

The European Parliament and Civil Society in EU Trade Negotiations: The Untold Story of an Erratic Engagement

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The article calls into question the picture that is often uncritically depicted around the European Parliament (EP) and civil society as newly empowered actors and consistent advocates of citizens' interests in EU trade negotiations. The contribution of the article is twofold. First, it provides a comparative and empirical account of the mobilization of the EP and civil society across the negotiations of the new generation EU trade agreements. It shows that a common thread has been an erratic engagement, along the lines of politicization: the EP has only been vocal in response to civil society mobilization; and civil society mobilization in turn has been inconsistent, even though some contested issues were common to all trade negotiations. Second, the article sheds light on improvements in democratic treaty-making practices that emerged as a result of the mobilization of the EP and civil society. While drawing some lessons on EU trade law-making going forward, the article calls for a more modest appraisal of the legacy of these newly emerged democratic practices.

Keywords: EU trade negotiations, international treaty-making, European Parliament, civil society, mobilization, CETA, TTIP, EU-Singapore FTA, EU-Japan EPA

1 INTRODUCTION

The contestation of the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) is often depicted as having opened the way to a new, post-Lisbon era of EU trade negotiations, which seek wider engagement and contribute to a more legitimate trade law-making. What this portrait often fails to show, however, is a more nuanced account exposing the inconsistencies of such mobilization across trade negotiations. By comparing the mobilization in the EU trade negotiations with Canada, the US, Singapore and Japan, this article reveals a story of inconsistent engagement by both institutional and non-institutional actors. The focus is on the European Parliament (EP) – the only EU institution that represents citizens at the EU level and enjoys a formal role in treaty-making –, and on civil society – the main protagonist of this unprecedented mobilization, but also the

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major absentee in EU law on treaty-making.¹ Against a backdrop of inconsistent mobilization, the article sheds light on the outcomes resulting from the challenges to treaty-making practices. It compares when, how and with which result the EP and civil society mobilized across EU trade negotiations.

On the one hand, cases of contestation *did* lead to changes which enhanced the democratic quality of treaty-making. On the other hand, however, the EP and civil society engaged inconsistently, depending on either the trade partner or the degree of politicization of trade negotiations. It was with TTIP, and subsequently with the Comprehensive Economic Trade Agreement (CETA) with Canada, that most improvements in treaty-making can be observed. These improvements yet did not occur in the negotiations with Singapore, nor were they replicated in the negotiations with Japan. The article therefore underscores the importance of consistent engagement and systematic scrutiny by both the EP and civil society, irrespective of the public saliency and politicization of trade negotiations. Furthermore, in light of the demands by the EP and civil society, the article provides the basis for further research on the future direction of EU law on treaty-making and its actors in the post-Lisbon era.

There is certainly no shortage of academic research on the EP and civil society in international agreements. As regards the EP, the focus is generally on the success stories of when it managed to leverage its powers, above all its veto power.² The risk, however, is to lose sight of less successful stories, with the result of overestimating the EP's role in EU external relations.³ For instance, the EP's mobilization in the Brexit negotiations has been described as a *further* example showing an increase in EP powers and an expansion of its institutional remit.⁴ This article tones down this narrative. It provides a more comprehensive and nuanced picture by

¹ The article understands civil society as a heterogeneous set of actors, comprising non-governmental and non-for-profit organizations, public interest groups, trade unions and grassroots movements.

² A. Héritier et al., *European Parliament: Ascendant Parliamentary Strategies of Self-Empowerment in the EU* (Palgrave Macmillan 2019); B. Kerremans et al., *Parliamentary Scrutiny of Trade Policies Across the Western World*, study for the INTA Committee (European Union 2019). On the SWIFT agreement, see e.g., A. Ripoll Servent, *The Role of the European Parliament in International Negotiations After Lisbon*, 21 J. Eur. Pub. Pol'y (2014); on the PNR agreement, see J. Santos Vara, *The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data After Lisbon* (CLEER Working Papers 2013); on the ACTA, see K. Meissner, *Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP*, 21(2) Eur. Foreign Aff. Rev. (2016).

³ Servent, *supra* n. 2; J. Monar, *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications*, 15 Eur. Foreign Aff. Rev. (2010); G. Rosén, *The Impact of Norms on Political Decision-Making: How to Account for the European Parliament's Empowerment in EU External Trade Policy*, 24 J. Eur. Pub. Pol'y (2016); C. Roederer-Rynning, *Parliamentary Assertion and Deep Integration: The European Parliament in the CETA and TTIP Negotiations*, 30 Cambridge Rev. Int'l Aff. (2017); L. Van den Putte et al., *The European Parliament as an International Actor in Trade: From Power to Impact*, in *The European Parliament and Its International Relations* (S. Stavridis & D. Irrera eds, Routledge 2015).

⁴ E. Bressanelli et al., *Negotiating Brexit: The European Parliament Between Participation and Influence*, 41 J. Eur. Integration 360 (2019).

means of a comparative perspective. Several contributors have conducted a comparative exercise, yet have done so by examining international agreements of a different nature, and in different combinations.⁵ This article focuses on the negotiations of the new generation EU trade agreements with North-American and Asian trade partners. They provide two opposite sets of cases that corroborate the findings according to which the saliency of negotiations impacts on the degree of EP engagement.⁶ This selection leaves outside an examination of the recent negotiations of the UK-EU Trade and Cooperation Agreement (TCA), where the EP had a prominent role.⁷ The negotiating process of the UK-EU TCA is a special case where, from the very beginning, both the Commission and the Council had a ‘strategic incentive’ to make sure the EP was fully involved in the negotiations to avoid any procedural complaints.⁸ It is suggested that further research could look into how the Commission sought to anticipate and accommodate the EP’s procedural demands, and use the findings of this study to examine the extent to which the Commission’s adjustments were informed by previous EP challenges to treaty-making.⁹

As regards civil society, the literature questions the effectiveness of mechanisms for civil society to have an influence at the negotiation stage.¹⁰ Scholarly contributions have addressed ways to improve the involvement of civil society, while also cautioning against the perils of bringing in new actors.¹¹ This article is not concerned with an evaluation of the available mechanisms for, or the desirability of, civil society engagement. Rather, it is interested in capturing different degrees of mobilizations and their outcomes. The literature has mostly covered civil society mobilization in TTIP and, to a lesser extent, in CETA.¹² This mobilization is often justified as a result of the EU ‘deep trade agenda’ behind

⁵ Roederer-Rynning, *supra* n. 3; *The European Parliament in External Agreements* Ch. 8 (Héritier et al., *supra* n. 2); Meissner, *supra* n. 2; Kerremans et al., *supra* n. 2.

⁶ Héritier et al., *supra* n. 2; Roederer-Rynning, *supra* n. 3.

⁷ Bressanelli, *supra* n. 4.

⁸ *Ibid.*, at 357.

⁹ Future research could also examine the extent to which the EP’s involvement in the UK-EU TCA negotiations represents a precedent for future EU trade negotiations, or whether it remains a one-off instance, as in the case of TTIP.

