legitimacy of an FTA.[78] When it comes to private economic actors, governments seek to regulate behaviour of market actors by laying down disclosure and compliance requirements to hold corporations accountable. Thus, corporate governance operates in the same way as administrative law operates in the public, trans-governmental domain.[79] While regulatory transparency is about transparency *for* business, business transparency is about transparency *of* business. In the Commission's own admission, business transparency has a substantial role to play in the trade-labour linkage to ensure sustainable GVCs.[80] Currently, the implementation of CETA has not made progress in this direction. This is, as the next chapter of this thesis explains, mainly due to a lack of progress on furthering the trade-labour linkage to widen the ambit of what should be covered under labour standards.

[76] Lisa-Maria Glass and Jens Newig, 'Governance for Achieving the Sustainable Development Goals: How Important Are Participation, Policy Coherence, Reflexivity, Adaptation and Democratic Institutions?' (2019) 2 Earth System Governance 100031.
[77] ILO, *Ending Forced Labour by 2030* (ILO 2018) 8; Arthur PJ Mol, 'Transparency and Value Chain Sustainability' (2013) 107 Journal of Cleaner Production 1.
[78] Karin Bäckstrand, 'Are Partnerships for Sustainable Development Democratic and Legitimate?' in Philipp Pattberg and others (eds), *Public-Private Partnerships for Sustainable Development* (Edward Elgar 2012) 165.
[79] Marc Moore, *Corporate Governance in the Shadow of the State* (Bloomsbury Publishing 2013) 14.
[80] Opinion of the European Economic and Social Committee on 'An Appropriate Framework for the Transparency of Companies' [2017] OJ C75/18.

5.2. Efficiency

Efficiency depends on institutional oversight, stakeholder engagement and the application of regulatory tools. With reference to labour and environmental standards under CETA, these elements are analysed as follows.

5.2.1. Institutional Mechanisms under CETA

The EU utilises regulatory cooperation to further bilateral dialogues and steer consultations on areas of joint interest with partner countries.[81] It is the transgovernmental strand that shapes regulatory governance at the international level. Through regulatory cooperation, governments access each other's regulatory processes as stakeholders.[82] Regulatory cooperation in a given area may result in the adoption or recognition of another jurisdiction's laws or standards when developing regulations[83] or in an administrative arrangement for the exchange of information as has happened under CETA (in respect of non-food consumer products).[84] In this manner, the horizontal dimension triggers responses towards legalisation in the vertical dimension where resultant instruments may range from hard to soft law. However, the nature of regulatory cooperation in CETA is soft as it is characterised by flexible structures,[85] voluntary processes with the option to refuse participation or opt-out.[86] As such, the

[81] Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Bloomsbury 2012) 207-233.
[82] Anne C M Meuwese, 'EU-US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?' in David Vogel and Johan FM Swinnen (eds), *Transatlantic Regulatory Cooperation* (Edward Elgar 2011) 261.
[83] OECD (n 71) 24.
[84] Individual Reports and Info Sheets on Implementation of EU Free Trade Agreements COM (2019) 455 final 27.
[85] Martino Maggetti, 'Hard and Soft Governance' in Kennet Lynggaard and Karl Löfgren (eds), *Research Methods in European Union Studies* (Palgrave Macmillan 2015) 252.
[86] CETA, art 21.2.6.

parties are not required to undertake any particular regulatory activity.

Bilateral dialogues of the EU with developed countries such as Canada have a specific regulatory focus to 'address global and regional challenges' owing to the parties' 'like-mindedness' to act on key issues of global governance[87] based on the 'strategic importance' of Canada to the EU and vice versa.[88] Recalling the discussion in Chapters 2 and 3 of this thesis, regulatory cooperation is the primary tool that transatlantic governmental bodies have utilised to advance their governments' strategic, political and regulatory agendas. Governments work with individual regulators in identifying potential partners for cooperation activities and review regulatory initiatives.[89] As the regulatory cooperation chapter of CETA is made applicable to the TSD chapters, significant questions arise on how the parties intend to manage this foray into sustainable development and sustainability governance through trade.

The CETA committees entrusted with the task of taking decisions in the respect of regulatory cooperation and sustainable development are the RCF and the TSD committee, respectively.[90] These committees assist the CETA Joint Committee[91] which is the overarching body 'responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement'.[92] Contact Points appointed within governmental bodies in Canada and the EU are responsible for managing the communication

[87] EU-Canada Partnership Agenda, EU-Canada Summit (Ottawa, 18 March 2004); see also, ch 2 of this thesis.
[88] ibid.
[89] CETA, art 21.6.2.
[90] CETA, arts 26.2.1 (g) and 26.2.1 (h).
[91] CETA, art 26.1.
[92] CETA, art 26.1.3.

between the Parties to arrange meetings and sessions.[93] At the time of writing, there are no instances that demonstrate that the RCF and TSD Committee work with each other. Both draft and follow separate agendas and there is no coordination between them. Therefore, the horizontal dimension on TSD in CETA is narrow, covering only Chapters 22, 23 and 24 of the agreement.

The TSD Committee is responsible for implementing CETA's provisions on labour and environment and publishing its reports and decisions.[94] As part of facilitating the transnational strand of regulatory governance, the parties are required to organise a CSF comprising representatives of civil society organisations. This is beyond the purview of 'government-to-government' FTA implementation[95] as Canada and the EU are made answerable to the CSF on the implementation of labour and environmental provisions on an annual basis.[96] At the time of writing the CSF has been convened thrice. Participants of the CSF are arranged as DAGs along the vertical dimension in the EU and Canada. DAGs form the foundation of the consultative mechanism at the respective national/supranational levels.[97] Representative employers, unions, labour and business organisations, and environmental groups, are members of DAGs and may represent provincial and member state interests. While the EU and Canadian DAGs may be able to pose questions to the TSD Committee, CETA does not make provision for an opportunity wherein they can pose questions to the RCF leaving a gap in the institutional set-up wherein consultations could have been

[93] CETA, art 22.4.2. For contact points for Regulatory Cooperation see CETA, art 21.9; for labour standards see CETA, art 23.8; for environmental standards see CETA, art 24.13.
[94] CETA, arts 22.4.1 and 22.4.4.
[95] CETA, art 22.4.4.
[96] CETA, arts 22.4.4(b) and 22.5.
[97] CETA, art 24.13.5 (labour) and CETA, art 24.13.5 (environment).

undertaken for better coordination on sustainable development. Consumer interest groups from the EU and US have communicated that they view sustainability as a key area of focus should EU-US regulatory cooperation go ahead in limited sectors in the aftermath of the failure of the TTIP negotiations.[98] Their statement is an acknowledgement of the significant overlap between regulatory cooperation on the one hand and social and environmental standards on the other. Such an interest in bridging the gap between regulatory cooperation and sustainability should be encouraged in the EU-Canada partnership since CETA can foster greater engagement by leveraging its institutional framework.

5.2.2.Stakeholder Engagement

The horizontal provisions of CETA mandate collaborative participation of public-private actors in the implementation of the TSD chapters of the agreement. Consultations for setting agendas for regulatory cooperation,[99] monitoring the impact of the implementation of the agreement[100] and organising CSF are some examples of collaborative participation. CETA directs governments to encourage CSR 'to strengthen coherence between economic, social and environmental objectives',[101] 'including the implementation and follow-up of internationally recognised [environmental] guidelines'.[102] These provisions might have qualified as an example of mandated participation to promote sustainability but are restricted to voluntary,

[98] Sharon Anglin Treat, 'Transatlantic Coalition Calls for Consultation, Transparency and Sustainability in US-EU Regulatory Dialogues' (2021) <https://www.iatp.org/transatlantic-coalition-calls-consultation-transparency-sustainability-us-eu> accessed 22 July 2022.
[99] CETA, art 21.8.
[100] CETA, art 22.3.3.
[101] CETA, art 22.3.
[102] CETA, art 24.12.1(c).

cooperation-based practices.[103] However, the agreement leaves scope for regulatory governance along horizontal and vertical dimensions. The former is exemplified by provisions directing the parties to promote decent work and environmental standards through cooperation on eco-labelling schemes as well as fair-trade initiatives.[104] This predominantly relates to an outward-looking EU-Canada partnership keen on supporting sustainable development in trading partnerships with developing countries. Whereas the latter seeks upward convergence with international instruments such as the OECD Guidelines for Multinational Enterprises, the ILO Decent Work Agenda and multilateral environmental agreements.[105] Transnational actors seem more focussed on the internal implications of CETA in Canada and the EU.

Non-state actors in the EU and Canada want to ensure that CETA does not negatively impact labour and environmental standards.[106] What we witness is a problem of competing interests between 'powerful states and well-organized economic actors' and 'more weakly organized and less powerful groups' and individuals.[107] The objectives of regulatory cooperation under CETA carry an inherent tension between the environmental and economic objectives. On the one hand, the

[103] CETA, art 22.3.2(a) and CETA, art 24.12. The voluntary-mandatory distinction is irrelevant only when 'legal compliance is acknowledged as a basic component of CSR' but CETA's provisions do not mandate compliance see Onyeka K. Osuji, 'Corporate Social Responsibility, Juridification and Globalisation: "Inventive Interventionism" for a "Paradox"'' (2015) 11 International Journal of Law in Context 265, 266.
[104] CETA, art 22.3,2(a) see also Ashley Overbeek, 'Examining the Efficacy of Fair Trade and Alternative Consumption on Environmental Sustainability and Human Rights in Developing Countries' [2019] Consilience 158.
[105] CETA, arts 22.3.2(b), 23.7.1(c), 24.12(b).
[106] Research Participant Nos. 1 and 2, EU CSO and Research Participant Nos. 3 and 4, Canada CSO.
[107] Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 The American Journal of International Law 211.

objective of regulatory cooperation to 'contribute to the protection of human life, health or safety, animal or plant life or health and the environment'[108] is supportive of sustainable development. On the other, the objective to 'facilitate bilateral trade and investment'[109] may result in mutual incompatibility with sustainability-related labour and environmental objectives. To this end, NGOs seek transnationalisation of regulatory cooperation.

When the EU and Canada conducted the first round of consultations in 2018 with the objective of identifying topics for regulatory cooperation, industry and social-interest representations had differing opinions on what areas should fall under regulatory cooperation. The Canada–EU Trade and Investment Association, a group representing industry, suggested that only the CSF and DAGs should be the preferred route to consult with private actors on labour and environmental standards because they were established as per the requirements of the TSD provisions of CETA.[110] The submission of the Canadian Environmental Law Association (CELA) opined differently, stating that the process of regulatory cooperation should not be dominated by industry and must look beyond harmonising regulatory standards 'to better protect the public interest in both jurisdictions'.[111] CELA's emphasis on ensuring transparency and public participation of interested stakeholders such as environmental and labour organisations,[112] further suggests the preference for regulatory cooperation to be a transnational process. The process of regulatory cooperation remains transgovernmental for now. As of the date of writing,

[108] CETA, art 21.3 (a).
[109] CETA, art 21.3 (c).
[110] Submission of the Association, RCF Consultations (n 41).
[111] CELA's submission, RCF Consultations (n 41).
[112] ibid.

another round of consultations for deciding areas for regulatory cooperation has not taken place and stakeholders are being informed about the work of the RCF through debrief meetings, but not included in decision making.

There is a difference between the EU and Canadian approaches to DAGs which has bearing on the vertical dimension of regulatory governance under CETA. The EU has one DAG for addressing labour and environmental issues whereas Canada has two separate DAGs for each area.[113] The EU has exported the model of its EESC[114] to structure its DAGs comprising three groups: the Business/Employers' Group (the Business sub-Group), the trade unions (Labour sub-Group) and a third group (Other organisations sub-Group) with mixed composition comprising experts like economists or SME representatives.[115] Each group has two members from the EESC.[116] The Canadian labour DAG has seats for five trade unions, two of which are vacant at the time of writing.[117] Apart from meeting for the yearly civil society dialogue there is no interaction between the Canadian labour and environmental DAGs.[118] With time there may be an inclination to combine the two separate DAGs,[119] but

[113] Research Participant No. 2, EU CSO and Research Participant No. 4, Canada CSO.
[114] European Economic and Social Committee (EESC). TEU, art 13 and TFEU, art 301-304.
[115] Research Participant No. 2, EU CSO (describing the composition of the third DAG group as 'very random' and providing the examples above); see also 'Organisation' <https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-canada-domestic-advisory-group/organisation> accessed 22 July 2022.
[116] ibid.
[117] Research Participant No. 4, Canada CSO. The three seats are taken by the Canadian Labour Congress which is the national labour body in Canada, the Quebec Federation of Labour comprising members from the public and private sector of the province and Unifor which is Canada's largest private sector union.
[118] ibid.
[119] This is however not a 'strong sentiment' at the moment, Research Participant No. 4, Canada CSO.

another point of difference is that business representation does not form a part of Canadian civil society.

According to the CSO interviewees, CSOs on both the Canadian and EU sides are interested in working with governmental bodies in the implementation of the TSD chapters of CETA.[120] However, there is an interest-based polarisation between the *different types* of CSOs in the internal, vertical dimension on the EU side. The previous chapter on the Canadian approach to regulatory governance in the trade-labour-environment linkage discussed a key finding on the composition of civil society there stating that it represented only non-profit interests. The EU continues to maintain a different structure of civil society, one that combines business and labour and environmental interests, leading to internal polarisation within its DAG.

5.2.3. Implications of the EU-Canada Strategic Partnership Agreement

As outlined in Section 3.2, Chapter 1 of this thesis, CETA is a pillar of the overarching political instrument, the Strategic Partnership Agreement (SPA), 2016.[121] The SPA incorporates the need for normative cooperation 'based on the *values* that the EU and Canada are sharing and projecting worldwide'.[122] The SPA, sets up a broader framework on areas that are relevant for values-based regulatory governance of labour and environment such as Human Rights, Fundamental Freedoms, Democracy and the Rule of Law (Title II), Economic and Sustainable Development (Title IV); and Political Dialogue and

[120] ibid.
[121] Strategic Partnership Agreement between the European Union and Canada [2016] OJ L329/45 (SPA).
[122] SPA, Title I.

Consultation Mechanisms (Title VI). Under the SPA, the EU and Canada carry out bilateral dialogues on labour and environment.

Firstly, a Bilateral Dialogue on Employment, Social Affairs and Decent Work was initiated in 2017 under the SPA.[123] It is a transgovernmental horizontal dialogue because it involves only EU and Canadian federal level representations on labour. The Dialogue takes place annually and, at the time of writing, three dialogues have taken place[124] on: (i) the future of work, the participation of women in the labour market and youth employment; (ii) the gender wage gap; and (iii) the new world of work (including the platform economy which refers to the increasing digitisation of workplace[125]) and inclusive growth, respectively.

Secondly, on environment, the SPA replaces previously existing arrangements for dialogues on environment and climate change namely, the Canada-EU High-Level Dialogue on Environment which began in 1983, and the High-Level Dialogue on Climate Change initiated in 2010. As of the date of writing, Canada has hosted the High-Level Dialogue on the Environment in Ottawa on October 24, 2017, and the EU has hosted the Canada-EU High Level Dialogue on Climate Change in Brussels on May 24, 2018[126] under the revised SPA format.

[123] SPA (n 121), art 12.10.
[124] 1st meeting of the EU-Canada Bilateral Dialogue on Employment, Social Affairs and Decent Work (12-13 December 2017, Brussels); 2nd meeting of the EU-Canada Bilateral Dialogue on Employment, Social Affairs and Decent Work (14-16 November 2018, Ottawa) and 3rd Bilateral Dialogue on Employment, Social Affairs and Decent Work (19-20 February 2020, Brussels).
[125] Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 Harvard Law & Policy Review 479.
[126] Cooperation on Environment and Climate Change under the Canada European Union Strategic Partnership Agreement (January 2020).

The parallel coverage of labour and environment under the SPA and CETA makes them a subject of *non-centralised avenues*[127] in EU-Canada relations. Figure 6.C below depicts how the dialogues under the SPA run alongside the institutional and regulatory imperatives established under CETA.