¹⁰ See e.g., A. Dür & D. De Bièvre, *Inclusion Without Influence? NGOs in European Trade Policy*, 27 *J. Pub. Pol’y* (2007); L. Drieghe et al., *Participation of Civil Society in EU Trade Policy Making: How Inclusive Is Inclusion?*, *New Pol. Econ.* (2021).

¹¹ See e.g., W. Benedek et al., *Improving EU Engagement With Non-state Actors* (2015), <https://www.fp7-frame.eu/wp-content/uploads/2016/08/14-Deliverable-7.2.pdf>; J.-B. Velut, *What Role for Civil Society in Cross-Regional Mega-Deals? A Comparative Analysis of EU and US Trade Policies*, 55 *Revue interventions économiques* (2016).

¹² See e.g., M. Wendel, *International Trade Agreements and Democratic Participation*, *Eur. Y.B. Int’l Econ. L.* (2017); L. Eliasson & P. Garcia-Duran Huet, *TTIP Negotiations: Interest Groups, Anti-TTIP Civil Society Campaigns and Public Opinion*, 16 *J. Transatlantic Stud.* (2018); R. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, 83 *Geo. Wash. L. Rev.* (2015).

the new generation EU trade agreements, which have put politically sensitive issues on the negotiating table.¹³ However, there appears to be almost no coverage nor criticism of instances when civil society completely failed to engage in the negotiations with Singapore and Japan.¹⁴ The aim here is to present the other side of the coin, by stressing when civil society did not engage – even though some of the contested issues were common to all the trade negotiations examined in this article.

The contribution to the literature is twofold. First, the article focuses on the shifts towards democratic treaty-making practices that have resulted from EP and civil society contestation when it occurred, as well as on the incoherencies and missed opportunities that are often overlooked. Second, it provides new empirical and comparative knowledge, by integrating a wide range of research sources spanning legal documents, EP resolutions, questions for written answer to the Commission by individual members of the EP (MEPs), civil society position papers and websites, and semi-structured interviews with EU policy officials and Brussels-based civil society actors. The article is structured around two main parts, which examine how the EP (section 2) and civil society (section 3) challenged EU treaty-making in the negotiations with Canada and the US (sections 2.1 and 3.1) and with Singapore and Japan (sections 2.2 and 3.2). The comparison across regional lines implies that the article does not follow the chronological order of the negotiations (see Figure 1 below). Section 4 concludes by critically discussing and summarizing the findings of the analysis.

Figure 1 Timeline of EU Trade Negotiations With Canada, Singapore, Japan and the US

2 THE EP IN TRADE NEGOTIATIONS

The Treaty of Lisbon has introduced a number of innovations enhancing the role of the EP in international treaty-making. The EP is now to be ‘immediately and fully informed’ throughout the negotiating process.¹⁵ Article 218(10) of the Treaty

¹³ Such as behind-the-border measures and domestic regulations. See A. Young, *Not Your Parents’ Trade Politics: The Transatlantic Trade and Investment Partnership Negotiations*, 23 Rev. Int’l Pol. Econ. (2016).

¹⁴ Particularly on the EU-Japan negotiations, exceptions include Eliasson & Garcia-Duran Huet, *supra* n. 12; H. Suzuki, *The New Politics of Trade: EU-Japan*, 39 J. Eur. Integration (2017); D. Kleimann, *Negotiating in the Shadow of TTIP and TPP: The EU-Japan Free Trade Agreement*, Policy Brief German Marshall Fund of the United States (Jun. 2015).

¹⁵ Articles 207(3) and 218(10) TFEU, Case C-425/13, *Commission v. Council*, ECLI:EU:C:2015:483.

AQ1 on the Functioning of the European Union (TFEU) was interpreted by the European Court of Justice (ECJ) as extending to ‘the intermediate results reached by the negotiations’, thus reaching beyond the formal procedural stages of Article 218 TFEU.¹⁶ This information right provides an important instrument for democratic scrutiny, but tends to meet criticism as a mechanism for meaningful influence.¹⁷ The procedure for international treaty-making in Article 218 TFEU still excludes the EP from the initial phase, when the Commission provides recommendations to the Council, determining the mandate for the negotiations.¹⁸ The second innovation of the Treaty of Lisbon is the EP’s consent, which is needed before the Council can adopt a decision to conclude an agreement.¹⁹ On multiple occasions, the EP either threatened to use, or exercised, this veto power.²⁰ However, there are no examples of vetoes to trade agreements. Coming at the very final stage, the power of consent has several financial and reputational costs attached.²¹ The incentives to use this nuclear option in the context of trade agreements often do not outweigh the benefits of giving consent, implying that this power may remain a threat. The negotiations of the UK-EU TCA provide a recent example of the EP appearing as a barking dog that does not bite. The EP eventually gave its consent despite a number of concerns expressed in parliamentary meetings, and despite unmet demands for an Inter-institutional Agreement to secure democratic oversight over the implementation of the UK-EU TCA.²²

The EP has increasingly challenged the inter-institutional balance of EU treaty-making. The Framework Agreement concluded with the European Commission in 2010 provides a number of examples of how the procedure set out in Article 218 TFEU (and in particular the information right in Article 218 (10) TFEU) could be supplemented to enhance the EP’s involvement in the

¹⁶ Case C-263/14, *Parliament v. Council*, ECLI:EU:C:2016:435, para. 75. For a more extensive discussion, see I. Heliskoski, *The Procedural Law of International Agreements: A Thematic Journey Through Article 218 TFEU*, 57 *Com. Mkt. L. Rev.* (2020); and P. Koutrakos, *Institutional Balance and Sincere Cooperation in Treaty-Making Under EU Law*, 68 *Int’l & Compar. L. Q.J.* (2019).

¹⁷ See e.g., Bressanelli et al., *supra* n. 4. It is questionable to what extent this information right, in itself, is able to confine the political discretion of the negotiators, particularly if it remains a one-way practice. See the next paragraph on how the information right could be clarified and expanded.

¹⁸ Articles 207(3), 218(2) and 218(3) TFEU.

¹⁹ Article 218(6) TFEU.

²⁰ For example, European Parliament, *Legislative Resolution of 4 July 2012 on the Draft Council Decision on the Conclusion of the Anti-counterfeiting Trade Agreement (2011/0167(NLE))* OJ C 349E. See C. Eckes, *How the European Parliament’s Participation in International Relations Affects the Deep Tissue of the EU’s Power Structures*, 12 *Int’l J. Const. L.* (2014).

²¹ M. Peffenköber & J. Adriaensen, *Detecting Looming Vetoes: Getting the European Parliament’s Consent in Trade Agreements*, 9 *Pol. & Governance* (2021).

²² On the Interinstitutional Agreement, see Letter from the Conference of Presidents on the European Parliament’s role in the implementation of the EU-UK Trade and Cooperation Agreement, file with the author. See also European Parliament, *The EU-UK Trade and Cooperation Agreement – The Outcome of EU-UK Negotiations* (debate) (27 Apr. 2021), https://www.europarl.europa.eu/doceo/document/CRE-9-2021-04-27-ITM-004_EN.html (accessed 14 Jun. 2022).

negotiations of international agreements.²³ For example, it clarifies that the EP should be informed ‘in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament’s views as far as possible into account’.²⁴ The Commission is then expected to incorporate the EP’s comments in the negotiating texts and to explain if it does not do so.²⁵ This reason-giving element arguably goes beyond a mere information right of the EP and may have the potential to effectively influence the negotiations. The Agreement also allows MEPs to act as observers in EU delegations in international conferences (but does not refer to bilateral agreements).²⁶ It swiftly specifies that MEPs ‘may not take part directly in the negotiating sessions’.²⁷ The Commission may nonetheless grant them observer status, yet ‘subject to the legal, technical and diplomatic possibilities’.²⁸ At the time of its conclusion, the Framework Agreement received much opposition by the Council, which argued that the Agreement would have altered the institutional balance by vesting the EP with rights that were not provided for in the Treaties.²⁹ In its final version, the Agreement is very clear that it ‘does not affect the powers and prerogatives of Parliament, the Commission or any other institution or organ of the European Union’.³⁰ This controversy shows the tension between the aim of ensuring that diplomatic negotiations proceed speedily and in secret, and emerging practices towards a more transparent and democratically accountable EU external action, albeit with possible trade-offs.³¹

The article focuses on these emerging practices. In particular, it shows that the innovations of the Treaty of Lisbon emerge as a small step when contrasted with the EP’s demands and strategies during the negotiations to grab new prerogatives beyond what the Treaties provide. Examples of self-empowerment are presented next, and compared with instances where the EP did not assert additional rights.

²³ *Framework Agreement on Relations Between the European Parliament and the European Commission*, OJ L 304 (20 Nov. 2010), provisions 23–29 and Annex III. The author is grateful to one of the anonymous reviewers for raising this point.

²⁴ *Ibid.*, provision 25.

²⁵ *Ibid.*, Annex III, provision 4.

²⁶ *Ibid.*, provision 25.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Council Statement, *Framework Agreement on Relations Between the European Parliament and the Commission*, C:2010:287:TOC (23 Oct. 2010).

³⁰ *Framework Agreement*, *supra* n. 23, provision C.

³¹ M. Cremona & A. Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014).

³² The numbers exclude the resolutions on Strategic Partnership Agreements and on the Investment Agreements, as well as two resolutions on EU-ASEAN relations. On the EU-Singapore FTA, see *European Parliament Legislative Resolution of 13 February 2019 on the Draft Council Decision on the Conclusion of the Free Trade Agreement Between the European Union and the Republic of Singapore*, OJ C449/43. On CETA, see *European Parliament Resolution of 5 May 2010 on the Upcoming EU-Canada*

Figure 2 EP Resolutions Adopted at Different Stages of the Trade Negotiations.³²

2.1 THE EP IN THE TRADE TALKS WITH CANADA AND THE US: FROM LATECOMER TO REACTIVE ACTOR

In the trade talks with Canada and the US, the EP emerged, respectively, as a latecomer and a reactive actor. In the former case, the EP attempted to be involved – albeit eventually with no success – and became more vocal only once the negotiations politicized because of the ongoing negotiations with the US.³³ In the trade talks with Canada, the EP demanded to be informed throughout the negotiating process.³⁴ The Commission, however, recommended a change to the negotiating directives without waiting for the EP's position on the matter.³⁵ The finalized text of the agreement was given to the EP only a few weeks before its publication.³⁶ The CETA negotiations remain a case of very little transparency, internally among the institutions, as well as with the wider public.³⁷ Most contestation came from civil society groups and national parliaments once the

Summit on 5 May 2010, OJ C81E/64; *European Parliament Resolution of 8 June 2011 on EU-Canada Trade Relations*, OJ C380E/20; *European Parliament Legislative Resolution of 15 February 2017 on the Draft Council Decision on the Conclusion of the Comprehensive Economic and Trade Agreement*, OJ C252/348. On TTIP, see *European Parliament Resolution on Improving EU-US Relations in the Framework of a Transatlantic Partnership Agreement*, OJ C298E/226; *European Parliament Resolution of 26 March 2009 on the State of Transatlantic Relations in the Aftermath of the US Elections*, OJ C117E/198; *European Parliament Resolution of 17 November 2011 on the EU-US Summit of 28 November 2011*, OJ C153E/124; *European Parliament Resolution of 23 May 2013 on EU Trade and Investment Negotiations With the United States of America*, OJ C55/108; *European Parliament Resolution of 13 June 2013 on the Role of the EU in Promoting a Broader Transatlantic Partnership*, OJ C65/120; *European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership*, OJ C265/35. On EUJEP, see *European Parliament Resolution of 11 May 2011 on EU-Japan Trade Relations*, OJ C377E/19; *European Parliament Resolution of 13 June 2012 on EU Trade Negotiations With Japan*, OJ C332E/44; *European Parliament Resolution of 25 October 2012 on EU Trade Negotiations With Japan*, OJ C72E/16; *European Parliament Legislative Resolution of 12 December 2018 on the Draft Council Decision on the Conclusion of the Agreement Between the European Union and Japan for an Economic Partnership*, OJ C 388.

³³ Roederer-Rynning, *supra* n. 3.

³⁴ *EP Resolution on EU-Canada Summit*, *supra* n. 32, *EP Resolution on EU-Canada Relations*, *supra* n. 32.

³⁵ European Commission, *Recommendation from the Commission to the Council on the Modification of the Negotiating Directives for an Economic Integration Agreement With Canada in Order to Authorise the Commission to Negotiate, on Behalf of the Union, on Investment* (14 Jul. 2011), <https://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf>.

³⁶ P. Delimatsis, *TTIP, CETA, and TiSA Behind Closed Doors*, in *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Stefan Griller et al. eds, OUP 2017).

³⁷ *Ibid.*; S. Riekmann, *The Struggle for and Against Globalization: International Trade Agreements and the Democratic Question*, in Griller et al., *supra* n. 36.

negotiations were already concluded. At that stage, the EP only endorsed this mobilization. By then, little could be done to change transparency practices and/or access to documents.³⁸ Even though CETA came to be highly politicized, and despite the opposing Opinion of the Committee on Employment and Social Affairs (EMPL), the EP eventually consented to the agreement.³⁹

It was during the TTIP negotiations with the US that the EP mobilized the most to challenge treaty-making practices. The EP sought to be regularly informed and to increase transparency and public access to documents, and eventually increased the amount of information it could access to an unprecedented level.⁴⁰ Above all, the EP demanded to have access to the negotiating mandate. The Council, however, relied on the international relations exception under Regulation 1049/2001 to deny disclosure.⁴¹ The Council eventually decided to disclose the mandate following the leaks by individual MEPs,⁴² European Parliament, *EU-US Trade Deal: 14 EP Committees Have Their Say* (23 Feb. 2015), <https://www.europarl.europa.eu/news/en/headlines/priorities/ttip/20150220STO24366/eu-us-trade-deal-14-ep-committees-have-their-say> (accessed 14 Jun. 2022). but most importantly after the Court's finding in *Council v. In 't Veld*, which set significant boundaries to institutional discretion and secrecy of international relations.⁴³ The publication of the TTIP mandate is to be welcomed as a shift towards positive practices, contributing to greater legitimacy and democracy.