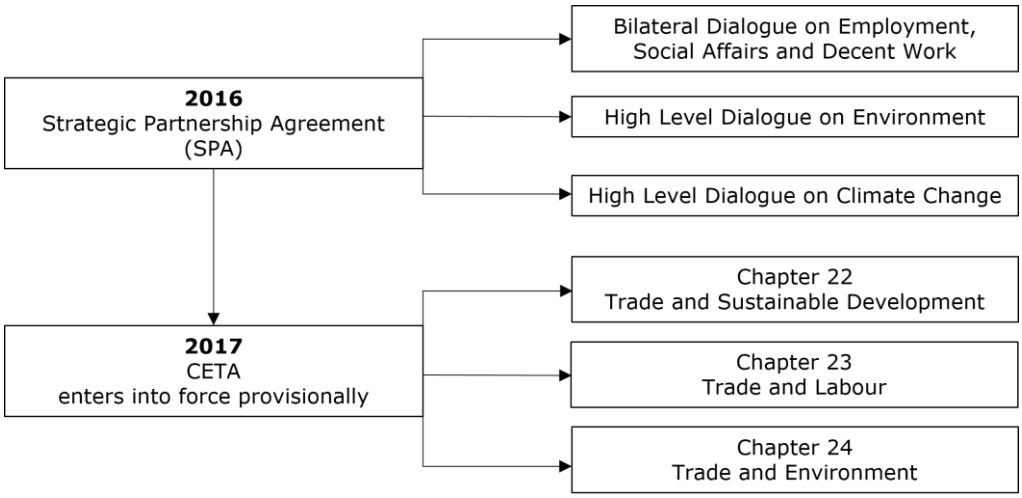


Figure 6.C: Labour and Environment as Subjects of Non-Centralised Avenues in the EU-Canada Partnership

The SPA and CETA together reflect the EU's 'two-track' approach to 'the codification of bilateral relations on a much broader set of issues'.[128] This may not be problematic at the outset but the SPA does not engage with the other strand of regulatory governance identified earlier, namely transnational. This in turn means that while state actors are actively involved in labour and environmental cooperation under two separate agreements the participation of non-state actors is marginalised.

Apparently, CETA is only *one of the forums* that the EU and Canada utilise for cooperating on labour and environmental

[127] Elizabeth Trujillo, 'Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power' (2018) 25 Indiana Journal of Global Legal Studies 365, 367 (emphasis added).
[128] Giovanni Grevi, 'Why EU Strategic Partnerships Matter' [2012] European Strategic Partnerships Observatory Working Paper 1, 9.

standards. In other words, since arrangements under the SPA and CETA target separate issues, the horizontal dimension of regulatory governance in EU-Canada economic relations stands bifurcated. The interaction of governmental bodies in the dialogues taking place under the SPA is likely to impact the regulatory governance of labour and environmental standards under CETA. In the case of labour standards for instance, the bilateral dialogue under the SPA is to 'deepen the [mutual] cooperation and provide a forum for peer learning and knowledge sharing […]'.[129] The EU and Canada have identified 'topics which are of high priority to both' such as the future of work, the participation of women in the labour market and youth employment that fall in the category of Employment, Social Affairs and Decent Work.[130]

The parallel and overlapping cooperation frameworks produce challenges for the assessment of CETA as a separate agreement meant to shape the bilateral and global regulatory governance of labour and environmental standards. Furthermore, dialogues under the SPA are largely intergovernmental and do not mandate the participation of CSOs. It has emerged that labour and environmental groups otherwise participating in CETA's implementation may be completely unaware about the SPA labour and environmental dialogues as interviewees have denied their knowledge.[131] From the perspective that regulatory governance is part of a larger field of democratic governance,[132] the SPA falters on a key element. Arguably, it follows that the

[129] At the time of writing, three bilateral dialogues have taken place focussing on the abovementioned areas see 'EU-Canada Dialogue' <https://ec.europa.eu/social/main.jsp?catId=87&intPageId=5114#EUcanada> accessed 22 July 2022.
[130] ibid.
[131] Research Participant No. 4, Canadian CSO and Research Participant No. 5, Canadian CSO.
[132] OECD (n 71) 16.

SPA does not remedy the wider issues of lack of transparency[133] and accountability[134] in the EU-Canada partnership.

5.2.4. Regulatory Tools and Methods

The traditional purpose of seeking a reduction in regulatory barriers is to make trade easier for business by identifying and eliminating regulatory divergences between the partners.[135] One of the ways to achieve this is to adopt similar methodologies on regulatory impact and risk assessments.[136] CETA provides for ex post evaluation in this respect to reduce regulatory divergences between the Parties.[137] In this connection, 'regulatory quality'[138] seeks to minimise administrative costs incurred by public and private actors because of duplication and incompatibility between legal systems.[139] Accordingly, the main objectives are to seek rapprochement of regulatory methods and tools for '[…] deep[ening] mutual understanding of regulatory governance'[140] and promoting compatibility between regulatory approaches for the 'improvement of competitiveness and efficiency of industry'.[141]

Exploring approaches to regulation to integrate sustainable development and sharing experiences on regulatory tools such

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[133] Biuković (n 59) 96-99; European Public Service Union, 'Municipalities Concerned about CETA, TTIP and TISA' (2014) <https://www.epsu.org/article/municipalities-concerned-about-ceta-ttip-and-tisa> accessed 22 July 2022.
[134] Dirk De Bièvre, 'The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiations' (2018) 53 The International Spectator 70, 75.
[135] Hoekman, 'Trade Agreements and International Regulatory Cooperation in a Supply Chain World' (n 63).
[136] CETA, arts 21.4 (a) and 21.4 (b).
[137] CETA, art 21.4 (o)-(q).
[138] CETA, art 21.3 (b) (i)-(vii).
[139] CETA, art 21.3 (d) (i)-(iii).
[140] CETA, art 21.3 (b).
[141] CETA, art 21.3 (d).

as impact assessments (IAs), under CETA, requires that the parties facilitate horizontal consultations on regulatory processes by engaging regulatory departments and private entities to this end. Regulatory cooperation and TSD chapters direct that the parties cooperate on IAs under Article 21.4 (a) (iv) and Article 22.1.3 (d) CETA, respectively. Progress on integrating sustainability considerations will ultimately depend on whether they receive the required attention on the regulatory agenda of the parties.

The relevance of IAs lies in the fact that they carry the potential for regulatory reform. However, the meaning of regulatory reform in this context is accompanied by plurality as it covers meanings such as justifying a regulatory approach; or increasing political control over the executive with powers over regulatory functions or an improvement of regulatory decisions based on rational analysis.[142] This plurality is reflected in Claudio M Radealli's four 'images'[143] of regulatory IAs described as *rationality* which relates to bureaucratic decision-making that maximises welfare and prefers Pareto-efficient choices; *power* which relates to political control over decentralised authority and monitoring decision-making by agencies; *management* which seeks administrative reform and its increased competitiveness and lastly, *symbolic action* wherein 'rulemaking procedures may look like they impose burdens on agencies, but the real burdens depend entirely on whether or how they are implemented'.[144]

[142] *Regulatory Impact Analysis* (OECD 1997) 33.
[143] Claudio M Radaelli, 'Rationality, Power, Management and Symbols: Four Images of Regulatory Impact Assessment' (2010) 33 Scandinavian Political Studies 164 (emphasis added).
[144] Cary Coglianese, 'The Rhetoric and Reality of Regulatory Reforms' (2008) 25 Yale Journal on Regulation 85, 93 (emphasis added).

As criteria in IA, the rationality and management images may necessitate considering sustainability related aspects in regulation. Whereas it is the power and symbolic action images that are relevant to ascertain which authority is responsible to monitor, implement or reform regulation so that it achieves objectives such as sustainability and sustainable development.

A key observation in respect of Canada is that while it scores well on the scale of introducing management reform, federalism attenuates the uniformity of a regulatory strategy given the strong, autonomous provincial powers.[145] There is no reason why this would not reflect in regulation concerning sustainability because the regulatory response of provinces will not be uniform but at best co-ordinated effort to bring consistency at the national level.

Similarly, in the EU, IAs are utilised to assess whether EU level action is required at all. This is in line with the principles of subsidiarity and proportionality and affects uniformity of practice.[146] Thus the challenges in cooperating on IAs emanate from the vertical dimension of EU-Canada relations i.e., the constitutional and regulatory frameworks of the EU and Canada, respectively.

5.3. Accountability

The TSD provisions are excluded from CETA's general dispute settlement mechanism.[147] The General Dispute Settlement chapter of CETA (Chapter 29) provides for arbitration,[148]

[145] Radaelli (n 143) 173 (emphasis added).
[146] Angela Maria Noguera, 'Impact Assessment: Empirical Evidence' in Pierre Larouche and Péter Cserne (eds), *National Legal Systems and Globalization* (TMC Asser Press 2013) 291, 331.
[147] CETA, ch 29.
[148] CETA, art 29.6.1.

requires compliance with the final panel report[149] and entitles a party to suspend obligations or receive compensation in the case of non-compliance by the opposite party.[150] Whereas the TSD chapters mostly operate under the administrative branch of regulatory governance with no emphasis on adjudication.

The dispute resolution process under the TSD chapters of CETA provides for a consultations-based mechanism along with the option to request a panel for seeking recommendations. Social non-state actors repeatedly point at the 'unenforceability' of the TSD provisions in case of potential violations.[151] Since the TSD dispute resolution process ends with a set of recommendations, a CSO representative questions 'then what?'[152] expressing dissatisfaction with the effectiveness of the mechanism. The DAGs may play a role in the horizontal dispute settlement mechanism by submitting observations to the TSD Committee in case the responding party does not implement the recommendations made in the final report,[153] but the panel is not under any obligation to consider such submissions.

With the TSD dispute settlement procedure being a subject of a softer, consultations-based approach, such civil society actors are also keen on pursuing better 'enforcement' of international standards and in this regard hold a conflicting viewpoint to that of the EU. The Commission has time and again referred to the TSD provisions as 'enforceable',[154] but this position is framed without considering the differentiation between 'binding' and 'enforceable' being drawn by the civil society. The

[149] CETA, art 29.12.
[150] CETA, art 29.14.1.
[151] Research Participant No. 1, Research Participant No. 2, EU CSO and Research Participant No. 4, Canada CSO.
[152] Research Participant No 1, EU CSO.
[153] CETA, arts 23.10.12 and 24.15.11.
[154] Research Participant No 1, EU CSO.

understanding of 'enforceability' under international law that is held by civil society members is primarily in terms of a sanctions-based approach[155] that aids a binding obligation resulting from the parties' commitment to respect an agreement in good faith (in accordance with the principle such as *pacta sunt servanda*).[156] The EU and Canada have re-iterated their commitment to uphold international labour and environmental standards, in a binding undertaking in CETA but a violation of these standards will not result in sanctions because the parties essentially seek to utilise soft law.

At this point, it is important to mention that the EU is externalising its approach to regulatory governance in the field of social policy that is, as discussed in Chapter 4 of this thesis, embedded in soft processes like the OMC and the Semester system. These processes seek to influence (not prescribe) regulatory outcomes[157] and enforcement in this context is the broad concept comprising soft methods that are intended to promote voluntary compliance or respond to non-compliance.[158] For example, the OMC was introduced to resolve the internal legitimacy crisis of the EU and restrict 'further delegation of competencies in nationally-sensitive policy areas' but

[155] Research Participant No. 1, Research Participant No. 2, EU CSO.
[156] VCLT, art 26.
[157] Anne Brunon-Ernst and Arnaud Van Waeyenberge, 'Effects of the Open Method of Coordination (OMC) in Research and Innovation: Indirect Legislation in EU Policy-Making?' (2015) 47 The Journal of Legal Pluralism and Unofficial Law 22; Luc Tholoniat, 'The Career of the Open Method of Coordination: Lessons from a "Soft" EU Instrument' (2010) 33 West European Politics 93.
[158] Kenneth W. Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and The Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2008) 63; David M Trubek and Louise G Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-Ordination' (2005) 11 European Law Journal 343.

compliance is discretionary and without recourse to judicial processes for ensuring accountability. [159]

Business CSO representatives tend to extend their support to the cooperation-based process for resolving potential disputes, but socially and environmentally oriented CSO representatives are more likely to argue that sanctions should be an option as a last resort.[160] As one of the interviewees points out, the US approach of imposing sanctions as the last resort should be considered while relying on the EU's cooperation-based approach for the most part when a dispute takes place.[161] At a meeting held on the Review of the TSD chapters (May 2019), speaking with specific reference to labour standards, a CSO representative contended that the softer approach of the TSD chapters offered insufficient protection.[162]

A Canadian CSO interviewee explains that both Canadian and EU DAGs are predominantly concerned with the 'question of enforceability' of TSD provisions for the time being.[163] In this direction they are at first interested in developing procedural regulatory governance. The Canadian view is that sanctions should be imposed under CETA in case of violations of TSD provisions.[164] However, CETA has already been signed, and the TSD chapters are clear that remedies for violation will only encompass consultation-based solutions and are excluded from

[159] Damian Chalmers and Martin Lodge, 'The Open Method of Co-Ordination and the European Welfare State' [2003] ESRC Discussion Paper No. 11.
[160] Research Participant No. 2, EU CSO and Research Participant No. 4, Canada CSO.
[161] 'To be honest, it is not one against the other' Research Participant No. 2. However, NGOs have different views on this with some seeking a hard sanctions-based approach and some seeking an improvement of the cooperation-based mechanism Civil Society Meeting, Brussels (European Commission, May 2019) see ch 1 of this thesis.
[162] ibid. this point was raised in reference to all EU trade agreements covering EU GSP as well as the new generation trade agreements such as CETA.
[163] Research Participant No, 4, Canada CSO.
[164] ibid.

the general dispute settlement chapter. Nevertheless, the interviewee stated that Canadian CSOs are keen to pursue a sanctions-based agenda through a *reform strategy* on TSD under CETA. This will entail the option to penalise corporations that violate TSD provisions but at the time of the interview no formal steps had been taken by Canadian CSOs to either formulate a common position among themselves or approach the Canadian government in this respect.[165] The EU is opposed to incorporating a sanctions-based provision for TSD chapters, but this insight sheds light on the rift between socially oriented opinions and EU-level decisions. As such sanctions have never been utilised in the trade-labour-environment linkage in EU FTAs.

While the EU may not have come on board yet as far as the sanctions-based approach is concerned, it has proposed a complaints mechanism that will function on its own side i.e., under the EU's vertical dimension for TSD issues arising in its trade policy.[166] Member States, individual companies, business/trade associations, civil society organisations and citizens from the EU will be able to approach the Chief Trade Enforcement Officer (CTEO) to supervise TSD-related dispute settlement in EU FTAs.[167] Once the complaint is received and assessed, the Commission may also employ resources and methods such as fact-finding activities, consultations and hearings to take an enforcement action.[168] This is in line with

[165] Research Participant No, 4, Canadian CSO (emphasis added).
[166] Commission, 'Commission Launches New Complaints System to Fight Trade Barriers and Violations of Sustainable Trade Commitments' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2134> accessed 22 July 2022.
[167] Commission, 'Working Approaches to the Enforcement and Implementation Work of DG TRADE' <https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159075.pdf> accessed 22 July 2022.
[168] ibid.

the 15-point Trade and Sustainable Development Action Plan of 2018 (TSD Action Plan) seeking to improve the implementation of the consultation mechanisms in the TSD chapters of EU FTAs.[169] These developments are evidence of more adaptive regulatory governance.

5.4. Adaptability

> 'One learns about others from their response to the question asked; and one learns about oneself in gathering the information to formulate a response, which in turn can lead to adaptive learning.'[170]

The application of adaptability to international trade entails '[…] encouraging constant monitoring of outcomes […] the participation of multiple voices in transparent policy-making processes'.[171] The TSD Action Plan is one such example as the EU seeks to improve the existing framework on TSD provisions based on the feedback received from all stakeholders. At the time of writing, the EU has conducted a review of the TSD Action Plan. Taking the feedback of stakeholders into account, the Commission intends to undertake further contemplation on issues that have been raised by actors representing labour and environmental interests such as inter alia monitoring FTA implementation and institutional mechanisms, and the possibility of sanctions for noncompliance.[172] This review was

[169] 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) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf > accessed 22 July 2022, 8.
[170] Gregory Shaffer, 'Alternatives for Regulatory Governance Under TTIP: Building from the Past' (2016) 22 Columbia Journal of European Law 1.
[171] Rosie Cooney and Andrew T F Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' (2007) 18 The European Journal of International Law 523, 524.
[172] Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM (2021) 66 final, 13.

conducted through consultative mechanisms that are a criterion of adaptive or responsive regulatory governance.[173] Recent developments in the implementation of TSD provisions in EU FTAs help demonstrate that consultative mechanisms may be central to the process at the bilateral level and even an aim of the dispute resolution process. Let us consider the findings of the Panel in the labour dispute under the TSD provisions of the EU-Korea FTA[174] in the light of this contention.