The EP also demanded that all MEPs be given access to consolidated documents, since at the time only thirty MEPs were allowed to scrutinize confidential documents.⁴⁴ These demands were successful: they were embedded in an operational arrangement between the EP Committee on International Trade (INTA) and the Commission's Directorate General (DG) for Trade which extended access to all MEPs.⁴⁵ Under such agreement, readings rooms were also set up for MEPs,

³⁸ Roederer-Rynning, *supra* n. 3.

³⁹ *Opinion of the Committee on Employment and Social Affairs for the Committee on International Trade on the Draft Council Decision on the Conclusion of CETA* (8 Dec. 2016); *EP Resolution Consenting to CETA*, *supra* n. 32.

⁴⁰ Meissner, *supra* n. 2.

⁴¹ Article 4(1)(a) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43 (31 May 2001).

⁴² European Parliament, *EU-US Trade Deal: 14 EP Committees Have Their Say* (23 Feb. 2015), <https://www.europarl.europa.eu/news/en/headlines/priorities/ttip/20150220STO24366/eu-us-trade-deal-14-ep-committees-have-their-say> (accessed 14 Jun. 2022).

⁴³ V. Abazi, *Transparency in the Institutionalization of Transatlantic Relations: Dynamics of Official Secrets and Access to Information in Security and Trade*, in *Institutionalization Beyond the Nation State: Transatlantic Relations: Data, Privacy and Trade Law* (E. Fahey ed., Springer 2018). See also E. Fahey, *EU Foreign Relations Law: Litigating to Incite Openness of EU Negotiations*, 4 Eur. J. Risk Reg. (2014).

⁴⁴ J. Organ, *EU Citizen Participation, Openness and the European Citizens Initiative: The TTIP Legacy*, 54 Com. Mkt. L. Rev. (2017).

including at the national level, for national parliaments. The EP took up a significant monitoring role, getting the Commission to inform the INTA Committee before and after each negotiating round, and even **creating** special monitoring groups.⁴⁶ The amount of opinions, hearings and questions to the Commission by MEPs – not only from the INTA Committee, but also other Committees, such as the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Foreign Affairs (AFET) – are reflective of an intense interest in the TTIP negotiations, particularly if compared to other trade negotiations.⁴⁷

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As Roederer-Rynning has observed, however, the EP's mobilization was only galvanized in the aftermath of politicization and civil society **contestation**.⁴⁸ In fact, some of the political groups within the EP were able to act as channels for civil society concerns, by amplifying and taking charge of their demands.⁴⁹ The EP also interacted with other institutionalized actors. For instance, it called on the Commission to implement the Ombudsman's recommendations on transparency, and to strengthen its engagement with stakeholders.⁵⁰ Overall, the EP attempted to stretch its legal entitlements and to engage with civil society and other institutionalized actors, **resulting** in positive shifts enhancing the democratic quality of trade law-making.

2.2 THE EP IN THE TRADE TALKS WITH SINGAPORE AND JAPAN: FROM SILENT TO IRRESOLUTE ACTOR

The comparison with the trade talks with Singapore and Japan showcases the inconsistency of the EP's engagement. In the negotiations for the EU-Singapore Free Trade Agreement (EUSFTA), the EP was largely passive and silent. It does not appear to have asserted its rights in treaty-making, nor to **have sought to** go beyond them.⁵¹ The fact that no resolution was adopted before the signing of the FTA demonstrates little interest in the negotiations. At least up until 2013, the EU-Singapore negotiations did not provoke any clash

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⁴⁵ European Commission, *Operational Arrangements for Access to TTIP-Related Documents Between INTA Committee and DG TRADE as Endorsed by the College of Commissioners* (2 Dec. 2015).

⁴⁶ Van den Putte et al., *supra* n. 3.

⁴⁷ D. Jancic, *Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures*, 17 Cambridge Y.B. Eur. Legal Stud. (2015); Roederer-Rynning, *supra* n. 3.

⁴⁸ Roederer-Rynning, *supra* n. 3.

⁴⁹ A. Young, *European Trade Policy in Interesting Times*, 39 J. Eur. Integration (2017); G. Siles-Brügge, *Transatlantic Investor Protection as a Threat to Democracy: The Potency and Limits of an Emotive Frame*, 30 Cambridge Rev. Int'l Aff. (2018).

⁵⁰ Recommendations (c)(i) and (d)(vi) in EP Resolution on the negotiations for TTIP, *supra* n. 32.

⁵¹ L. McKenzie & K. Meissner, *Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA*, 55 J. Com. Mkt. Stud. (2017).

with the EP.⁵² For example, the Council decided to extend the mandate to include investment, without seeking or waiting for the EP's opinion on the matter, yet also without raising any objection by the EP.⁵³ Out of the total eighteen questions addressed on EUSFTA, only one raised concerns about the trade agreement.⁵⁴ The first EP resolution on the EU-Singapore trade negotiations was the one which consented to the agreement.⁵⁵ Unlike the resolutions on TTIP, the final recommendations by the INTA Committee were not accompanied by other committees' opinions.

In the context of the negotiations for the EU-Japan Economic Partnership Agreement (EJPEA), the EP tried to influence the negotiations from the outset, except that it adopted no other resolutions once the negotiations had started, until it gave the final consent to the agreement.⁵⁶ The EU-Japan negotiations are the very first case where the EP adopted three resolutions *prior to* the adoption of the mandate, requesting the Council not to approve the launching of the negotiations until the INTA Committee had taken its position.⁵⁷ Soon after the EP's adoption of the third resolution, the Council adopted the negotiating directives.⁵⁸ The EP's assertion led to placing its contribution at the agenda-setting stage, rather than at a later stage – a practice that is unforeseen under EU international relations. However, the EU-Japan negotiations were not influenced by the TTIP negotiations in terms of openness and access to documents. For example, the EP was only partially informed about the state of play of the negotiations, as shown by a minority of MEPs' criticism of the lack of transparency of the negotiations.⁵⁹

⁵² J. Pelkmans et al., *Workshop: Trade and Economic Relations With ASEAN*, report for INTA Committee (2013), [https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433718/EXPO-INTA_AT\(2013\)433718_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433718/EXPO-INTA_AT(2013)433718_EN.pdf).

⁵³ There is no record of the EP having objected to the Council's decision. While a monitoring group on the EU-Singapore FTA had been set up, and one may expect that it was informed about that decision, there is no EP document stating a position on the matter.

⁵⁴ A.-M. Mineur (GUE/NGL), *Question for Written Answer E-007624-17 to the Commission* (2017), https://www.europarl.europa.eu/doceo/document/E-8-2017-007624_EN.html (accessed 14 Jun. 2022).

⁵⁵ *EP Resolution on the conclusion of EUSFTA*, *supra* n. 32.

⁵⁶ *EP Resolution on the conclusion of EJPEA*, *supra* n. 32.

⁵⁷ *EP Resolution on EU-Japan Trade Relations*, *supra* n. 32; *EP Resolution of 13 June 2012 on EU Trade Negotiations With Japan*, *supra* n. 32; *EP Resolution of 25 October 2012 on EU Trade Negotiations With Japan*, *supra* n. 32.

⁵⁸ Council of the European Union, *Directives for the Negotiation of a Free Trade Agreement With Japan* (29 Nov. 2012), https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156051.en12.pdf (accessed 14 Jun. 2022).

⁵⁹ P. Arimont (PPE), *Question for Written Answer P-004345-17* (2017), https://www.europarl.europa.eu/doceo/document/P-8-2017-004345_EN.html; F. J. Millán Mon (PPE), *Question for Written Answer E-015936-15* (2015), https://www.europarl.europa.eu/doceo/document/E-8-2015-015936_EN.html; Parliamentary question by A. Szejnfeld (PPE), *Question for Written Answer P-012117-15* (2015), https://www.europarl.europa.eu/doceo/document/P-8-2015-012117_EN.html; A.-M. Mineur (GUE/NGL), *Question for Written Answer E-012674-15* (2015) https://www.europarl.europa.eu/doceo/document/E-8-2015-012674_EN.html; B. Eickhout (Verts/ALE), *Question for Written*

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Unlike the TTIP negotiations, no reading rooms were set up for MEPs to scrutinize the negotiating documents.⁶⁰ Yet at the same time, since the start of the negotiations, the EP failed to adopt any other resolutions on the EPA, with the exception of the one giving consent to the agreement. Here, only the EP committees on the environment, public health and food safety (ENVI), and on agriculture and rural development (AGRI) gave their opinions.⁶¹ This suggests little interest by other committees that had otherwise been vocal for TTIP and CETA, namely LIBE and EMPL.

A comparison of the EP's engagement in trade negotiations with North-American and Asian trade partners does not lead to a clear-cut picture. With some trade partners, the EP was extremely vocal and achieved some tangible results (US), or tried to assert its role during the negotiations, albeit only modestly and unsuccessfully (Canada); while in other cases it was totally silent (Singapore), or tried to influence the negotiations before they would start, but then largely remained silent until the end of the negotiations (Japan). The TTIP negotiations provide an example of how the EP reaffirmed its newly acquired legal rights to be informed and its power of consent in treaty-making⁶²; the negotiations of TTIP are also an example where the EP demanded powers not envisaged in the Treaties. By contrast, with respect to the Asian trade partners, the EP emerges as a much more silent and acquiescent actor, engaging in little scrutiny and showing little interest. Notwithstanding the experience with the TTIP negotiations, one can hardly conclude that informing the EP throughout the negotiating process is an institutionalized practice by now. Rather, it appears to depend on the politicization of trade negotiations and the EP being vocal about them. Similar discrepancy in civil society engagement across trade negotiations is presented next.

Answer P-005519-17 (2017), https://www.europarl.europa.eu/doceo/document/P-8-2017-005519_EN.html (accessed 14 Jun. 2022).

⁶⁰ E. Maurel (S&D), *Question for Written Answer E-004417-17*, https://www.europarl.europa.eu/doceo/document/E-8-2017-004417_EN.html (accessed 14 Jun. 2022); X. Benito Ziluaga (GUE-NGL) accused on twitter the European Union for negotiating a trade deal in secrecy, and that national parliaments could not debate or amend it, https://twitter.com/xabierbenito/status/1073226012119445504?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1073226012119445504&ref_url=https%3A%2F%2Fwww.europeandatajournalism.eu%2Ftools-for-journalists%2FQuote-Finder%2FQuote-Finder-notes%2FThe-EU-has-signed-a-free-trade-agreement-with-Japan (accessed 14 Jun. 2022).

⁶¹ *Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on International Trade on the Draft Council Decision on the Conclusion of the Agreement Between the European Union and Japan for an Economic Partnership* (17 Oct. 2018).

⁶² Meissner, *supra* n. 2.

3 EU CIVIL SOCIETY IN EU TRADE NEGOTIATIONS

Unlike the EP, civil society actors do not enjoy a formal role in the law of treaty-making, but have benefitted from the emergence of a number of (more or less permanent) mechanisms and initiatives aimed at involving them during the negotiations.⁶³ The Civil Society Dialogues are the main avenue for engagement and consultation. However, research suggests that these mechanisms mostly work as platforms for debriefing by the Commission and information gathering, rather than as instruments to exert a meaningful influence over the negotiations.⁶⁴ From a legal perspective, an important novelty of the Treaty of Lisbon is the European Citizen Initiative (ECI).⁶⁵ The ECI allows citizens to invite the Commission to submit a proposal on matters where they consider ‘a legal act of the Union is required for the purpose of implementing the Treaties’.⁶⁶ Yet some scholars believe that the ECI is a very limited tool for bringing about legislative output, and this was indeed the case during the negotiations of TTIP.⁶⁷ The following analysis shows that civil society actors have challenged the negotiations of the new generation EU FTAs in a number of ways, ranging from street mobilization to a more sophisticated mobilization through law, such as the ECI. Improvements in treaty-making practices can only be observed in TTIP and CETA, where mobilization has been at the highest.⁶⁸ If the negotiations with Singapore largely preceded TTIP and passed under the radar, the negotiations with Japan were not influenced by the TTIP and raised little to no controversy.

3.1 THE UNPRECEDENTED MOBILIZATION AGAINST TTIP AND CETA

Unlike TTIP, the negotiations with Canada did not spark mobilization at the outset, and could initially proceed by and large with little public scrutiny.⁶⁹ Contestation of CETA should be understood as a side effect of politicization of

⁶³ See e.g., European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015); European Commission, *Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements* (2018).

⁶⁴ Velut, *supra* n. 11; M. L. Marceddu, *Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin’?*, 21 J. Int’l Econ. L. (2018); N. Gheyle & F. De Ville, *How Much Is Enough? Explaining the Continuous Transparency Conflict in TTIP*, 5 Pol. & Governance (2017); Dür & De Bièvre, *supra* n. 10.

⁶⁵ Article 11(4) TEU, which has taken effect via Regulation 211/2011 of the European Parliament and of the Council of 16 Feb. 2011 on the citizens’ initiative, OJ L 65/1.

⁶⁶ Article 2 Regulation 211/2011, *ibid.*

⁶⁷ Anastasia Karatzia, *The European Citizens’ Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking*, 54 Com. Mkt. L. Rev. (2017); Organ, *supra* n. 44; Abazi, *supra* n. 43.

⁶⁸ The recently revived negotiations for an EU-Mercosur Association Agreement are another example of high level of civil society mobilization during trade negotiations, albeit not examined here.

⁶⁹ Roederer-Rynning, *supra* n. 3.

TTIP, which took place when CETA negotiations had almost terminated. A posteriori, the negotiations of CETA have been described as amongst the least transparent of the latest EU trade negotiations.⁷⁰ When the contestation of TTIP spilled over to CETA, a comparable degree of transparency demands arose.⁷¹ Yet the fact that civil society actors started being vocal at a later stage ^{was} also reflected in the way they mobilized. The purpose of their engagement was not to influence the negotiations – which had by then come to an end – but to block the provisional application of CETA and its ratification at a later stage. In doing so, civil society leveraged mobilization of other actors, including citizens, national courts and national parliaments.⁷²

By mobilizing public opinion, civil society groups triggered citizens' action through law. In a lawsuit submitted to the German Federal Constitutional Court, around 125,000 citizens and MPs demanded to block the provisional application of CETA.⁷³ While not successful, some have considered the reservations to be 'a partial victory'.⁷⁴ A series of further developments show that such contention put a great political pressure on national parliaments and governments,⁷⁵ who in turn challenged CETA via judicial scrutiny.⁷⁶ Examples include the refusal of the Walloon Parliament in Belgium to consent to CETA⁷⁷; the request by members of the French Parliament to the French Constitutional Council of a ruling on the

⁷⁰ Delimatsis, *supra* n. 36.