In the EU-Korea FTA Labour Dispute, the EU filed a complaint against Korea stating that its labour laws were inconsistent with Article 13.4.3 of the FTA requiring the parties' commitment to the freedom of association.[175] The Panel found certain provisions of the Korean legislation, namely the Trade Union and Labour Relations Adjustment Act (TULRAA), to be in violation of the labour-related obligations under EU-Korea FTA making recommendations for Korea to align them with the principles concerning freedom of association.[176] These findings pertained to the three issues raised by the EU in its complaint pertaining to:

(1) Article 2(1) of the TULRAA defining a 'worker' as a person who lives on wages, salary, or equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by the Korean courts, excludes some categories of self-employed persons such as heavy goods

[173] Characteristics discussed in the context of EU and Canadian legal systems see chs 4 and 5 of this thesis.
[174] [2011] OJ L127/6.
[175] 'Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement' (2021) <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf > accessed 22 July 2022 (Panel of Experts Proceeding).
[176] ibid.

vehicle drivers, as well as dismissed and unemployed persons from the scope of freedom of association.[177]

(2) Article 2(4)(d) of the TULRAA stating that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of 'worker' are allowed to join the organisation and;[178]

(3) Article 23 (1) of the TULRAA stating that trade union officials may only be elected from among the members of the trade union.[179]

There was a fourth issue raised by the EU, concerning Article 12(1)-(3) of the TULRAA, in connection with Article 2(4) and Article 10, providing for a discretionary certification procedure for the establishment of trade unions.[180] In the context of this issue, the EU argued that TULRAA was in violation of the freedom of association because it provided Korean administrative authorities discretionary powers to refuse certification of trade unions. Whereas Korea argued that its system of trade union certification was compliant with the principle of freedom of association. In its assessment, the Panel relied on the findings of the Korean Constitutional Court in another case concerning the constitutionality of the said provision of TULRAA.[181] The Panel agreed with the EU's argument that the provisions of TULRAA are broad, vague, or imprecise when it comes to laying down the grounds for disqualifying trade unions, especially because Korea was unable to provide a definitive answer as to how the provision is applied to individual applications.[182] Nevertheless, in its decision on the

[177] Panel of Experts Proceeding (n 175) 28.
[178] ibid.
[179] Panel of Experts Proceeding (n 175) 28.
[180] ibid.
[181] Panel of Experts Proceeding (n 175).
[182] ibid.

fourth issue, the Panel did not conclude that the TULRAA was in violation of the FTA's labour provisions in the light of the decision of the Korean Constitutional Court, deferring to the highest authority to interpret Korean law.[183] Instead, the Panel stated that the certification of trade unions should be referred to the consultative bodies established under Article 13.12.4 of the EU-Korea FTA, namely the contact points, the TSD Committee and the DAGs.[184]

The recommendation of the Panel under the EU-Korea FTA that the parties engage the institutional framework within the agreement to streamline trade union certification procedure reiterates the significance of transnational legal processes in overcoming the challenges to international regulatory governance arising on account of domestic constitutional and regulatory frameworks.

Article 13.11 of the EU-Korea FTA provides that the parties cooperate on social and environmental policies set out in Annex 13 of the Agreement. Therefore, a soft law approach underpins TSD-related activities. The cooperation on trade union certification procedures falls under paragraph 1(k) of Annex 13 pertaining to inter alia the ILO Decent Work Agenda and core labour standards. The employment of soft law is directed at modernising labour law because it helps in coordinating national labour policies at the international level.[185] Such outcomes are supported by the ILO as well wherein trade becomes a vehicle for transforming labour standards.[186] Currently, the CSF under

[183] Panel of Experts Proceeding (n 175).
[184] ibid.
[185] Adalberto Perulli, *Social Rights and Administrative Regulations for Effectiveness and Sustainability: What Modernization of Labour Law?* (ILO 2012) 13.
[186] See ch 3 of this thesis, section 3.5.2 (Insight from the Field of International Labour Law).

the EU-Korea FTA is working with the Korean government to fully implement the provisions of ILO conventions on the Freedom of Association and Protection of the Right to Organize, Right to Organise and Collective Bargaining, and Forced Labour.[187] This case helps demonstrate that the regulatory governance in EU FTAs is grounded in adaptability that operates between hard and soft frameworks in a transnational setting. This is relevant for CETA because both agreements have the same institutional arrangements on TSD such as the DAGs, CSF and the TSD Committee. The EU-Korea FTA offers insight into the reliance on adaptability to further regulatory governance.

Adaptive regulatory governance offers the benefits of responsiveness and inclusiveness but also revives the tussle over the preference for legal frameworks arranged along their binary *binding* and *non-binding* nature.[188] Therefore in the implementation of EU FTAs, state and non-state actors are seen as advocating their interests from distinct standpoints. The success of this mechanism depends on the extent to which it is employed to strengthen regulatory governance.

5.5. Coherence

Finally, let us look at the extent to which CETA can promote horizontal coherence between the various policy areas it encompasses. Coherence is defined as a pursuit for synergy and seeking harmony between 'the market' and 'the social' objectives in economic relations.[189] A potential impediment to

[187] '7th Committee on Trade and Sustainable Development' (2021) <https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159567.pdf> accessed 22 July 2022.
[188] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 The European Journal of International Law 733 (emphasis added).
[189] See ch 4 of this thesis, section 2.2.

coherence under CETA is its investment provisions, particularly the Investment Court System (ICS) therein.[190] The way ICS operates has horizontal as well as vertical implications in respect of CETA. Horizontal because it is likely to obstruct synergy and harmony between the investment and TSD provisions of CETA and vertical because the outcome on an investment dispute has the potential to affect the application of substantive labour and environmental standards in the EU and Canada. Thus, CETA's potential to render coherence is consequential because it demonstrates an inherent hierarchical arrangement of CETA's chapters. A higher degree of legalisation is rendered to the trade and investment rules due to the provisions on adjudicatory processes.[191] Whereas the implementation of the TSD provisions rests upon administrative decision making which in turn requires administrative law to develop for better regulatory governance.

The ICS is meant to be an improvement of the Investor-State Dispute Settlement Mechanism (ISDS) that has developed under the framework of international investment law. The reform of the ISDS was sought because the mechanism offers sweeping powers to foreign investors i.e., wealthy corporations to the extent that it is capable of impacting the host state's capacity to regulate in areas of public policy hindering regulation for inter alia sustainable development.[192] In other words, foreign investors can sue host governments on the introduction of new domestic regulation under the ISDS curtailing the state's

[190] CETA, ch 8.
[191] Kenneth W. Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 421.
[192] Juan J Garcia Blesa, 'Indeterminacy, Ideology and Legitimacy in International Investment Arbitration: Controlling International Private Networks of Legal Governance?' [2021] International Journal for the Semiotics of Law 1.

right to regulate. The investor can do so by for instance, demonstrating that its right to 'fair and equitable treatment' has been violated or that the investor has faced 'indirect expropriation' because of the host state's regulatory action. Additionally, the ISDS threatens transparency and in turn the legitimacy of FTAs, that are key principles of regulatory governance because the arbitration proceedings are opaque with the parties and the tribunal being under no obligation to disclose the details of the proceeding or the outcome.[193] Another point of criticism, one that should be addressed by international investment law, is that of inconsistency because arbitrators' decisions are at times distinct on the same point of law in different investment disputes.[194]

Methods to reconcile ISDS, covering the aspects of defining investors' rights and arbitrators' decision making powers, with sustainable development have been presented.[195] They will largely entail that the arbitration panel consider the impact of investments on the local community and the environment which requires building synergies between policies to prevent for instance, social dumping or projects that intensify the ongoing climate crisis.

The EU has taken the initiative to reform the ISDS through the ICS. The ICS is seen as a stepping stone towards the EU's vision

[193] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749.
[194] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.
[195] Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge 2017); Maria Chochorelou and Carlos Espaliu Berdud, 'Sustainable Development in New Generation FTAs: Could Arbitrators Further the Principle through ISDS?' (2018) 27 RECIEL 176.

to establish a Multilateral Investment Court.[196] For now, the EU is resorting to the incorporation of the ICS in its FTAs such as CETA. This has not been without hurdles even for the EU.

Within the EU, the acceptance of the ICS is a problem with legal and social undertones.[197] An example of the challenge posed to the legal acceptability of the ICS is *Opinion 1/17*[198] wherein the question of the compatibility of the ICS provisions under CETA with EU law was brought into question.[199] Whereas the difficulty of its social acceptability is reflected from its contestation (and that of ISDS) by civil society and environmental groups based on the argument that the ICS subordinates public policy objectives (such as the maintenance of labour and environmental standards) to economic objectives (protection of investors' right and investment protection).[200] This contestation of the ICS is embedded in the social conception of legitimacy that seeks to ascertain whether law meets the 'normative expectations of its subjects'.[201]

In *Opinion 1/17*, the CJEU held that the ICS is compatible with EU law albeit *only if* it has no adverse effect on its autonomy.[202] The 'thornier issue' of legal compatibility of the ISDS or ICS with EU law had remained unresolved since *Opinion 2/15*[203] that

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[196] Maria Fanou, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' [2020] Cambridge Yearbook of European Legal Studies 1 and Catharine Titi, 'Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law & Policy* (OUP 2019) 514.
[197] Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 Oxford Journal of Legal Studies 729.
[198] *Opinion 1/17* (CETA Opinion) EU:C:2019:341.
[199] Seeking the justification of the ICS in a 'functioning legal system' such as that of EU see A Thomas (n 197) 735.
[200] Research Participant No. 1, EU CSO.
[201] A Thomas (n 197) 742.
[202] Maria Fanou, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 *Cambridge Yearbook of European Legal Studies* 106, 120 (emphasis in original).
[203] *Opinion 2/15* ECLI:EU:C:2017:376.

decided, against a substantially political backdrop, that the EU could enter into an FTA with Singapore that contained investment provisions if all member states ratified the agreement.[204] Even though Opinion 1/17 has resolved the questions on the legal compatibility between ICS and EU law, insofar as the social acceptance of the ICS is concerned, civil society participants interested in promoting labour and environmental standards through trade consider the ICS illegitimate because it lacks the notion of *reciprocity* which requires further attention. The notion of reciprocity is described as

> an awareness that what one actor does in a particular transaction is of more than passing interest because it will affect the behavio[u]r of the same, and also other, actors in a continuing line of similar—or even different—transactions[205]

In the view of civil society actors, therefore, the ISDS and ICS do not differ much except that the former makes use of ad-hoc arbitration whereas the latter institutionalises the process and neither restrain the actions of private foreign investors thereby encouraging disputes against the state in the future.[206] In the aftermath of *Opinion 1/17*, the social unacceptance of the ICS by the civil society continues to cast a shadow on CETA's legitimacy.[207] Civil society actors also want governments to

[204] Nicholas Wiggins, 'T-tip Negotiations Round Two: An Opportunity to Redirect the Trajectory of International Investment Law' (2021) 169 University of Pennsylvania Law Review 1289, 1305.
[205] Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 199 (emphasis in original).
[206] Research Participant No. 1, EU CSO.
[207] Melikyan Arman, 'The Legacy of Opinion 1/17: To What Extent is the Autonomous EU Legal Order Open to New Generation ISDS?' (2021) 6 European Papers 645, 648, 650, 653; Robert Basedow, 'The EU's International Investment Policy Ten Years On: the Policy-Making Implications

utilise the consultative mechanisms (at EU level and those under EU FTAs with third countries such as CETA) to deliberate on standardising a social and environmental sustainability criteria for foreign investors.[208] Such an initiative on the part of the EU would feed into an ongoing agenda identified at the UN level seeking to define a sustainability criteria for investments and its application throughout the lifecycle of an investment (as opposed to applying it only to the admission stage).[209] It is also evident that in proposing the ICS, the EU has primarily responded to the transparency-related legitimacy concerns and absence of a review mechanism under the ISDS.[210] There are changes proposed to the grant of rights to foreign investors or perhaps it is assumed that better transparency will result in improving the outcomes from the exercise of investors' rights.

6. Conclusions

Utilising the elements of transparency, accountability, efficiency, adaptability, and coherence as criteria to assess regulatory governance under CETA in this chapter leads to the following findings.

First, the institutional strand of transparency under CETA needs improvement because there are instances wherein governmental departments in the EU and Canada have not disclosed information sought by labour and environmental interest groups. Although, there is positive progress on regulatory and business transparency that contributes to cost

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of Unintended Competence Transfers' (2021) 59 Journal of Common Market Studies 643, 644, 646, 652.

[208] ibid.

[209] PAGE, *International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy* (UNEP 2018), 18.

[210] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749.

effectiveness for business, especially encouraging for SMEs. Second, even though CETA provides for a comprehensive institutional set-up on TSD, the efficiency of regulatory governance may be affected by differing opinions of civil society participants on the inclusion of TSD under regulatory cooperation, the existence of parallel and opaque frameworks on labour and environmental cooperation under the SPA and different approaches to IA. Third, there is also a gap in the objectives of accountability between on the one hand those groups of the civil society that represent labour and environmental interests and, on the other, governmental representatives. Governments on the EU and Canadian side intend to strengthen accountability through adaptive means whereas civil society groups wish governments to work towards enforceability of the TSD provisions as the end goal. The same is true for the ICS as well. These are examples of lack of coherence as to the results that the actors are working towards in CETA. However, outcomes such as the imposition of sanctions are contingent upon disputes taking place. We must now assess whether CETA contributes to the development of substantive labour and environmental standards to arrive at the final conclusions.

CHAPTER 7: EU-CANADA COMPREHENSIVE AND ECONOMIC TRADE AGREEMENT AND THE REGULATORY GOVERNANCE OF LABOUR AND ENVIRONMENTAL STANDARDS

1. CETA: A Step Towards Sustainable Development?

This Chapter seeks to assess the implications of the adoption and implementation of the substantive Trade and Sustainable Development (TSD) provisions in Chapters 22-24 of CETA interlinking sustainable development with labour and the environment. Chapter 22 of CETA on 'Trade and Sustainable Development' carries overarching provisions which outline the preference for a coordination-based approach to 'Decent Work' and environmental protection.[1] The subsequent chapters of CETA carry specific provisions on 'Trade and Labour'[2] and 'Trade and Environment'.[3] We will call Chapters 22-24 collectively the TSD chapters.

With regard to the research question posed by this thesis, the relevance of CETA is twofold. First, CETA is an agreement between advanced economies with international business supply chains and therefore, offers the opportunity to examine the application of sustainable development by these powers as recalibrated by the UN's 2030 Agenda. At their level, advanced economies face specific challenges, for instance, the requirement to ensure sustainable consumption and production.[4] In their economic relations with developing countries, the EU and Canada have utilised trade as a tool for promoting sustainable development. Analysis on TSD has

[1] CETA, art 22.3.2(a).
[2] CETA, ch 23.
[3] CETA, ch 24.
[4] Justice Mensah, 'Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review' (2019) 5 Cogent Social Sciences 1653531.

substantially focussed on north-south economic relations.[5] In relation to each other, the EU and Canada step away from the role they have performed as developmental actors in north-south trading partnerships. In this context, CETA could become a model for future partnerships between economically developed countries, especially in its implementation aspect.[6]

Second, business processes are globalised and supply chains need to be managed end-to-end to address global sustainability concerns. In this connection CETA's importance is highlighted by the following example wherein:

> […] a Company X that is headquartered in Canada, has its research and development (R&D) function in the United States, manufactures its product in China using parts made in India, sells to the European common market, and offers after-sales service from Thailand. The firm in each geographic area specializes in one task, performing at a higher level than if one firm were to complete all activities.[7]

This example underscores CETA's relevance for the wider landscape of international trade law as well as international labour and environmental standards.[8] The agreement points to

[5] Olivier De Schutter, *Trade in the Service of Sustainable Development* (Hart 2015); Christian Barry and Sanjay G Reddy, *International Trade and Labor Standards* (Columbia University Press 2008); Mark Langan and Sophia Price, *Sustainable Development in Africa-EU Relations* (Routledge 2018).
[6] Stanko Krstic, 'Regulatory Cooperation to Remove Non-Tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement (CETA)' (2012) 39 Legal Issues of Economic Integration 3.
[7] Trade Commissioner Service, 'Spotlight on Global Value Chains' (*Government of Canada*, 2020) <https://www.tradecommissioner.gc.ca/tcs-sdc/assets/pdfs/spotlight_global_value-eng.pdf> accessed 22 July 2022.
[8] Lorand Bartels, 'Human Rights, Labour Standards, and Environmental Standards in CETA' in Stefan Griller, Walter Obwexer and Erich Vranes (eds),

'the benefit of considering trade-related labour and environmental issues as part of a global approach to sustainable development'.[9] From this perspective, the bilateral and external implications of CETA are 'about providing a framework for global supply chains'[10] highlighting the agreement's importance for international trade.