⁷¹ R. Patz, *Just the TTIP of the Iceberg? Dynamics and Effects of Information Leaks in EU Politics*, 7 Eur. J. Risk Reg. (2016); C. Herrmann, *Transleakancy*, in *Trade policy between law, diplomacy and scholarship* (C. Herrmann et al. eds, Springer 2015).

⁷² As some Member States still had to ratify the agreement, European and Canadian civil society organizations sent letters to EU national parliaments. See Amis de la Terre, *Letter Sent to the National Assembly* (2 Jul. 2019), http://www.amisdelaterre.org/IMG/pdf/courrier_parlementaires_ceta_an_020719-4.pdf (accessed 14 Jun. 2022); the letter was backed by Canadian NGOs in an open letter, see Council of Canadians, *French Politicians Should not Ratify CETA* (15 Jul. 2019), <https://canadians.org/update/french-politicians-should-not-ratify-ceta>; and by some Canadian and Quebecois politicians, see Global News, *Letter from Canadian and Quebecois Politicians from Across Political Parties Who Join Us in Asking French Politicians to not Ratify CETA* (17 Jul. 2019), <https://globalnews.ca/news/5502729/ceta-open-letter/> (accessed 14 Jun. 2022).

⁷³ Riekmann, *supra* n. 37.

⁷⁴ *Ibid.*

⁷⁵ A similar situation has characterized the recently revived negotiations of the EU-Mercosur Association Agreement, subject to a lot of criticism and resistance from national governments and parliaments (and sub-national parliaments, e.g., Walloon Parliament), in addition to the general public opposition and civil society mobilization. See e.g., Civil society letter calling for the EU to put human rights and sustainability front and centre of the Free Trade Agreement negotiations (25 Apr. 2018), https://www.fern.org/fileadmin/uploads/fern/Documents/EU-Mercosur%20FTA%20NGO%20letter_2.pdf (accessed 14 Jun. 2022).

⁷⁶ J. Larik, *Prêt-à-ratifier: The CETA Decision of the French Conseil Constitutionnel of 31 July 2017 Case Note: The CETA Decision of the French Conseil Constitutionnel*, 13 Eur. Const. L. Rev. (2017).

⁷⁷ G. Van der Loo & R. A. Wessel, *The Non-ratification of Mixed Agreements: Legal Consequences and Solutions*, 54 Com. Mkt. L. Rev. (2017).

compatibility of CETA with constitutional law⁷⁸; and Belgium's request to the ECJ on the compatibility of CETA with EU law.⁷⁹

The impasse created by the Wallonia case is particularly relevant for the outcome that it produced. At a time when the CETA negotiations had long terminated, the EU and Canada adopted the Joint Interpretative Instrument (JII).⁸⁰ With the latter, they provided a series of guarantees to the Walloon parliament and to the public more broadly. As part of a compromise, the Belgian federal government would then request an Opinion to the ECJ, on the compatibility of the Investment Court System (ICS) with the EU Treaties, including fundamental rights.⁸¹ Although the Court found no incompatibility, the evolution of this process remains a notable instance of challenge to EU external trade law and policy, in this case by a Member State, on behalf of a **region**, supposedly acting in support of fundamental rights. The JII also played an important role in the subsequent ruling by **the** French Constitutional Council: the JII was arguably decisive for the dismissal of incompatibility, raising doubts as to whether the Court would have reached the same conclusion in its absence.⁸²

Finally, De Bièvre has argued that it was precisely the combination of civil society mobilization against Investor-State Dispute Settlement (ISDS) and the demands by some governments, chiefly Germany and France, that triggered the Commission to change its stance on the arbitration system for investment protection.⁸³ During the legal scrubbing process, when the text was already finalized, the EU proposed and obtained the agreement by Canada to substitute ISDS with the ICS. One can wonder whether such a change would have occurred without **the** pressure by national governments and civil society mobilization. Even though both civil society and the **Member States** became acquainted with the change only *ex post facto*, it still sets a significant precedent for how EU trade agreements are negotiated and concluded, and how they evolve as a result of the involvement of other actors.⁸⁴

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⁷⁸ Conseil constitutionnel (French Constitutional Council), Decision 2017-749 DC (31 Jul. 2017). See Larik, *supra* n. 76.

⁷⁹ More specifically, of the Investment Court System contained in the agreement. See Opinion 1/17: Request for an opinion submitted by the Kingdom of Belgium pursuant to Art. 218(11) TFEU, OJ C369/02.

⁸⁰ *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and Its Member States*, [2017] OJ L11/3.

⁸¹ S. Gstöhl & D. De Bièvre, *The Trade Policy of the European Union* (Red Globe Press 2017). See also Walloon Parliament, *Motion déposée en conclusion du débat sur l'Accord économique et commercial global (AECG-CETA)* (28 Oct. 2016), https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2016/11/motion_aecg_adoptee_parlement_wallon_28.10.2016.pdf (accessed 14 Jun. 2022).

⁸² Larik, *supra* n. 76.

⁸³ D. De Bièvre, *The Paradox of Weakness in European Trade Policy: Contestation and Resilience in CETA and TTIP Negotiation*, 53 Int'l Spectator (2018).

The negotiations for TTIP represent a peak in civil society engagement and politicization. From the outset, the lack of information about the negotiations raised a huge amount of aversion: consumer, labour and environmental civil society organizations on both sides of the Atlantic organized campaigns, mobilized in the streets and leaked documents.⁸⁵ The ‘behind closed doors’ trade negotiations prompted a number of organizations to express their determination to monitor the process closely and to demand the publication of draft negotiating texts.⁸⁶ Together with the EP, civil society put high pressure on the Commission and the Council to have access to the negotiating texts. The inadequate responses by the Council and the Commission to civil society demands prompted the intervention of the European Ombudsman.⁸⁷ The Ombudsman took on the case by initiating two own-initiative inquiries, which triggered positive developments in terms of transparency.⁸⁸ For instance, an outcome in this regard was the Commission’s decision to publish the EU’s textual proposals and position papers, and to design a transparency initiative, thus making TTIP a unique case of positive shifts towards unprecedented transparency.⁸⁹

Not only did civil society actors mobilize to obtain more information about the negotiations. They also attempted to halt them altogether by means of the ECI. During the TTIP negotiations, civil society succeeded in mobilizing public opinion and gathering over 3 million signatures for a petition against the conclusion of

⁸⁴ H. Lenk, *An Investment Court System for the New Generation of EU Trade and Investment Agreements*, 1 Eur. Papers (2016).