With these observations as reference points, CETA's role in advancing labour and environmental standards is analysed in two parts in this chapter. Part I is dedicated to demonstrating that regulatory cooperation may assist in (i) addressing issues such as modern slavery when it comes to labour standards and (ii) regulatory divergences in the field of environment. Part II moves on to the core TSD provisions of CETA identifying constraints and opportunities for EU-Canada engagement on social dialogue and regulation for climate change, respectively.

2. The Two Dimensions of Regulatory Governance Under CETA in Relation to Labour and Environmental Standards

Figure 7.A below shows that the promotion of international labour and environmental standards at the bilateral level or in third countries (i.e., through EU-Canada partnership) falls under the horizontal dimension. Whereas the promotion of international labour and environmental standards at the member state and sub-national levels in the EU and Canada depends on the vertical dimension. This is not to say that these dimensions operate in isolation but that one dimension is more pronounced depending on the phase of engagement on an

Mega-Regional Trade Agreements: CETA, TTIP, and TiSA (OUP 2017) 202-215.

[9] CETA, art 22.1.2.

[10] Kurt Hübner, Anne-Sophie Deman and Tugce Balik, 'EU and Trade Policy-Making: The Contentious Case of CETA' (2017) 39 Journal of European Integration 843, 845.

issue. For instance, the implementation of TSD provisions will first and foremost be dealt with under the horizontal dimension, by the institutions and processes set up under CETA. An example of the interaction between the dimensions is when the parties consult each other (horizontally) on implementing international labour and environmental obligations and policies set by organisations such as the ILO and UN, (vertically) within their respective legal systems. Addressing international labour or environmental standards in third countries or at the multilateral level as 'like-minded' or 'strategic partners' can be regarded, from the EU's perspective, as the external effects of CETA's horizontal dimension.

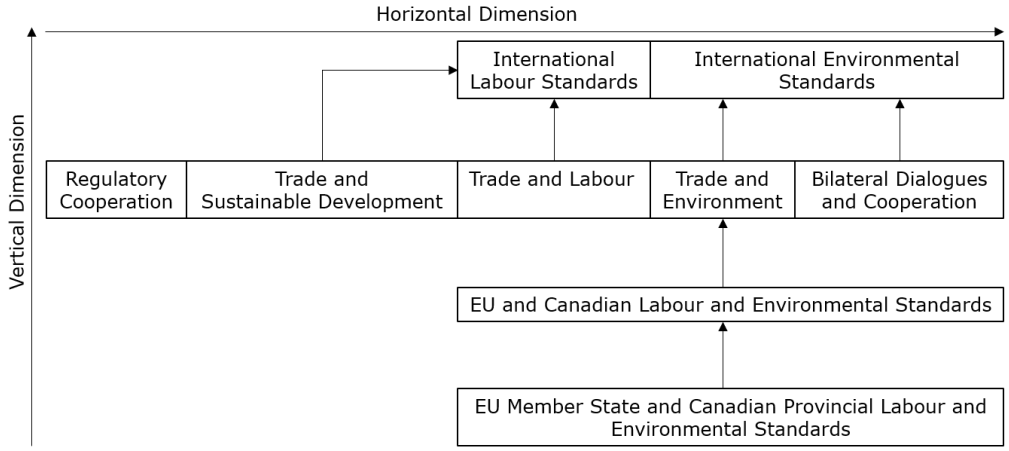


Figure 7.A: The Horizontal and Vertical Dimensions under CETA on Labour and Environmental Standards

By employing the horizontal and vertical dimensions, CETA becomes a platform for regime interaction. The next section delves into the extent to which substantive labour and environmental standards can be promoted as part of regulatory cooperation objectives and as obligations under the TSD chapters, respectively.

Part I

3. Regulatory Cooperation under CETA and Labour and Environmental Standards

The plan for an EU-US Transatlantic Trade and Investment Partnership (TTIP) was the first example of EU's enthusiasm to pursue a 'deep' regulatory agenda with a transatlantic partner.[11] As discussed in Chapter 2, the 'deepness' is attributed to the kinds of regulatory barriers being addressed in EU FTAs.[12] Although the scope of regulatory cooperation under the TTIP was expected to be quite extensive, the draft text did not state that TSD fell under its ambit. CETA is the only agreement among the EU's 'second' or 'new generation' trade agreements,[13] wherein the regulatory cooperation chapter extends to the TSD chapters.[14] At this point we must also recall the discussion in Chapter 2 on WTO-extra and WTO-plus areas of regulatory barriers. Labour and environment fall under WTO-extra category meaning that they are outside the purview of WTO agreements (excluding the Trade and Environment linkage as established under the general exceptions clauses of WTO Agreements). Therefore, their inclusion in CETA indicates an even 'deeper' engagement between the EU and Canada on

[11] 'TTIP- EU Proposal for Chapter: Regulatory Cooperation' (2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf> accessed 22 July 2022; Ignacio Garcia Bercero, Geraldine Emberger and Jan Vandenberghe, 'EU-US Engagement on Regulatory Issues: Lessons Learnt, Notably in the Context of the TTIP Negotiations' [2018] European Foreign Affairs Review 149.

[12] Melo Araujo, 'Regulating through Trade: The Re-Calibration of EU Deep and Comprehensive FTAs' (2019) 31 Pace International Law Review 377, 379, 383-384.

[13] As classified by the EU, the 'second' or 'new generation' FTAs are the ones that extend to *new* areas such as sustainable development see Commission, 'EU Trade Agreements: Delivering New Opportunities in Times of Global Economic Uncertainties' (2019) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2071> accessed 22 July 2022 (emphasis added).

[14] CETA, art 21.1.

sustainable development-related issues.[15] In comparison, other new generation FTAs such as the EU-Korea,[16] EU-Columbia-Peru-Ecuador,[17] EU-Central America,[18] EU-Vietnam,[19] EU-Singapore,[20] EU-Mercosur[21] do not contain a standalone chapter on regulatory cooperation on TSD. The EU-Japan FTA contains a chapter entitled 'Good Regulatory Practices and Regulatory Cooperation' but it does not extend to the TSD chapters.[22] Similarly, the EU-Mexico FTA, if concluded, will contain a chapter entitled 'Good Regulatory Practices' (GRPs).[23] It will have a narrow scope as GRPs typically carry directions for internal consultations with regulatory agencies, trans-governmental coordination, maintaining regulatory transparency and impact assessments and the draft text does not carry an express mention of TSD as an intended area for regulatory cooperation.

The extension of regulatory cooperation over labour and environmental standards as seen in CETA can be attributed to the shared interest of the EU and Canada to pursue them in international relations,[24] underpinned by their respective

[15] LSE, 'Comparative Analysis of Trade and Sustainable Development (TSD) Provisions for Identification of Best Practices to Support the TSD Review' (2021) <https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159899.pdf> 125.
[16] [2011] OJ L127/6.
[17] [2012] OJ L354/3.
[18] [2012] OJ L346/3.
[19] [2020] OJ L186/3.
[20] [2019] OJ L294/3.
[21] 'EU-Mercosur Agreement: The Agreement in Principle' (2021) < https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/agreement-principle_en> accessed 22 July 2022.
[22] Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/30 (EU-Japan FTA), art 18.1.2.
[23] For a discussion on the components of GRPs see ch 2 of this thesis, section 4.
[24] ibid.

normative and internationalist actorness,[25] and calls for further analysis.

3.1. Regulatory Cooperation for Sustainable Development: Assessing its Potential under CETA

The Regulatory Cooperation Forum (RCF) is the specialised CETA committee responsible for facilitating regulatory cooperation between the EU and Canada.[26] The previous chapter demonstrated that under CETA, regulatory cooperation is a trans-governmental (state to state) process carried out by public departments and agencies in the EU and Canada. However, there is a provision to consult with private entities comprising stakeholders and representatives from academia, think-tanks, NGOs, and business and consumer organisations[27] that opens an avenue for transnational engagement on regulatory cooperation within the CETA framework. This also means that interested parties from the EU Member States and Canada can engage in prioritising areas for regulatory cooperation.

At the time of writing, the RCF has conducted one such round of consultations in 2018 (RCF Consultation).[28] The sections that follow analyse the extent to which labour and environmental standards have been promoted through the RCF Consultation.

3.2. Regulatory Cooperation and Labour Standards

The issue of labour standards was not raised in any of the (over fifty) stakeholders' responses received during the RCF

[25] See chs 4 and 5 of this thesis.
[26] CETA, art 21.6.1.
[27] CETA, art 21.8.
[28] 'Consultations on the Canada European Union Comprehensive Economic Trade Agreement' (2018) <https://open.canada.ca/data/en/dataset/c45c4cda-7134-4e65-8e99-5214eb07bcf3#wb-auto-6> accessed 22 July 2022 (RCF Consultations).

Consultation. This is a setback for CETA's TSD agenda because the first chance to diffuse a key aspect of social sustainability in the governance of trade has been lost. There was, however, one submission that suggested the RCF should consider the issue of modern slavery[29] for regulatory cooperation. Specifically, the submission from Professor Errol Mendes stated that regulatory cooperation (i) should combat modern slavery in EU-Canada supply chains (ii) consider issues relating to Canadian corporations whilst drawing parallels with the governance of corporations in the EU (iii) consider regulatory cooperation on conflict minerals and (iv) discuss, through research and pilot projects, implications of the interaction between US-Canada-EU-UK companies.[30] There is a difference in the definitional premise of modern slavery between Canada and the EU as 'child labour is the centrepiece of the proposed Modern Slavery legislation' in Canada.[31] Additionally, Canada relies much more on the ILO conventions instead of OECD frameworks that the EU prefers in this respect. Therefore, the EU and Canada would benefit from regulatory cooperation on modern slavery, to reduce divergences and improve regulatory implementation and compliance.[32]

It is unfortunate that modern slavery has not been considered as a vital area for regulatory cooperation under CETA even though the EU seeks to make global supply chains 'more responsible' and is 'concerned with jobs in specific export-

[29] For definition see ch 3 of this thesis.
[30] RCF Consultations (n 28).
[31] Sara L Seck and Penelope Simons, Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement (Final Report for the SSHRC Knowledge Synthesis Grant, 2020) 21.
[32] CETA, arts 21.3(b)(vi) and 21.3(b)(vii).

oriented industries'.[33] Additionally, the Commission highlighted its commitment to ensure the protection of labour standards in the minerals trade.[34] It stated that CETA includes the obligation to promote CSR in this respect.[35] This is all the more reason to explore the relevance of the EU-Canada partnership in this respect. The paragraphs below contain suggestions to develop a framework for addressing modern slavery through CETA.

3.2.1. Modern Slavery in Supply Chains

The ILO covers forced labour, debt bondage, forced marriage, slavery and slavery-like practices, and human trafficking under the definition of modern slavery.[36] Out of these, the issue of forced labour has a direct interface with trade and supply chain sustainability.[37] The ILO has adopted instruments that outline the strategic framework for addressing forced labour under the core Convention.[38] The EU approaches modern slavery predominantly from a human rights perspective to address human trafficking.[39] Consequently, forced labour is addressed under the ambit of 'business and human rights' through policy instruments such as strategic frameworks and action plans.

[33] James Harrison and others, 'Labour Standards in EU Free Trade Agreements: Working Towards What End?' (2016) 5 GREAT Insights Magazine 34.
[34] Commission, 'The EU Ensuring a Sustainable Minerals Trade' (2017) <https://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155508.pdf> accessed 22 July 2022.
[35] ibid.
[36] *Global Estimates of Modern Slavery* (ILO 2017) 10.
[37] ibid. 12.
[38] 2014 Protocol to ILO Convention No. 29 on Forced Labour, 1930 and its accompanying Recommendation No. 203.
[39] Silvia Scarpa, *Contemporary Forms of Slavery* (European Parliament 2018) 46.

3.2.2. EU Policy on Modern Slavery in Supply Chains

There is no comprehensive framework on modern slavery at the EU level,[40] but there are soft law frameworks to guide EU trade policy.[41] The EU assumes the role of a multilateral actor, seeking upward vertical convergence with international legal frameworks. For instance, the frameworks developed at the EU level direct that the implementation and vertical integration of national policies with UN Guiding Principles on Business and Human Rights,[42] the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and ISO 26000 be promoted through its trade policy.[43] The EU relies on trans-governmental engagements, acting through the Commission to coordinate with third countries.

Up until now the EU had been more proactive in proposing regulatory measures concerning conflict minerals. It adopted Regulation (EU) 2017/821 which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.[44] This regulation broadly promotes the

[40] ibid. 'The EU currently lacks a coherent, comprehensive and overarching conceptual framework dedicated to contemporary forms of slavery in its external action.'
[41] The Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (2012) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 22 July 2022; The Council of the European Union, *EU Action Plan on Human Rights and Democracy* (European Union 2015).
[42] Daniel Augenstein, Mark Dawson and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' (2018) 3 Business and Human Rights Journal 1.
[43] The Council of the European Union, *EU Action Plan on Human Rights and Democracy* (n 41) Objective 18.c. and Objective 25.d.
[44] OJ L130/1. This regulation entered into force on 1st January 2021.

OECD's framework on supply chain due diligence[45] but does not just concern slavery. More recently, the EU has encouraged businesses across all sectors of production and all levels of the supply chain to adopt the Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in their Operations and Supply Chains as part of RBC[46] based on the OECD framework and draws specific considerations to tackle forced labour in supply chains.

3.2.3. Canadian Policy on Modern Slavery in Supply Chains

Canada has conducted consultations with trade unions, businesses, experts, investors, CSOs, and provinces and territories, on potential regulation to address labour exploitation in global supply chains.[47] A Bill for the enactment of a Conflicts Minerals Act was introduced in the Parliament but it was defeated in the second reading.[48] Had the Bill been enacted, Canadian companies would have been required to 'exercise due diligence in respect of the exploitation and trading of designated minerals originating in the Great Lakes Region of Africa'[49] on similar lines to the EU. At present, for mining, extraction and

[45] Comprising requirements to fulfil Management Systems Obligations (art 4); Risk Management Obligations (art 5); Third-party Audit Obligations (art 6); Disclosure Obligations (annual reporting of supply chain due diligence policies and practices by the importer) (art 7); see also Ionel Zamfir, 'Towards a Mandatory EU System of Due Diligence for Supply Chains' (*European Parliamentary Research Service*, 2020) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf> accessed 22 July 2022, 4.

[46] European Union External Action, 'Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains' (2021) <https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf> accessed 22 July 2022.

[47] Government of Canada, 'Supply Chain Consultations' (2019) <https://www.canada.ca/en/employment-social-development/programs/international-affairs/consultation-supply-chains/issue-paper.html> accessed 22 July 2022.

[48] 'Bill C-486 (Historical) Conflict Minerals Act' (2015) <https://openparliament.ca/bills/41-2/C-486/> accessed 22 July 2022.

[49] ibid.

conflict minerals, Canada promotes its own policy initiatives as well as the UN and OECD frameworks.[50] Multinational corporations are free to choose from the various frameworks and make disclosures as per the conditions stipulated therein.

Initially, the Government of Canada did not use the term 'modern slavery' stating that it is not defined in international law or domestic legislation.[51] Canada's approach to labour exploitation primarily focuses on child labour but is not intended to be strictly restricted to this issue.[52] A new bill, to enact the Modern Slavery Act and to amend the Customs Tariff legislation has been introduced in the federal Senate.[53] The bill does not define modern slavery but states that the Act will apply to prevent and reduce child labour and forced labour in the production of goods in Canada or elsewhere but imported by Canadian companies. The ILO Conventions on the Abolition of Forced Labour, 1957 (No. 105) and the Worst Forms of Child Labour, 1999 (No. 182) are the overarching frameworks of the Bill.

3.2.4. A Framework for Addressing Modern Slavery under CETA

3.2.4.1. Promoting Soft Law in Transnational Legal Process

The use of soft law may be helpful in addressing modern slavery in supply chains through regulatory cooperation under CETA. This will in turn feed into the Parties' aspiration to encourage

[50] For the complete list of initiatives see Government of Canada, 'CSR Abroad - Performance Standards and Guidelines' <https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/csr-abroad-performance-standards-and-guidelines/17229> accessed 22 July 2022.
[51] Government of Canada, 'Supply Chain Consultations' (n 47).
[52] ibid.
[53] Bill S-211 An Act to enact the Modern Slavery Act and to Amend the Customs Tariff 2020. First Session, 43rd Parliament 2019-2020.

CSR through the agreement.[54] At times, a differentiation is drawn between labour standards as human rights on the one hand and as sustainable development objectives on the other to analyse the 'shift' in the EU's approach to the trade-labour linkage.[55] However, CSR and RBC policy direct 'businesses [to] contribute more or less voluntarily to the societal guiding vision known as sustainable development'[56] referring to labour standards in its context. Analysis demonstrates that state-backed initiatives at the national and international levels lead to 'hardening' corporate accountability by mandating reporting from businesses.[57] This is in line with the observation that soft law is instrumental in the development of hard law commitments.[58] Regulatory cooperation can thus be utilised to stir business activity and compliment governmental initiatives and the work of social actors on labour and environmental standards. This is to say that any progress in this respect will foster the achievement of environmental objectives through labour law – a contribution towards just transitions. As has been highlighted in Section 2.1.4. in Chapter 3 of this thesis, the field of just transitions aims the protection of societal interests in the

[54] CETA, arts 21.1 and 22.3.2(b).
[55] Tonia Novitz, 'Labour Standards and Trade: Need We Choose Between "Human Rights" and "Sustainable Development"?' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 113; Aakriti Bhardwaj and Jeff Kenner, 'Labour Standards in EU-Mexico Trade: An Assessment along Two Narratives of Convergence' in Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020) 221.
[56] Reinhard Steurer, 'Soft Instruments, Few Networks: How "New Governance" Materializes in Public Policies on Corporate Social Responsibility Across Europe' (2011) 21 Environmental Policy and Governance 270.
[57] In the context of the legislations in the US, UK, Australia and France and the United Nations Guiding Principles see Justine Nolan, 'Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?' [2018] Revista de Direito Internacional and Rae Lindsay, Anna Kirkpatrick and Jo En Low, 'Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights' (2018) 18 Business Law International 29.
[58] See ch 3 of this thesis, section 3.5.

process of decarbonising economies. Since labour standards are a component of these interests, labour and environmental standards interlink in just transitions. CETA carries the requisite provisions to support the expansion of the linkage between the disciplines of labour and environment.

3.2.4.2. Building the Horizontal Dimension

CETA contains a separate chapter on Bilateral Dialogues and Cooperation.[59] Neither the regulatory cooperation chapter nor the labour chapter applies to the provisions setting up these bilateral dialogues. However, Article 25.4 of this chapter seeks to establish a dialogue on raw materials promoting the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[60] The OECD frameworks recognise the centrality of ILO conventions and standards in addressing child labour and forced labour in supply chains.[61] Therefore, the CETA Joint Committee and the TSD Committee should consider undertaking labour-related issues in supply chain sustainability to aid Bilateral Dialogues and Cooperation. In this manner, the horizontal dimension can be strengthened through the institutions set up by CETA which would then help facilitate progress along the vertical dimension.

3.2.4.3. Contributing to Supply Chain Governance

Since Canada and the EU are in the process of introducing legislation on human rights due diligence, the parties could exchange information on the results of public consultations and follow-up actions. This is another aspect where trans-

[59] CETA, ch 25.
[60] CETA, art 25.4.2(c).
[61] *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 37; *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD 2018) 11.

governmental engagements could shape regulatory governance. In *Nevsun Resources Ltd v Araya,*[62] the Canadian Supreme Court held that a Canadian company pushing workers into forced labour in a mine owned by it in Eritrea would be liable under Canadian law for breach of customary international law. The Court also stated that it does not have the jurisdiction and the resources to monitor the impact of its decisions abroad.[63] In this context the court highlighted the role of the executive as follows:

> [..] the executive has the resources to study complex matters of state, conduct research, and consult with affected groups and the public […] can craft broad legal and institutional responses to these issues […] create delegated regulatory authority, and implement policy and procedures […] develop specialized units with a mandate to monitor, make recommendations, implement and, where necessary, adjust a course of action. The domain of foreign relations is, in our view, perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so.[64]

Therefore, in the context of CETA, coordination and communication between Global Affairs Canada and the Trade Commissioner Services on the one hand and the Commission and respective DGs on the other is necessary for such decisions to have extraterritorial effect. Chapter 1 of this thesis highlighted the role of the executive in EU and Canadian trade policy.

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[62] *Nevsun Resources Ltd v Araya* 2020 SCC 5.
[63] ibid. para 256.
[64] ibid.

The example of the Canadian Bill on Conflict Minerals demonstrates how challenging the issue of ensuring responsible supply chains is. The Bill was not enacted into law because it was modelled after the Dodd-Frank Act of 2009 enacted in the US. Canadian senators were not convinced if that Act had achieved its purpose.[65] It is one of the examples of Canada taking a differing stance from the US for a valid reason. An unintended negative consequence of the Dodd-Frank Act was that multinational corporations simply stopped buying minerals from the Great Lakes Region of Africa. Both Canada and the EU are aware of this consequence of the US legislation and its negative impact on jobs in poor communities.[66]

The EU has taken a 'lessons learnt' approach after witnessing the effects of the US legislation.[67] As a result, the EU regulation differs from the US legislation on four counts: (i) it has an open geographic scope and does not apply to an area or region as defined in the US legislation (The Democratic Republic of Congo and neighbouring countries) (ii) it is applicable to a narrower range of companies i.e., only importers of gold (3TG), smelters and refiners as opposed to all listed companies on the New York Stock Exchange manufacturing or contracting to manufacture tin, tungsten, tantalite, and gold (3TG) (iii) it requires that companies demonstrate that they have a due diligence procedure in place instead of requiring them to mention that their products are 'conflict free' and (iv) it makes enforceability mandatory for large importing multinational corporations but

[65] See 'House Debate', 'Bill C-486 (Historical) Conflict Minerals Act' (n 48).
[66] European Commissiom, 'Responsible Supply Chains: What's the EU Doing?' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154020.pdf> accessed 22 July 2022.
[67] Dirk-Jan Koch and Olga Burlyuk, 'Bounded Policy Learning? EU Efforts to Anticipate Unintended Consequences in Conflict Minerals Legislation' (2020) 27 Journal of European Public Policy 1441.

voluntary for SMEs.[68] By working in partnership with Canada, the parties could exchange expertise on assessing the performance of the regulation and also consider steps to duplicate its requirements with other partners.

3.3. Regulatory Cooperation and Environmental Standards

For environmental standards, Canada and the EU received several responses from stakeholders in the RCF consultation completed on 16 February 2018.[69] One of the concerns highlighted by EU-based groups is along the vertical dimension and seeks greater representation of sub-national interests within member states as the German Association of Cities stated that[70]

> In the event that the RCF discusses policies which directly affect the local level including but not limited to policy areas such as […] environmental regulation, it is of utmost importance to include the umbrella associations of municipalities appropriately.

Otherwise, the area of risk regulation emerges as the most prominent concern of stakeholders representing environmental interests. Their responses can be categorised as arguments: (i) on the negative impact of regulatory cooperation on environmental standards (ii) in support of the EU's approach to risk regulation and (iii) in support of the Canadian approach to risk regulation. These are discussed as follows:

[68] ibid.
[69] RCF Consultations (n 28).
[70] ibid.

3.3.1. Regulatory Cooperation and Protection of Environmental Standards

Organisations such as the Canadian Environmental Law Association (CELA) and Environmental Defence expressed concern that 'regulatory cooperation can result in the weakening of regulations designed to protect human health and the environment'.[71] ClientEarth, representing EU interests, expressed its outright opposition to regulatory cooperation on environmental standards. They contended that chemicals and pesticides should not be the subject matter of regulatory cooperation at all given the regulatory divergences between the EU and Canada.[72] The Irish Environmental Network criticised regulatory cooperation for its potential negative impact on the EU environmental acquis[73] and its position in the international fora on environmental protection and climate action.

EU-based Lobby Control stated that regulatory cooperation along the horizontal dimension of CETA is 'particularly dangerous for regulations in the public interest'. The group highlighted that the sweeping capacity to cover '*any* new legislation in the field of biotechnology'[74] has the potential to weaken EU standards. They also questioned the need to have a provision stating that the bilateral dialogue on biotechnology will cover 'any relevant issue of mutual interest' given that Canada has challenged the EU risk regulations at the WTO in the past.[75]

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[71] RCF Consultations (n 28).
[72] ibid.
[73] For the discussion on the EU environmental acquis see ch 4 of this thesis.
[74] CETA, art 25.2(e); Submission of Lobby Control, RCF Consultations (n 28).
[75] ibid. For the discussion on the *EC-Biotech* case see ch 3 of this thesis.

3.3.2. Support for the EU's Approach to Risk Regulation

In their submission, CELA and Environmental Defence state that the Canadian Environmental Protection Act, 1999[76] should adopt the *stronger* precautionary aspects of the EU's REACH program.[77] EU-based Trade and Environment presented a six-point proposal for regulatory cooperation in the areas of (i) public procurement (ii) climate change (iii) fossil fuel subsidies (iv) CSR frameworks (v) cooperation with multilateral secretariats (vi) bilateral dialogues in areas covered by (iii) and (iv). Along similar lines, the need to safeguard EU animal health standards was expressed in reference to horsemeat and genetically modified salmon by stakeholders representing animal welfare who argue that US and Canadian standards diverge considerably from that of the EU in the area of SPS.[78] EU-based Lobby Control stated that Article 21.4(n)(iv) is inconsistent the EU's approach to the precautionary principle by promoting its North American interpretation. The Article states that the parties 'conduct cooperative research agendas in order to [...] establish, when appropriate, a common scientific basis'.

3.3.3.Support for Canada's Approach to Risk Regulation

The submissions of Canadian stakeholders representing industry interests expressed disagreement with the EU's approach to risk regulation.[79] Canadian stakeholders contend that the EU's approach is in violation of international scientific

[76] Canadian Environmental Protection Act, 1999, SC 1999, c 33.
[77] Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC (18 December 2006) (emphasis added).
[78] See submission of Animal Rights Sweden and Eurogroup for Animals, RCF Consultations (n 28).
[79] On the respective international, EU and Canadian perspectives see chs 3, 4 and 5, respectively.

agreements and WTO obligations,[80] and driven by the EU's internal politics.[81] One Canadian stakeholder suggested that working with the US is far more convenient as its regulatory approach to risk aligns with that of Canada.[82] Even where business stakeholders have suggested an alignment of EU-Canadian approaches, the expectation is that the EU will take the approach prevalent in North America.[83]

Non-economic civil society actors see defensive interests in EU-Canada trade.[84] It also emerges that within the vertical as well as the horizontal dimensions, there is a rift between the transnational strands of regulatory governance with economic/industry actors on the one hand and non-economic/social actors on the other. Let us consider an aspect related to state preferences in risk regulation in CETA that may throw some light on the direction of future developments in this respect.

The CETA chapter on 'Bilateral Dialogues and Cooperation'[85] seeks to 'promote efficient science-based approval processes for biotechnology products'[86] and is especially relevant for GMO-related issues. The subsequent provisions 'to cooperate internationally on issues related to biotechnology, such as low-level presence of GMOs'[87] and 'engage in regulatory cooperation

[80] See submissions of Canadian Meat Council, Cereals Canada, RCF Consultations (n 28).
[81] Submissions of Canadian Toy Association, Cereals Canada, RCF Consultations (n 28).
[82] Submission of Canadian Vehicle Manufacturers Association presented in the context of chemicals regulation containing reference to the Stockholm, Rotterdam, Basel and Minamata Conventions, RCF Consultations (n 28).
[83] Submission of Cereals Canada, Croplife and Saskatchewan Ministry of Agriculture, RCF Consultations (n 28).
[84] The very reason the civil society mobilised against CETA see ch 6, section 5.1(referring to the particular interviewees statement).
[85] CETA, ch 25.
[86] CETA, art 25.2.2(b).
[87] CETA, art 25.2.2(c).

to minimise adverse trade impacts of regulatory practices related to biotechnology products'[88] may symbolise an inclination toward the Canadian approach to risk regulation notwithstanding the voluntarism underlying the cooperation-based provision. In section 2.1.2, Chapter 3 of this thesis I discussed that the EU and Canada differ in their application of the precautionary principle, particularly the methods to arrive at scientific information and the extent of its utilisation to regulate risk. I also explained that the provisions of CETA directing cooperation on GMOs are a result of the decision rendered by the WTO in the *EC-Biotech* case that essentially rejected the European interpretation of the precautionary principle. It is therefore possible that in practice the EU moves closer to the North American approach to risk regulation with respect to the regulation of GMOs. EU member states like France and Italy have expressed opposition to this shift as a matter of policy.[89] However, the judgment of the French Constitutional Court in the respect of CETA as discussed in Section 5.1.1, Chapter 4 of this thesis[90] did not consider this shift as a tacit threat to the European approach to risk regulation.[91]

[88] CETA, art 25.2.2(d).

[89] Commission, 'Several European Countries Move to Rule Out GMOs' <https://ec.europa.eu/environment/europeangreencapital/countriesruleoutgmos/> accessed 22 July 2022.

[90] French Constitutional Council, Judgment of 31 July 2017, No. 2017-749 DC available at < https://www.conseil-constitutionnel.fr/en/decision/2017/2017749DC.htm>.

[91] ibid. The TSD provisions are discussed in the context of the precautionary principle based on the contention of the applicants that CETA undermines the EU's criteria on risk regulation. The French Constitutional Council relied on TFEU, art 191(2) and CETA, ch 22, art 24.8.2 and para 9 of the supplementing Interpretative Instrument to hold that the principle is protected under EU law and respected by CETA, respectively. Furthermore, the judgement states that CETA's chapter on regulatory cooperation does not infringe the precautionary principle either see para 61.

3.4. On the Lack of Progress on Labour and Environmental Standards in Regulatory Cooperation under CETA

Coming to the content of regulatory cooperation, at a CETA stakeholder RCF debriefing session held on 10 February 2021, three important points of significance to labour and environmental standards emerged.[92]

First, neither labour nor environmental issues receive the exclusive focus of the RCF. Instead, the parties continue to take a sectoral approach to regulatory cooperation, covering consumer product safety, 'cosmetic-like' drug products, pharmaceutical inspections, cybersecurity, animal welfare, and pediatric medicines. These sectors were identified based on the submissions received from all stakeholders at the first call for consultations for regulatory cooperation conducted in 2018. It is unlikely that we will see an expansion in these areas as the officials stated that much is left to be done in the identified sectors.[93]

Second, the RCF is not keen on engaging on labour standards even though the regulatory cooperation chapter applies to CETA's labour chapter. The panel stated that labour does not fall under the ambit of regulatory cooperation *stricto sensu* and since there is a specialised TSD committee, labour standards are best left to be dealt with by the said committee.[94] Even in the aftermath of the Covid-19 pandemic, labour standards are

[92] Commission, 'CETA Regulatory Cooperation Forum - Stakeholder Debrief Meeting' (2021) <https://single-market-economy.ec.europa.eu/events/ceta-regulatory-cooperation-forum-stakeholders-debrief-meeting-2021-02-10_en> accessed 22 July 2022.
[93] ibid. In response to the question 'When can we expect regulatory cooperation to cover areas?' that I asked during the debriefing. Notes my own.
[94] ibid. In response to the question 'The Regulatory Cooperation Chapter of CETA applies to the Trade and Labour Chapter of the agreement. Has the RCF considered issues related to labour standards? Especially after the covid-19 outbreak?' that I asked during the debriefing. Notes my own.

unlikely to receive the attention of the RCF and will be left to be discussed in the CSF.[95] The TSD committee should take note of the submissions made at the time of the RCF consultations because there is a provision stating that '[…] the Parties shall discuss […] views presented by stakeholders'[96] for the effective implementation of CETA's labour provisions.

Third, even where environmental concerns are related to the areas identified for regulatory cooperation, they are not considered in tandem. For instance, when the RCF discussed the issue of consumer products or 'cosmetic like' drugs, the TBT or SPS measures with environmental implications were not taken up. There has been no discussion on transboundary pollution from an environmental or climate change perspective.[97] Furthermore, the idea of just transitions that is equally relevant for labour and environment, has not been considered at all.

The observations reflected in the paragraphs above are based on the discussions significant for labour and environmental standards in the first four years of CETA's implementation. For now, it can be concluded that as such there is no categorical focus on both labour and environmental standards in the process of regulatory cooperation.