⁸⁵ M. Conrad & A. Oleart, *Framing TTIP in the Wake of the Greenpeace Leaks: Agonistic and Deliberative Perspectives on Frame Resonance and Communicative Power*, 42 J. Eur. Integration (2020).

⁸⁶ Public Citizen, *Letter to Obama Alerting TAFTA Concerns* (11 Nov. 2013), <https://www.citizen.org/wp-content/uploads/public-citizen-letter-to-obama-alerting-to-tafta-concerns.pdf>; Centre for International Environmental Law, *Letter to Ambassador Michael Froman and Commissioner Karel De Gucht* (12 May 2014), https://www.ciel.org/Publications/TTIP_REGCO_12May2014.pdf; Friends of the Earth, *Letter to Commissioner Karel de Gucht* (19 May 2014), http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf (accessed 14 Jun. 2022).

⁸⁷ European Ombudsman, *Letter to the Commission* (28 Jul. 2014), https://www.ombudsman.europa.eu/en/correspondence/en/54633#_ftn1 (accessed 14 Jun. 2022). See also Meissner, *supra* n. 2.

⁸⁸ Following this example, in the context of the negotiations of the EU–Mercosur Association Agreement, a number of civil society organizations filed a complaint with the European Ombudsman, condemning the EU Commission’s failure to finalize a sustainability impact assessment before the end of the negotiation process (in doing so, they referred to the Ombudsman’s decision in case 1409/2014/MHZ on the Commission’s failure to carry out a prior human rights impact assessment of the EU–Vietnam FTA). The Ombudsman found this to be a case of maladministration. While the Commission’s finalization of the assessment does not represent an example of new, or improvement in, democratic practices, civil society mobilization was pivotal for exercising pressure on the EU Commission to secure adherence to existing best practices. See Civil society letter, *supra* n. 86, and European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalize an updated ‘sustainability impact assessment’ before concluding the EU–Mercosur trade negotiations (18 Mar. 2021), <https://www.ombudsman.europa.eu/en/decision/en/139418> (accessed 14 Jun. 2022).

⁸⁹ E. Fahey, *On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal Order: A Legal Perspective*, 43 Legal Issues Econ. Integration (2016).

TTIP (and CETA later).⁹⁰ The submission of the petition as a request to register for an ECI marked ordinary citizens' engagement through law, as opposed to street mobilization.⁹¹ Although the Commission first rejected the application, the organizers of the initiative brought an action to the General Court of the EU, seeking annulment of the decision.⁹² The Court found that the Commission's narrow interpretation of 'legal act' constituted a considerable restriction to the recourse to the ECI 'as an instrument of European Union citizen participation' and annulled the decision.⁹³ Whilst the ECI sought to **reject** TTIP as a whole – hence contributing little to shifts in treaty-making practices – it can still be deemed an instance of citizens **asserting themselves** as actors of EU trade law-making.

The mobilization of civil society actors against the lack of information had an impact on the new mechanisms created for them to scrutinize the negotiations.⁹⁴ The Commission adopted a new policy on transparency,⁹⁵ granted public and institutional access to documents,⁹⁶ and found itself in a situation of having to repeatedly reassure the public that TTIP would have not lowered standards. Another observable development in this regard is the Commission's decision to establish an Expert Advisory Group specifically for TTIP.⁹⁷ The Group comprised fourteen members representing business, consumer, labour and health interests.⁹⁸ They were informed throughout the negotiations and **were** also allowed to consult EU negotiating texts, raise questions and provide comments.⁹⁹ As such, it is one of the experiments most praised by civil society actors themselves.¹⁰⁰ The Advisory Group can be understood as a form of institutionalization of civil society in treaty-making processes, as it represents an embrace of civil society groups as actors of EU external trade. The negotiations of TTIP are now widely recognized by civil

⁹⁰ Eliasson & Garcia-Duran Huet, *supra* n. 12. A similar petition has been arranged by 450 civil society organizations through the creation of a coalition to stop the EU-Mercosur Association Agreement, see <https://stopeumercosur.org/#coalition-statement> (accessed 14 Jun. 2022).

⁹¹ Fahey, *supra* n. 89.

⁹² Case T-754/14, *Efler and Others v. Commission* EU:T:2017:323.

⁹³ *Ibid.*, § 38. The Commission decided not to appeal the decision and registered the initiative on 10 Jul. 2017. In the meantime, CETA was signed, thus voiding the initiative of its purpose. See European Commission, *European Citizens' Initiative: Commission Registers 'Stop TTIP' Initiative* (17 Jul. 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1872 (accesses 14 Jun. 2022).

⁹⁴ Abazi, *supra* n. 43.

⁹⁵ European Commission, *Communication to the Commission Concerning Transparency in TTIP Negotiations*, C(2014)9052 final (25 Nov. 2014), <https://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9052-EN-F1-1.Pdf> (accessed 14 Jun. 2022).

⁹⁶ Abazi, *supra* n. 43.

⁹⁷ European Commission, *Expert Group to Advise European Commission on EU-US Trade Talks* (27 Jan. 2014), https://europa.eu/rapid/press-release_IP-14-79_en.htm (accessed 14 Jun. 2022).

⁹⁸ *Ibid.*

⁹⁹ European Commission, *Transatlantic Trade & Investment Partnership (TTIP) Advisory Group: Terms of Reference* (27 Jan. 2014), <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=11459&no=1> (accessed 14 Jun. 2022).

¹⁰⁰ Interviews with civil society representatives.

society as the marking point of shifts in the Commission's treaty-making practices, particularly in terms of transparency and access to documents.¹⁰¹ TTIP is a successful case whereby an unprecedented array of actors challenged and noticeably impacted treaty-making practices.¹⁰²

3.2 THE PASSIVITY IN THE TRADE TALKS WITH SINGAPORE AND JAPAN

In the EU-Singapore negotiations, civil society actors stood as major absentees. No EU position papers or reports of the negotiating rounds have been published, not even retrospectively.¹⁰³ It is therefore striking how civil society groups have not denounced the overt lack of information and documents (un)available on the EU-Singapore trade negotiations: no reports, articles or publications can be found in the websites of some of the typically most active organizations, even though the negotiations touched upon controversial issues that would later receive harsh opposition in the context of TTIP.¹⁰⁴ Different civil society groups mobilized to campaign only in relation to the EU-Singapore Investment Protection Agreement (EUSIPA), and not so much against its trade counterpart (EUSFTA).¹⁰⁵ Civil society actors presented their views a few days prior to the expected EP's final vote on both EUSFTA and EUSIPA.¹⁰⁶ Against the disappointment created by the EP's consent, calls were made onto the national parliaments, to 'step up where MEPs have failed'.¹⁰⁷ However, the separation of the agreements meant that national parliaments did not need give consent to EUSFTA, but only to EUSIPA. The EU-Singapore negotiations are therefore a case of absent

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¹⁰¹ *Ibid.*

¹⁰² Young, *supra* n. 13.

¹⁰³ Only the text of the agreement is available under 'Singapore' in the 'transparency in action' website, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395> (accessed 14 Jun. 2022).