Let us now consider the potential to improve regulatory governance by utilising the provisions of Chapters 23 and 24 of

[95] 'In light of the challenges posed by COVID-19, participants are encouraged to provide perspectives, including on sustainable supply chains.' '2020 EU-Canada CETA Civil Society Forum' <https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159110.pdf> accessed 22 July 2022.
[96] CETA, art 23.11.3.
[97] Commission, 'CETA Regulatory Cooperation Forum - Stakeholder Debrief Meeting' (n 92). In response to a question asked by another participant on cooperation on environmental standards. Notes my own.

CETA that are dedicated to labour and environment, respectively.

Part II

4. The Trade and Labour Chapter

The labour chapter of CETA is set in the context that globalisation must be a vehicle for ensuring economic and social well-being.[98] The provisions draw on 'full and productive employment' and 'decent work' as benchmarks[99] and undertake to promote ILO core labour standards in accordance with obligations under the 1998 Declaration on Fundamental Principles and Rights at Work, the Decent Work Agenda and the 2008 Declaration on Social Justice for a Fair Globalization.[100]

Building on existing analysis of conflicting interests in the sphere of labour standards and international economic law along vertical and horizontal dimensions,[101] we now consider the potential impact of CETA on substantive labour standards.

4.1. Labour Standards in North-North Trade

Europe and North America have attempted to address the globalisation-related challenges posed to labour regulation. Insofar as domestic labour standards are concerned, both the EU and Canada see nationally rooted regulation models of labour standards at the workplace and labour relations come under increased pressure from international economic

[98] CETA, art 23.1.1.
[99] ibid.
[100] Research Participant No. 4, Canada CSO.
[101] The vertical dimension comprising ILO-member country interaction and the horizontal dimension comprising inter alia ILO-WTO interaction, respectively see Christine Breining-Kaufmann, *Globalisation and Labour Rights* (Hart Publishing 2007) 243-272.

integration.[102] One of the interviewees from the EU delegation has suggested that labour is not a matter of competition between the EU and Canada as seen in North-South trade agreements.[103] Another interviewee pointed out that nevertheless, there are 'gaps' in labour regulation requiring improvements of labour standards within the EU as well as Canada.[104] Alternatively, the interviewee stated that if the EU and Canada were pursuing the same strategy in an FTA with a developing country, there would be no reason not to pursue the same with each other, especially since CETA is called a gold standard agreement.[105]

4.2. Labour Governance

The EU utilises horizontal dialogue in trade policy to promote the ratification of ILO conventions in partner countries. This approach has achieved some success with developing countries.[106] When CETA negotiations began, Canada had not ratified all of the core labour conventions.[107] For this reason, CETA provides that '[…] Parties shall make continued and sustained efforts to ratify the fundamental ILO conventions […]'.[108] The fact that the ratification of the two remaining core

[102] Harry Arthurs, 'Who's Afraid of Globalization? Reflections on the Future of Labour Law' in John D R Craig and S Michael Lynk (eds), *Globalization and the Future of Labour Law* (CUP 2006) 56 and Brian Bercusson and Cynthia Estlund, ' Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Brian Bercusson and Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Hart Publishing 2008) 12.
[103] Research Participant No. 5, Canadian CSO.
[104] Research Participant No. 4, Canadian CSO.
[105] ibid.
[106] 'The ILO and the EU, Partners for Decent Work and Social Justice' (2012) <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf> accessed 22 July 2022, 9.
[107] The Right to Organise and Collective Bargaining Convention, 1949 and the Minimum Age Convention, 1973 (No. 138) were ratified on 14 June 2017 and 8 June 2016, respectively. In comparison, all EU Member States have ratified all ILO core conventions see *Analysis – In the Light of the European Union Acquis – of ILO Up to Date Conventions* (European Commission 2012).
[108] CETA, art 23.3.4.

conventions by Canada coincides with the timeline of CETA's negotiation and signing prompts the question whether the EU played a role in the process.[109] Since the EU undertakes ex-post evaluation of its trade agreements[110] and adopts a cooperation-based approach to the ratification of ILO conventions,[111] it is unlikely that Canada acted under the EU's insistence. A Canadian civil society representative explains that even if Canada ratified the ILO conventions as a 'price of entry' into the EU market,[112] ratification does not resolve the challenges faced in domestic (vertical) implementation given the highly decentralised Canadian federal structure and the provincial powers in the field of labour.[113]

Similar constraints exist for the EU in labour law and social policy, necessitating sincere cooperation[114] of its Member States on international labour standards in EU trade agreements. However, there is one key difference. The social partners work with the EU institutions to mobilise the process of reconciling 'the economic' and 'the social' as Member States retain shared competence over labour laws with the EU.[115] They also call for

[109] Especially since all EU Member States are signatories to all fundamental ILO conventions.
[110] 'Ex Post Evaluations' <https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/index_en.htm> accessed 22 July 2022.
[111] CETA, art 23.3.4 '[…] The Parties shall exchange information on their respective situations and advances regarding the ratification of the fundamental as well as priority and other ILO Conventions […]'.
[112] Research Participant No. 4, Canada CSO. The participant also stated that this cannot be confirmed officially on either the Canadian or EU side.
[113] ibid. Only 6% of the Canadian labour legislation is covered at the Federal level; on federal powers in the area of Canadian labour law see ch 5 of this thesis.
[114] TEU, art 4(3) see also ch 4 of this thesis, section 2.1 (Constitutional Underpinnings: Mixed Agreements and Sincere Cooperation).
[115] TFEU, art 4 see also Phil Syrpis, 'The EU and National Systems of Labour Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 944.

the ratification and observance of ILO conventions.[116] On the Canadian side, trans-provincialism[117] is absent. The participation of social actors is not underpinned by constitutional provisions and is far less institutionalised. Therefore, the two strands of regulatory governance i.e., trans-governmental and transnational are more embedded in the EU's legal system. This could work to the advantage of facilitating a network form of governance as public and private actors interact within the internal market.

The horizontal dimension on trade and labour is narrow under CETA. In other words, labour standards are not addressed beyond the TSD chapters in other provisions of the agreement. In comparison, the horizontal dimension on environmental standards, discussed in the subsequent sections on Trade and Environment, is wider. The TSD Committee may make recommendations to the CETA Joint Committee to modify the relevant provisions of the Trade and Labour Chapter[118] but given that recommendations of CETA committees are non-binding in nature[119] this would not trigger amendment procedures.

[116] For example the European Trade Union Confederation makes suggestions to the EU see Commission, *Analysis – In the Light of the European Union Acquis – of ILO Up to Date Conventions* (European Union 2014) 103-105; Europêche and The European Transport Workers' Federation, 'EU Social Partners Promote Ratification of ILO Work in Fishing Convention C188 in Bulgaria' <https://europeche.chil.me/attachment/154dee78-122d-452c-ad6b-2213d2265a09> accessed 22 July 2022.
[117] On division of powers in the Canadian legal system see ch 5 of this thesis. I have explored trans-provincialism in Canada as a parallel to transnationalism in the EU's context.
[118] CETA, art 23.11.5.
[119] Wolfgang Weiss, 'Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament' (2018) 14 European Constitutional Law Review 532, 539.

The discussion on the lack of regulatory cooperation on labour standards in Section 3.2 above is an example of restrictions to addressing labour standards more widely under other CETA chapters. This means that there are obstacles to constructing a framework to address issues related to employment and job creation that could have been addressed in relation to other provisions of the agreement.

Chapter 10 of CETA on labour mobility, states that

> 'all requirements of the Parties' laws regarding employment and social security measures shall continue to apply, including regulations concerning minimum wages as well as collective wage agreements.'[120]

Considering that in the EU as well as Canada, minimum wages are not administered centrally,[121] the enforcement of this provision is a matter for national and sub-national governmental authority. The Commission has proposed a directive on adequate minimum wage but it does not stipulate an amount as minimum wage.[122] While this is an attempt at upwards convergence in the EU, Canada relies on upwards and horizontal coordination for the administration of international labour standards in the national domain.

CETA provisions also leave it to the Parties to set their labour-related priorities, protections with the condition that their modification is in accordance with ILO conventions and frameworks.[123] These provisions exemplify the paradox that

[120] CETA, art 10.2.5.
[121] Discussed as part of EU/Canada labour policy in Chs 4 and 5, respectively of this thesis.
[122] Commission, Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union COM (2020) 682 final.
[123] CETA, art 23.2 and art 23.4 (emphasis added).

leads to 're-nationalisation of labour standards' in a globalised economy.[124] Cooperation on labour standards is likely to remain focussed on local priorities. This confines most governance aspects within the vertical dimension. The institutional mechanisms under CETA like the TSD committee, the CSF or the panel of experts (in case of a dispute) may direct the parties to improve or implement labour regulations. However, the implementation of such decisions or recommendations taken along the horizontal dimension will rely on the progress made under the vertical dimension. Therefore, a relationship of *dependability* emerges between the two dimensions insofar as the regulatory governance of labour standards is concerned.

4.3. Labour Standards and Supply Chain Governance

The Trade and Labour chapter states that 'policy coherence in decent work, encompassing core labour standards, and high levels of labour protection coupled with their *effective enforcement*'[125] significantly impacts 'economic efficiency, innovation and productivity, including export performance'.[126] In this connection CETA recognises the centrality of social dialogue[127] on labour matters for sustainable supply chains.[128] The need for efficient supply chains is also expressed by the Canada Supply Chain Management Association in their submission as part of the RCF Consultation.

As the previous chapter outlines, for civil society participants representing social and environmental interests as opposed to

[124] Roger Blanpain, 'The Globalisation of Labour Standards: The Soft Law Track' (2007) 14 Tilburg Law Review 10, 15.
[125] CETA, art 23.1.2 (emphasis added).
[126] ibid.
[127] CETA, art 23.1.2.
[128] ILO, 'Sustainable Enterprises and Jobs: Formal Enterprises and Decent Work' (2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_579893.pdf>.

business and industry interests, effective enforcement essentially encompasses conditionality and, in this direction, according to labour interest groups, CETA may be stepping back on a stronger trade and labour linkage.[129] They implore that labour standards should be addressed through an essential elements clause. These comments were made in the context of all EU FTAs containing TSD provisions[130] and may not be feasible in the case of CETA as neither Party would want to pursue renegotiation of the Agreement.

The EU successfully incorporated the essential elements clause in the EU-Canada Strategic Partnership Agreement (SPA) and linked it to CETA to protect human rights when Canada was not initially in favour of incorporating this clause. [131] The language of the 'essential elements' clause does not suggest that labour standards are covered by it. CETA can be terminated by either Party under the SPA which states that '[…] a particularly serious and substantial violation of human rights […] could also serve as grounds for [CETA's] termination […]'.[132] The SPA will effectively trigger Article 30.9 'Termination' of CETA. The SPA envisages a 'particularly serious and substantial violation' of human rights as a situation 'of an exceptional sort such as a coup d'état or grave crimes that threaten the peace, security and well-being of the international community.'[133] This definition concerns only the most serious crimes against

[129] On accountability in the context of CETA see Ch 6 of this thesis, section 5.3.
[130] Civil Society Dialogue on Trade and Sustainable Development Brussels 29 April 2019 see ch 1 of this thesis, section 4.3.2 (List of Meetings).
[131] Katharina L. Meissner and Lachlan McKenzie, 'The Paradox of Human Rights Conditionality in EU Trade Policy: When Strategic Interests Drive Policy Outcomes' (2019) 26 Journal of European Public Policy 1273.
[132] SPA, art 28.7.
[133] SPA, art 28.3.

humanity.[134] As far as human rights are concerned, the clauses under the SPA represent a novel approach for the EU to the extent that '[f]or the first time, not the suspension of the agreement, but the termination is envisaged, which makes the clause a truly 'nuclear option'.[135]

Two observations emerge. First, the SPA's essential elements clause offers restrictive scope on conditionality which does not extend to labour standards.[136] Second, we see that on the one hand, the EU successfully promotes human rights as a core norm in its external relations,[137] while on the other, the segregation between labour standards and human rights demonstrates that irrespective of the overlap between the two, the former is not promoted to the same extent in CETA and is a component of the *lesser* norm of sustainable development.[138]

Effective enforcement and social dialogue are two different modes for addressing labour protection through trade. However, looking at the architecture of CETA's trade and labour chapter, *effective enforcement apparently means promoting social dialogue* along the vertical and horizontal dimensions of CETA. Thus, regulatory governance *depends on* policy

[134] David Donat Cattin, 'Intervention of Humanity or the Use of Force to Halt Mass-Atrocity Crimes, the Peremptory Prohibition of Aggression and the Interplay between Jus ad Bellum, Jus in Bello and Individual Criminal Responsibility on the Crime of Agression' in Pia Acconci and others (eds), *International Law and the Protection of Humanity* (Brill 2016) 370-71.
[135] Ionel Zamfir, 'Human Rights in EU Trade Agreements' (2019) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf> accessed 22 July 2022, 10.
[136] This is because the scope of essential elements clauses depends on their wording which help decide whether they expand to cover certain areas such as labour standards see Nicolas Hachez, '"Essential Elements" Clauses in EU Trade Agreements Making Trade Work in a Way That Helps Human Rights?' [2015] Leuven Centre for Global Governance Studies Working Paper No. 158 97-98.
[137] Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 Journal of Common Market Studies 235.
[138] ibid (emphasis added); see also Ch 4 of this thesis for the discussion on Normative Power Europe.

negotiations, consultation, and exchange of information for strengthening social dialogue and institutional capacity building. This method requires transnationalism with non-state economic and social actors participating in the implementation of labour standards.[139] However, transnationalism is restricted to the monitoring and implementation of procedural standards[140] along the horizontal dimension, playing little role in extending regulatory governance of substantive standards along the vertical dimension.

It may be possible to engage with stakeholders and even the ILO for institutional support[141] but there are limitations. An interviewee stated that implementation of ILO core conventions and declarations at the national level is the only labour standards' obligation being pursued under CETA.[142] As discussed earlier in this chapter, the proposal to regulate combating modern slavery in supply chains between Canadian and EU corporations was not taken on board by the RCF[143] even though it is a target under Goal 8: Decent Work and Economic Growth of the 2030 Agenda for Sustainable Development.[144] Therefore, the probability of regulatory governance extending beyond the instruments identified in the Trade and Labour chapter remains low.

5. The Trade and Environment Chapter

Compared to labour standards, the horizontal dimension on environmental standards in CETA is capable of being much more

[139] Social CSOs especially are involved in grassroot level promotion and implementation of ILO standards see Research Participant No. 1, EU CSO.
[140] Discussed in the previous chapter.
[141] CETA, art 23.7.3 'The Parties may establish cooperative arrangements with the ILO […]'
[142] Research Participant No. 4, Canada CSO.
[143] RCF Consultations (n 28).
[144] SDG 8, Target 8.7.

widely applied. Obligations on environmental protection, on the lines of protecting domestic policy space and commitments under WTO agreements, are dealt with in several chapters of CETA. The section that follows demonstrate this by explaining the interlinkages between the Trade and Environment Chapter and other chapters of the agreement.

5.1. Environmental Standards in North-North Trade

Just like labour standards, environmental standards are not subject of much analysis in trading partnerships between developed economies. One reason for this is that the variation in the stringency of environmental standards is 'fairly limited' and so '[i]n trade-environment interaction, the action is in North-South interactions'.[145] In other words, it is assumed that environmental provisions in FTAs between developed and developing country create a trade-off between economic development and environmental protection.[146] Be that as it may, the universality of the SDGs[147] and the climate emergency, which makes climate action a global goal irrespective of the level of economic development a country has achieved,[148] are the fundamental justifications for pursuing environmental standards in an agreement like CETA.

[145] Leonardo Baccini and Johannes Urpelainen, 'Before Ratification: Understanding the Timing of International Treaty Effects on Domestic Policies' (2014) 58 International Studies Quarterly 29, 34.
[146] Clara Brandi and others, 'Do Environmental Provisions in Trade Agreements Make Exports from Developing Countries Greener?' (2020) 129 World Development 1.
[147] Adolf Kloke-Lesch, 'The Untapped Functions of International Cooperation in the Age of Sustainable Development' in Sachin Chaturvedi and others (eds), *The Palgrave Handbook of Development Cooperation for Achieving the 2030 Agenda* (Springer 2021) 127.
[148] Magnus Benzie and Åsa Persson, 'Governing Borderless Climate Risks: Moving Beyond the Territorial Framing of Adaptation' (2019) 19 International Environmental Agreements 369.

5.2. Environmental Governance

The horizontal dimension of the trade-environment linkage under CETA is extensive. Both parties can impose technical regulations, standards, and conformity assessment procedures without consultations in the case of environmental emergency,[149] prohibit market access for investments,[150] and promote environmental protection in the procurement process.[151] The General Exceptions chapter[152] incorporates GATT Article XX (b) and (g)[153] applicable to other chapters of the Agreement.[154] Excepting the chapters that are expressly excluded[155] from dispute resolution under CETA,[156] a Party can refer a matter to an arbitration panel.[157] Accordingly, the environment-related TBT and SPS measures can be brought before the panel. This may, however, not be beneficial for environmental governance. A WTO-like compliance mechanism will apply in such cases wherein, based on the findings in the panel's final report the responding Party will be required to comply with the final panel report.[158]

[149] CETA, art 4.6.1.
[150] CETA, arts 8.4.2(d) and 8.9.1.
[151] CETA, arts 19.9.6 and 19.9.9.
[152] CETA, art 28.3.1.
[153] CETA, art 28.3.
[154] Covering trade in goods (ch 2), sanitary and phytosanitary measures (ch 5), customs and trade facilitation (ch 6), Protocol on rules of origin and origin procedures, and in the case of establishment and treatment of investments (CETA, ch 8, sections B and C see also Annex 8-A, para 3). The GATT exceptions are replicated for trade in services (ch 9) and in respect of Temporary Entry and Stay of Natural Persons for Business Purposes (ch 10), Domestic Regulations (ch 12), Financial Services (ch 13), International Maritime Transport Services (ch 14), Telecommunications (ch 15), Electronic Commerce (ch 16), as well as investments (ch 8).
[155] Chapter 3: Anti-Dumping and Countervailing Measures; Chapter 8: Investments; Chapter 17: Competition Policy; Chapter 23: Trade and Labour and Chapter 24: Trade and Environment.
[156] CETA, ch 29.
[157] CETA, art 29.6.1.
[158] CETA, arts 29.10 and 29.12.

This aspect may reinforce the tension between trade and environmental obligations. As WTO jurisprudence in this respect has demonstrated,[159] it may be difficult for a party to justify domestic environmental measures. The EU-Ukraine dispute on softwood lumber is so far the only example where the EU has initiated arbitration under this type of procedure but the decision is pending at the time of writing. This dispute has been initiated under Article 306 of the Association Agreement between the European Union and Ukraine.[160] It concerns a temporary export ban imposed by Ukraine on all unprocessed timber.[161]

On promoting environmental standards through trade, the Parties aim to 'enhance mutual supportiveness between trade and environmental policies, rules and measures' in accordance with the MEAs they are party to.[162] The Trade and Environment chapter also covers obligations on sustainable trade in forest products,[163] fisheries and aquaculture products,[164] and the intention of the parties to cooperate on 'trade-related environmental issues of common interest'.[165] One challenge that emerges on the environmental front is that the chapter broadly refers to soft law instruments scattered across the fragmented international legal framework on environment,[166] making it difficult to prioritise areas for regulatory governance.

[159] Discussed in ch 3 of this thesis.
[160] [2014] OJ L 161/3.
[161] See European Union Delegation to Ukraine, Note Verbale (Kyiv, 20 June 2019).
[162] CETA, art 24.4.
[163] CETA, art 24.10.
[164] CETA, art 24.11.
[165] CETA, art 24.12.1.
[166] Beginning with the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development of 2002 and the Plan of Implementation of the World Summit on Sustainable Development of 2002 see CETA, art 22.1.1.

Furthermore, it is unclear how the horizontal dimension supports upward convergence with the many MEAs that the parties are signatories to. Even though the Commission expressed its intention to strengthen the horizontal cooperation-based approach,[167] and identify priorities with trading partners, an interviewee observed that environmental NGOs have neither been approached nor consulted.[168] As a result, provisions that seek the promotion of environmental standards run the risk of being conveniently ambiguous imposing no obligation to act.

The WTO has made use of ambiguous drafting in connection with environment because it is a sensitive area in terms of public opinion.[169] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, relevant for its role in the promotion of rules and procedures for the use of GMOs, is another such example. It was successfully negotiated since all parties agreed to it, but only on account of ambiguous drafting.[170] Ambiguous drafting, therefore, creates the fallacy that we have 'gotten more than was actually agreed to'.[171] On the one hand, ambiguous drafting is 'very effective in securing agreement to 'do something'' but on the other, it may not

[167] See Non Paper of the Commission Services 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) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf > accessed 22 July 2022.
[168] Research Participant No. 2, EU CSO.
[169] Sylvia Ostry, 'Perspectives on the Evolution of the Global Trading System' in Thomas J Courchene (ed), *Money, Markets, and Mobility* (Institute for Research on Public Policy 2002) 204.
[170] Sylvia Ostry, 'The Multilateral Trading System' in Alan M Rugman and Thomas L Brewer (eds), *The Oxford Handbook of International Business* (OUP 2003) 248.
[171] Sean Pager, 'TRIPS: A Link Too Far - A Proposal for Procedural Restraints on Regulatory Linkage in the WTO' (2006) 10 Marquette Intellectual Property Law Review 215.

identify 'what that 'something' is'.[172] Explicit recommendations and precise drafting are capable of strengthening institutional mechanisms established under bilateral trade relations because the relevant committees and bodies have a better idea of their mandate and objectives.[173] Ambiguity in MEAs was seen as 'constructive' at first, the reasoning being that the parties involved will resolve the interpretative problems in due course.[174] However, this has not happened,[175] and has eventually led us to non-binding international regimes.[176] Consequently, obligations under international environmental and climate frameworks that are unclear and vague make it hard to 'test and review' state conduct.[177] As discussed in Chapter 3, the achievement of the objectives set under MEAs should ideally benefit from their inclusion in FTAs. However, as per the analysis presented above, FTAs are likely to add another layer of ambiguity, CETA being no exception to this contention.

The Recommendation on Trade, Climate Action and the Paris Agreement adopted by the CETA Joint Committee is the most recent example in this respect.[178] The Recommendation reiterates the parties commitment to the Paris Agreement and

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[172] John J Kirton and Virginia W Maclaren, *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges* (Taylor & Francis 2018) 323.
[173] Roberto Dominguez and Mónica Velasco Pufleau, *The Modernisation of the European Union Mexico 'Global Agreement'* (European Union 2015) 50.
[174] Veit Koester, 'Global Environmental Agreements Other International Developments' (2005) 35 Environmental Policy and Law 170.
[175] ibid. 171- 172.
[176] Nina Hall and Åsa Persson, 'Global Climate Adaptation Governance: Why Is It Not Legally Binding?' (2018) 24 European Journal of International Relations 540.
[177] Maas M Goote, 'Non-Compliance Procedures in International Environmental Law: The Middle Way between Diplomacy and Law' (1999) 1 International Law FORUM Du Droit International 82, 84.
[178] See 'Recommendation 001/2018 of 26 September 2018 of the CETA Joint Committee on Trade, Climate Action and the Paris Agreement' <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157415.pdf> accessed 22 July 2022 (Recommendation of the CETA Joint Committee).

simply indicates that CETA will be one of the forums for discussing its implementation by EU member states and Canada. The Recommendation is not binding per se[179] and seeks upward vertical convergence with the Paris Agreement. As has been pointed out elsewhere, '[s]uch 'reaffirmations' have little or no meaning'.[180]

5.3. Environmental Standards and Supply Chain Governance

CETA contains provisions that direct the parties to foster trade and investment in goods and services for climate change mitigation, address adverse effects of trade on climate and develop and deploy low-carbon, climate-friendly and green technologies.[181] These provisions indicate that it is accepted that part of the solution to climate change lies in technology. However, how technological innovations are employed is a separate question. From a regulatory perspective there are two approaches that can be taken: technology neutral and technology specific.

Technology-neutrality originated as a regulatory principle in the field of information and communications technology (ICT) law in the US and was later adopted by the EU.[182] It has the following three meanings:[183]

1. That technical standards designed to limit negative externalities of ICT should just describe the result to be

[179] Weiss (n 119).
[180] Griller, Obwexer and Vranes (n 8) 204.
[181] CETA, arts 24.9.2 and 24.12.1(e)-(f).
[182] Iván Székely, Máté Dániel Szabó and Beatrix Vissy, 'Regulating the Future? Law, Ethics, and Emerging Technologies' (2011) 9 Journal of Information, Communication & Ethics in Society 180, 183.
[183] Winston J Maxwell and Marc Bourreau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation' [2015] Computer and Telecommunications Law Review 1.

achieved, leaving companies free to adopt the appropriate technological pathway to achieve it.

2. That regulators should refrain from using regulations in dynamic markets to select technological winners. While Meaning 1 limits regulatory interference in markets, this meaning relates to their structure i.e., government-imposed or market-led.
3. That regulators would apply the same principles of market analysis and remedies to all kinds of ICT networks and services. This is to eliminate competitive behaviour in industries (electricity, gas, water, railroad and telecommunications) where it 'is neither privately profitable nor socially desirable'.[184]

The technology-specific approach has the effect of *circumscribing* technology-neutrality as governments prescribe the technological pathway for the result to the achieved.[185] A mixed approach to ICT law i.e., with an overarching technology-neutral legislation and technology-specific subordinate regulation is said to serve policy goals better.[186] Technology neutrality and specificity are thus conceived 'in scalar rather than binary terms'.[187] In other words, technology neutrality can be 'thought of as situated on a continuum with 'full technology neutrality' and 'full technology specificity' *as the opposing (ideal) end points*'.[188] This is to say that the pursuit of

[184] Jérôme Bezzina and Mostafa Terrab, 'Impacts of New Technologies on Regulatory Regimes' [2005] *Communications & Strategies* 15.
[185] Sherzod Shadikhodjaev, 'Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?' [2021] European Journal of International Law 1, 5 (emphasis added).
[186] Brad A Greenberg, 'Rethinking Technology Neutrality' (2016) 100 Minnesota Law Review 1495, 1500.
[187] Per Sandin, Christian Munthe and Karin Edvardsson Björnberg, 'Technology Neutrality in European Regulation of GMOs' [2021] Ethics, Policy & Environment 1, 33.
[188] ibid. (emphasis added).

technology-specific solutions does not preclude technology-neutrality and vice-versa.

These regulatory approaches have seeped into the sphere of climate law as it seeks technology-based solutions to advance mitigation strategies.[189] When it comes to climate policy, it is argued that it cannot be completely neutral because governments will have to specify how a certain target has to be achieved.[190] There is however, room for a certain target to be less or more specific. For example:

> Certificates or feed-in tariffs for electricity from 'renewable energy sources' are less specific than tariffs for 'solar electricity', which are less specific than support to 'Solar PV', which in turn is less specific than support to 'Thin-film solar PV'. Parallel examples can be made for essentially all sectors and technologies.[191]

The Paris Agreement requires technology-specific responses because some aspects of climate action cannot be left to neutrality.[192] The UNFCCC[193] directs countries to focus on technology needs assessments (TNAs) to arrive at their respective technology specific pathways.[194] The outcome of a

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[189] See generally Valentine Bosetti and others (eds), *Climate Change Mitigation, Technological Innovation and Adaptation: A New Perspective on Climate Policy* (Edward Elgar 2014).
[190] Christian Azar and Björn A. Sandén, 'The Elusive Quest for Technology-Neutral Policies' (2011) 1 Environmental Innovation and Societal Transitions 135.
[191] ibid.
[192] Simon Dietz and others, 'The Economics of 1.5C Climate Change' (2018) 43 455; Christian Hey, 'Low-Carbon and Energy Strategies for the EU: The European Commission's Roadmaps: A Sound Agenda for Green Economy?' (2012) 21 GAiA 43.
[193] UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.
[194] UNFCCC, 'Updated Paper on Linkages between the TNA and NDC Process' (2018)

TNA is a technology action plan (TAP) which is the *technology responsive element of overall climate change strategies and plans, such as Nationally Determined Contributions (NDCs)* which are otherwise technology-neutral, and of 'a more general nature'.[195]

An arguable advantage of a technology neutral policy is that governments will not need to spend resources in updating it and businesses will not face 'requirement' barriers. However, a disadvantage is that changes to technologies are sometimes so significant that a technology-specific policy is needed to avoid regulatory gaps.[196] Furthermore, where law is evolving to meet the challenges posed by climate change, technology-specific policies are necessary to stay on the pathway to sustainable development.[197]

Technology specificity may be particularly relevant when it comes to pursuing a long-term climate strategy. There is increasing interest in assessing whether technology-neutrality is 'an appropriate assumption' in the long run.[198]

The extent to which the EU and Canada can intervene in this respect depends on the scope provided along the horizontal and vertical dimensions of their partnership. CETA's environmental

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<https://unfccc.int/ttclear/misc_/StaticFiles/gnwoerk_static/tn_meetings/40067a60235c4b1c9737e9abf532003a/e8a0bd09bec44237934ee7ed569b2d9d.pdf> accessed 22 July 2022, 10.

[195] ibid. 11 (emphasis added).

[196] Bert-Jaap Koops, 'Should ICT Regulation Be Technology-Neutral?' in Bert-Jaap Koops and others (eds), *Starting Points for ICT Regulation* (TMC Asser Press) 77-108; Greenberg (n 186).

[197] Azar and Sandén (n 190); Staffan Jacobsson and Anna Bergek, 'Innovation System Analyses and Sustainability Transitions: Contributions and Suggestions for Research' (2011) 1 Environmental Innovation and Societal Transitions 41; see generally Lorenz M Hilty and Bernard Aebischer, *ICT Innovations for Sustainability* (Springer 2014).

[198] Andrei Marcu and others, 'Developing the EU Long Term Climate Strategy' (2018) <https://www.bruegel.org/wp-content/uploads/2018/04/20180418_FINAL-_TechnicalPaper.pdf> 57.

provisions are silent on whether climate technologies should be developed based on neutrality or specificity. However, this issue needs attention as environmental groups are increasingly interested to know how trade and investment in green and renewable technologies can be developed in a manner that is mutually beneficial to the EU and Canada.[199] CETA's provisions on regulatory cooperation are applicable to the environmental provisions to the extent of 'the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered' by the environmental provisions.[200] Regulatory cooperation expressly mentions that the parties 'contribute to the improvement of competitiveness and efficiency of industry in a way that […] pursues compatible regulatory approaches including, if possible and appropriate, through […] the application of regulatory approaches which are technology-neutral.'[201] As mentioned before, environmental issues have not made it to the regulatory cooperation agenda at the time of writing, but if they were to, this provision is unlikely to favour regulatory intervention in the context of climate-friendly technologies. This observation is not because of the mention of technology-neutral as the preference, for it can be interpreted to include technology-specific components,[202] but because of the overarching emphasis on the competitiveness and efficiency of industry.

Progress towards technology-specific solutions under the vertical dimension of CETA is challenging given the decentralised forms of governance in the EU and Canada. The EU and Canada lack the supranational/federal

[199] Research Participant No. 5, Canadian CSO.
[200] CETA, art 21.1.
[201] CETA, article 21.3(d)(iii)(A).
[202] Sandin, Munthe and Edvardsson Björnberg (n 187).

competence/power to act and intervene in the areas relevant for climate policies. This is articulated as follows:

> Two of the EU's essentially constitutional characteristics - the internal market and the Lisbon Treaty - limit the competence of the EU to steer directly the choice of energy sources, as this would be inconsistent with the principles of a liberalized European energy market and with matters deemed to be of national sovereignty.[203]

Similarly, '[g]iven Canada's regionally distinct economies, federalism has thus far proven to be an obdurate political obstacle to adopting an integrated and effective climate change policy'.[204] These observations merely scratch the surface of the legal dilemma that underpins technology choices in the field of climate policy within these legal systems. For instance, at the EU level, neutrality is a benchmark for the Union from which member states may choose to deviate in favour of more specific approaches.[205] In turn, not a single approach can be mainstreamed as 'specific' for there are variations in its understanding within legal systems.

6. Conclusions

In covering labour and environment, the scope of regulatory cooperation is uniquely wide under CETA. It goes beyond the areas identified at the WTO but to what extent is the full scope for regulatory cooperation actually being utilised is the key question that needs to be answered.

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[203] Hey (n 192).
[204] Jason MacLean, 'Will We Ever Have Paris? Canada's Climate Change Policy and Federalism 3.0' (2018) 55 Alberta Law Review 889, 903.
[205] Lars Jerrentrup and others, 'Technology-Neutral Auctions for Renewable Energy: EU Law vs. Member State Reality' (2019) 16 Journal for European Environmental & Planning Law 386.

As the discussion on labour standards shows, the RCF and even non-state actors do not refer to labour standards as part of regulatory cooperation. The submission of Prof. Mendes sets the foundation of a proposal that modern slavery should be considered as a subject of regulatory cooperation. The EU and Canada could have leveraged soft law through engagement on modern slavery especially because they are developing standards concerning forced labour in supply chains and human rights due diligence internally. On environment, even though the RCF received several responses concerning the environment, the area received limited focus in the context of climate action.

When it comes to the labour chapter of CETA, we see that the EU exports its structure of transnational regulatory governance of labour but the fact that the conversations are limited to the implementation of core ILO conventions is not favourable to the field of transnational labour law that seeks to cater to various aspects of decent work.

Turning to the environmental chapter, an unfavourable finding is that even though the agreement reiterates commitments to the various MEAs there is no work plan to achieve them through CETA. In the light of the adoption of CETA Joint Committee's Recommendation on Climate Action, this chapter has examined how the parties might regulate technology for climate change but found that there are barriers along the vertical dimension on the EU and Canadian sides that will need thorough engagement if the parties are to address this issue in the future.

CHAPTER 8: CONCLUSIONS

1. Revisiting the Research Question

This thesis set out to seek answers to the question: *Does the EU-Canada partnership lead to better regulatory governance of labour and environmental standards in transatlantic trade?*

The discussion on the *international law* perspective at the beginning of this thesis brought out the patterns of interaction between the regimes of trade law, labour law and environmental law. It highlighted that the transnational law approach mobilises their linkage along the hard-soft continuum. CETA is better conceived as an instrument for the transnational regulatory governance of labour and environmental standards. Before proceeding to access this contention by analysing the provisions of CETA, we examined transnational regulatory governance 'bottom-up' from the EU and Canadian perspectives.

The analysis on *EU law* demonstrates the internal underpinnings of regulatory governance in the context of economic integration. This inquiry: (i) analysed the interaction between constitutional and regulatory imperatives within the supranational polity that is the EU and (ii) demonstrated that in instances where constitutional mandates constrain regulatory ambition at the Union level, the EU continues to engage with labour and environmental policies by leveraging transnational legal processes. The Union is thus able to engage its internal frameworks comprising policies such as Better Regulation, the Semester System and the Green New Deal and actors such as the Commission, the EESC, social partners and DAGs in its trade relations. On the EU's objective of promoting these standards as part of 'sustainable development through trade', it is essentially an *idea* that it seeks to promote as a constructivist

actor. The EU may make use of its normative and market power in this connection, but its success depends on the extent to which its policies are reflected in its trading partnerships with third countries. Accordingly, the thesis shifted its focus to *Canadian law* and unpacked its approach to TSD. As the thesis progressed, the analysis on the overarching research question was completed. With reference to the methodologies employed, they are presented as follows.

2. The Methodological Perspective

In the process of analysing the international, EU and Canadian perspectives, we managed to answer the first two sub-questions posed by this thesis: *What are the frameworks under international law governing the trade-labour-environment linkage?* and *What are the respective EU and Canadian approaches to regulatory governance and sustainable development in trade?* To this end, doctrinal legal analysis played a central role but then we were also partially able to answer the third sub-question - *To what extent are the EU and Canada able to promote labour and environmental standards through CETA?* This is because we can draw some conclusions about the level of intersubjectivity achieved between the EU and Canadian sides in relation to the agenda on 'trade and sustainable development'.

I contend that whether the transatlantic partnership between the EU and Canada leads to better the regulatory governance of labour and environment depends on whether it attains intersubjectivity as an *idea* which in turn depends on two levels of engagement i.e., self-interpretations and second order

interpretations.[1] By employing *constructivism* as a methodology we can see the differences between the EU and Canada in the self-interpretations of 'trade and sustainable development'. *Comparative legal method* helps us in establishing the key differences when it comes to understanding the behaviour of state and non-state actors.

European supranationalism and Canadian federalism are tasked with ensuring regulatory management within the respective systems. In other words, regulatory programmes on labour and environment have a domestic focus and have not been developed keeping in mind commitments made under FTAs.

Achieving commonly held objectives may not be straightforward. For instance, differences in the constitution of the civil society in the EU (that conceives business interests as part of civil society) and Canada (that takes only not-for-profit interests to constitute civil society) render different tones to their approaches to trade policy. Furthermore, the EU employs its own experiences from the process of economic integration. Whereas transnational law and legal process is a phenomenon occurring outside of the Canadian legal system. This is on account of the lack of an equivalent mandate or provision for establishing 'transprovincial' frameworks for engaging non-state actors in trade policy. Since the Canadian experience is tied to North American economic integration, the approach of the US permeates its trade policy. As a result, it is difficult for the EU to avoid a competing approach to the trade-labour-environment linkage in transatlantic trade.

[1] Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 European Journal of International Relations 147, 162; Benjamin Herborth, 'Denying the International' [2021] Cambridge Review of International Affairs 1 see Section 6.2, Chapter 4 of this thesis.

To complete the assessment on the third sub-question, we need to analyse the second order interpretations that take place within the framework of CETA. This thesis has employed *socio-legal analysis* to arrive at a better understanding of the second order comprising the cooperative and institutional frameworks for the regulatory governance of labour and environmental standards in EU-Canada relations.

As has been discussed in the previous chapters, regulatory governance and cooperation under CETA is unique for covering sustainable development as an objective.[2] Subsequent chapters repeat this observation to reiterate its relevance where necessary but *empirical insight* informs us that labour and environment have not been considered as subjects of regulatory cooperation for the time being (detailed in Chapter 7). This also points to the gap between the written word in an agreement and its practical implementation. In the four years of CETA's implementation, the RCF has never considered sustainable development as its objective. As a result, EU-level (better regulation) and Canadian approaches (such as CDoR) that assimilate sustainable development as part of regulatory governance in internal/domestic decision-making are unlikely to permeate bilateral relations. Additionally, the mandate for regulatory cooperation on labour and environmental standards under CETA is likely to remain underutilised.

The TSD chapters of CETA are not part of the dispute settlement procedure. Insofar as the promotion and implementation of the TSD chapters is concerned, transnational soft law seems to be the most preferred channel. The report of the CSF issued in December 2020 demonstrates that the Union has been able to engage with Canada on the uptake of clean technologies, but it

[2] CETA, art 21.1.

is distanced from a regulatory agenda wherein clean technology is pursued through softer engagements entailing dialogue and workshops to promote the trade and climate linkage at the bilateral and WTO level. On labour, Canada and EU are concerned with domestic implementation of labour standards in accordance with the ILO core conventions but there is an outward focus on aligning their schemes to promote labour standards in third countries. As a result, it is unlikely that the obligations on labour standards will extend beyond these two areas. It is even more unlikely that CETA will lead to changes in EU and Canadian policy frameworks and laws on labour standards.

The interaction on sustainable development, which is necessary for its acceptance as an intersubjective idea leading to its pursuance through transnational legal processes under CETA, is therefore limited and provides evidence of a weak level of intersubjectivity in the transatlantic context. It can also be said that the second order interpretations of TSD as a constructivist idea are for now underdeveloped. Furthermore, there are gaps between the interactions of the 'self-interpretations' in the EU and Canada on the one hand and 'second order interpretations' under CETA. For instance, CETA's labour chapter envisions effective social dialogue as essential for supply chain governance but there are shortcomings on the EU and Canadian sides in this respect. Similarly, in respect of the environment, the discussion on technology neutrality in the context of climate action demonstrates that the plurality of approaches in the EU and Canada is a substantial hinderance to cooperation. Thus, we can highlight whether and in what respect has the text governing trade relations led to the development of a 'law in

context' approach marking progress in the trade-labour-environment linkage.[3]

The thesis has utilised the international, internal, and bilateral conceptualisation of institutional frameworks and actors to address the research question.[4]

Figure 8.A. below presents the key findings as follows.

TSD in → ↓		Text		Context	
		Labour	Env.	Labour	Env.
1.	WTO	x	✓	x	x
2.	EU	✓	✓	✓*	✓
3.	Canada	x	✓	x	✓*
4.	CETA				
4.A.	RCF	✓	✓	x	x
4.B.	Joint Committee	✓	✓	✓*	✓*
4.C.	TSD Committee	✓	✓	✓	✓
4.D.	DSM	x	x	x	x
4.E.	CSF Non-Economic Interests	✓	✓	✓	✓
4.F.	CSF Economic Interests	✓	✓	x	x

Figure 8.A: TSD in Text and Context: International, Internal and Bilateral Findings

* Indicates partial development of the context of 'trade and sustainable development'

[3] Roger Cotterrell, 'Transnational Networks of Community and International Economic Law' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Taylor & Francis 2013) 133 see Section 4, Methodology, Chapter 1 of this thesis.
[4] See Section 2, Research Questions, Chapter 1 of this thesis.

✓ Indicates development of the text / context of 'trade and sustainable development'

x Indicates non-development of the text / context of 'trade and sustainable development'

Row 1 shows that sustainable development is referred to in the WTO primarily with reference to the environment. However, based on the discussion in Chapter 3, environmental protection has not been achieved through multilateral engagement. The trade-labour linkage is missing at the WTO level altogether hence the corresponding column is crossed to indicate no reference to labour standards in the textual and contextual sense at the WTO.

Row 2 has reference to the EU's internal approaches to the regulatory governance of labour and environmental standards. Labour standards have come to reflect the social dimension of sustainable development within the Union. This is even reflected in the context of the EU's internal market policies that have increasingly sought to establish a social market economy status. However, the contextual transition of objectives is only partial as case law (discussed in Chapter 4) demonstrates that labour standards may be overlooked in their interface with economic freedoms. The harder commitments on EU environmental and climate law demonstrate that the TSD context has developed further in the two fields.

Row 3 in the figure shows that the development of the context on TSD is completely missing when it comes to labour standards in the *internal dimension* of Canada. This observation pertains to the functioning of the Canadian internal market and the fact that the domestic CFTA makes no reference to labour standards. Even though environment and climate are recognised as one of the objectives under the CFTA, it excludes this objective from

its dispute resolution process, resulting in the partial development of the context of environmental protection and sustainable development in Canadian inter-provincial trade.

Compared to the EU, Canada's internal market functions independently of labour and environmental policies. While the EU's objective of promoting sustainable development is grounded in its constitutional framework, Canada's approach is a result of legislative and regulatory frameworks such as the FSD Act and the CDoR, respectively. The stress on transparency and accountability in these instruments indicates their importance in improving regulatory governance. However, labour standards are not seen as part of the FSD Act. Labour unions may participate in its implementation, meaning that the Act can be directed towards just transitions but the developments so far fall short of convincing us that considerable progress has been made in this direction.

Row 4.A informs us that even though there is textual reference to the TSD provisions in the regulatory cooperation provisions of CETA, it has not reflected contextually i.e., in the implementation of the agreement.

Row 4.B, which is concerned with the CETA Joint Committee, indicates that the Committee is responsible for TSD by virtue of being responsible for the implementation of *all* provisions of the agreement. It points to favourable treatment of environmental standards by the Committee on account of the adoption of the CETA Joint Committee Recommendation on Trade, Climate Action and the Paris Agreement. The conclusion that the Joint Committee may take an initiative in respect of labour standards is, however, speculative. Therefore, the notation in *Row 4.B.* is based on the positive inference derived from the adoption of the Recommendation related to climate action. It is not without the

disclaimer that there is insufficient evidence to suggest that the Committee has, for now, addressed TSD obligations of the parties in the respect of labour standards.

Row 4.C reflects the standalone provisions on TSD in the labour and environmental chapters of CETA and also that the task of undertaking the contextual development of TSD in EU-Canada trade relations is handed over to the TSD Committee that is understandably the most active in pursuing the implementation of TSD provisions.

Row 4.D identifies the express exclusion of the TSD provisions from the dispute settlement provisions of CETA.

Interest formation is the key characteristic relied upon in deciding the information presented in *Rows 4.E and 4.F*. All civil society participants welcome the inclusion of TSD provisions in CETA. However, there is a problem of competing interests that has largely taken the shape of sustainable development v. trade liberalisation with non-economic and economic actors polarising on the two objectives. As submissions to the RCF have shown, non-state economic actors are not too keen on promoting regulatory cooperation on the TSD provisions, even though, in theory they could so as members of the civil society.

3. General Observations

The topic 'Trade and Sustainable Development' has several connotations. In this thesis it is approached as a goal in EU trade policy with reference to its partnership with Canada. From a legal perspective, the theme spreads across the fragmented fields of trade law, EU law, Canadian law, labour law, and environmental law. 'Sustainable development through trade' requires intervention in economic activities to direct it towards social and environmental objectives. This element of

interventionism is best captured under the notion of 'regulatory governance' concerned with the rules that govern intervention for standard-setting and implementation of public policy objectives. The concept of 'regulatory governance' is also attuned to the fact that rule-making authority is delegated to state as well as non-state actors. Consequently, it is capable of incorporating the international and transnational methods of controlling economic activity.

Some additional factors influence the regulatory governance of labour and environmental standards under CETA. For instance, the provisions that have bearing on the implementation of TSD provisions - the chapters on regulatory cooperation, labour and environment - are all voluntary. Regulatory governance under CETA is inspired by the same principles that govern regulatory governance at state-level and covers fields of public policy just as governments do at the state-level but operates as a sui generis framework at the bilateral level. For instance, unlike EU and Canadian law, the regulatory governance of labour and environment under CETA rests completely on soft law and the mechanisms therein. The TSD provisions in EU FTAs reflect constructivism in international relations. Constructivists see value in soft law for its transformative capacity and for this reason, it is not apt to decide just yet if CETA has succeeded or failed to deliver on its sustainable development agenda. As seen at the WTO, soft law is very much capable of being regarded as a benchmark in due course.[5] It is however useful to outline some challenges that have appeared so far.

Our examination of CETA demonstrates that the challenges facing the trade-labour-environment linkage are downplayed when it comes to the interface between international

[5] See ch 3 of this thesis, section 2.2.2.

commitments and the bilateral frameworks meant to encourage states to fulfil them. Barring instances where the EU and Canada utilise CETA as a platform to arrive at a common position in the international fora, or exchange expertise in a specific area such as Canada consulting the EU on carbon border measures, other attempts to improve the regulatory governance of labour and environmental standards remain unutilised for now. Prominent areas that require focus in this regard are that of CSR and RBC. Even though CETA recognises the importance of CSR initiatives for labour and environmental standards under Article 22.3.2(b), it has not emerged on the agenda of TSD-related meetings of the parties. Whereas the obligation to ensure RBC can only be implied from Article 25.4.2(c) concerning Bilateral Dialogue on Raw Materials that mentions the importance of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. While RBC is essential in the extractive industry, it also offers avenues for furthering labour and environmental standards across supply chains and should therefore be considered under the TSD chapter of CETA.

There are other factors that are likely to impact progress in this direction such as the onset of the Covid-19 pandemic which led to the cancellation and rescheduling of events and meetings, some of which were eventually held online. Moreover, the RCF and CSF have no mandate to meet more than once a year. The expansive coverage of the TSD provisions, coupled with the new areas that need focus in the post-Covid world, it is likely that the EU and Canada will recalibrate priorities in their economic partnership. Furthermore, we do not know yet if the parties will deepen their engagement on regulatory governance issues,

including labour and environment, once CETA comes into force fully.

4. Areas for Further Research

This thesis contributes to the fields of public and administrative regulatory governance, international trade law, EU trade policy, EU-Canada relations, and sustainable development. In taking up the challenge to seek answers to a specific research question touching upon these areas, the analysis under this thesis had to be defined within set parameters. Nevertheless, the endeavour has been that it performs the role of a parallel body of work if future research is undertaken on aspects of transnational private regulatory governance in trade. Furthermore, as more and more FTAs address labour and environmental standards, the observations made under this thesis could contribute to comparative analysis of FTAs. This thesis has focussed on five factors shaping regulatory governance namely, transparency, accountability, coherence, efficiency and adaptability, but future research could carry out analysis based on other criteria. Even in respect of labour and environmental standards, other research projects could analyse a different set of standards, moving away from the ones analysed in this research such as the freedom of association and modern slavery in the context of labour, and precaution and technology regulation in the context of the environment. Labour and environmental provisions in the EU-UK Trade and Cooperation Agreement[6] also make for a significant research topic. In their Trade Continuity Agreement,[7] the UK and Canada have replicated and tailored

[6] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland [2021] OJ L149/10.

[7] Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (9 December 2020) [CS Canada No.1/2020].

CETA's TSD provisions but the parties may shape their approach to regulatory governance differently in the future. This is yet another aspect that could become the subject of future research. The provisions of CETA demonstrate a willingness to address the trade and labour linkage comprehensively and improve the trade and environment linkage beyond the developments at the multilateral level. As the EU-Canada partnership matures, this thesis may be a building block for further research and analysis.

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