¹⁰⁴ All the contributions by civil society on EUSIPA date 11 Feb. 2019, namely a few days prior to the expected EP's final vote. See Friends of the Earth Europe, *EU-Singapore Investment Deal Protects the Rich and Powerful* (11 Feb. 2019), <https://www.foeeurope.org/EU-Singapore-deal-protects-rich-110219>; European Trade Union Confederation (ETUC), *ETUC Position on Singapore Investment Protection Agreement* (11 Feb. 2019), <https://www.etuc.org/en/circular/etuc-position-singapore-investment-protection-agreement-eusipa>; SOMO, *The EU-Singapore Investment Protection Agreement* (11 Feb. 2019), <https://www.somo.nl/the-eu-singapore-investment-protection-agreement/>; StopISDS, *MEPs Take Note: EU-Singapore Deal Could Hinder Fight Against Fraud and Corruption*, <https://stopisds.org/meps-take-note-eu-singapore-deal-could-hinder-fight-against-fraud-and-corruption/>; Transnational Institute, *EU-handelsverdragen met Singapore en Vietnam strijdig met SER-meetlat* (14 Oct. 2018), <https://www.tni.org/en/node/24423>; Institut Veblen, Foodwatch & Fondation Nicolas Hulot, *Risque pour les droits humains: l'accord commercial UE-Singapour inquiète les ONG* (15 Feb. 2019), <https://www.bilaterals.org/?risque-pour-les-droits-humains-l>. Similarly, twitter shows several #stopEUSIPA hashtags (albeit only since 8 Feb. 2019) and only one #stopEUSFTA (author's query, https://twitter.com/search?q=%23stopEUSIPA&src=typed_query) (accessed 14 Jun. 2022).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ StopISDS, *supra* n. 104. *Ibid.*

mobilization by civil society groups, with no examples of demands for more transparency or actions through law.

Just as the trade negotiations with Singapore, the EU-Japan negotiations for the EPA **did not provoke significant** civil society mobilization. Suzuki has spoken of the ‘Japanese case’ to refer to the EU-Japan trade negotiations as an ‘exception’ to the recent mobilization in the context of TTIP and CETA.¹⁰⁸ Despite some early contestation from producers’ pressure groups in Japan, the negotiations remained exposed to a ‘participation deficit’ by civil society organizations, in Europe as much as in Japan.¹⁰⁹ The EUJEPAs negotiations went largely unnoticed: they did not politicize and did not undergo public scrutiny. No campaigns and opposition protests were carried on. This was despite the little transparency of the whole process; the initial uncertainty as to whether the agreement would have contained ISDS; and their overlap with the TTIP politicization.¹¹⁰ One may also suppose that, precisely because all the attention was on TTIP, fewer resources were left to scrutinize the negotiations for EUJEPAs.¹¹¹ Some scholars have observed that the EU-Japan negotiations began to gain more attention when the possibility of an agreement with the US had vanished.¹¹² Civil society eventually adopted position papers, yet just one year before the conclusion of the negotiations.¹¹³ Compared to the mobilization against TTIP and CETA, such adoption of position papers remained rather low profile and a late form of engagement. The late mobilization of civil society coincided with the first leak of the agreement¹¹⁴ and the subsequent Commission’s publication of its position papers in 2017.¹¹⁵ This may

¹⁰⁸ Suzuki, *supra* n. 14.

¹⁰⁹ *Ibid.*, at 880.

¹¹⁰ M. Bungenberg & A. Hazarika, *The European Union’s Trade and Investment Policy in Asia: New Challenges and Opportunities in a Changing Global Environment*, 15 Asia Eur. J. (2017); E. Coremans & K. Meissner, *Putting Power into Practice: Administrative and Political Capacity Building in the European Parliament’s Committee for International Trade*, Pub. Admin. (2018); Kleimann, *supra* n. 14; Suzuki, *supra* n. 14.

¹¹¹ Interview with a civil society representative.

¹¹² M. Frenkel & B. Walter, *The EU-Japan Economic Partnership Agreement: Relevance, Content and Policy Implications*, 52 Intereconomics (2017).

¹¹³ GUE/NGL report, *Making Sense of JEF TA* (Nov. 2017), http://s2bnetwork.org/wp-content/uploads/2018/03/JEF TA_report_final_.pdf; Fern, *The EU-Japan Free Trade Deal: A Threat to the Fight Against Illegal Timber?* (Briefing Note Sep. 2018), <https://www.fern.org/fileadmin/uploads/fern/Documents/Fern-Japan-FTA-threat-illegal-timber-briefing.pdf>. One exception is ETUC, the first to mobilize by reaching out to their Japanese counterparts. See e.g., Japanese Trade Union Confederation, *RENGO Calls for Job Creation and Better Working Conditions Through Japan-EU EPA: RENGO & ETUC Joint Action* (29 May 2015), <http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=362&dir=2015/05> (accessed 14 Jun. 2022).

¹¹⁴ Greenpeace Netherlands, *JEF TA Leaks* (27 Jun. 2017), <https://trade-leaks.org/jef ta-leaks/> (accessed 14 Jun. 2022).

¹¹⁵ The Commission’s publication of its position papers comes quite late from a number of perspectives: not only because of the stage of the negotiations, but also given its commitment to transparency in 2014; its adoption of transparency guidelines in 2015; and its publication, in Jan. 2015, of the position papers of the parallel TTIP negotiations as part of its transparency initiative. See European

lead to believe that scrutiny by civil society was not possible prior to this publication. The earliest report of the negotiations available on the Commission website only goes back to the fifteenth negotiating round, which took place in the spring of 2016.¹¹⁶ Reports of earlier rounds have not been published.¹¹⁷ In this respect, the EU-Japan negotiations represent a retrogress on transparency when compared to TTIP, and resemble ‘the trade policy *modus operandi* of the pre-Lisbon Treaty era’.¹¹⁸

4 CONCLUSION: THE UPS AND DOWNS OF AN ERRATIC ENGAGEMENT

The negotiation stage is pivotal for an issue to **be defined, framed and** become part of a trade agreement.¹¹⁹ It is at this stage that actors with a direct link to citizens have the chance to exercise influence. Yet what emerges from the analysis is an inconsistent picture of the degree of engagement by the EP and civil society across trade negotiations, with implications for the resulting procedural outcomes.

In terms of timing of the engagement, most contestation erupted in the context of TTIP because of civil society mobilization, and only afterwards spilled over CETA, when its negotiations had almost come to an end. The politicization of these trade negotiations prompted the EP to assert a front-line role as a spokesperson for citizens’ concerns. Yet the lack of politicization and saliency of the trade negotiations with Singapore and Japan meant that the EP did not engage significantly. In these cases, trade negotiations took place as in the pre-Lisbon era.

The timing of engagement had an impact on the modalities of contestation. The EP and civil society employed different tools and strategies. When it was not silent, the EP reaffirmed its competences in treaty-making under EU law, and in

Commission, *Opening the Windows: Commission Commits to Enhanced Transparency* (25 Nov. 2014), https://europa.eu/rapid/press-release_IP-14-2131_en.htm; European Commission, *The EU-Japan Agreement Explained*, <https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/agreement-explained/>; European Commission, *European Commission Publishes TTIP Legal Texts as Part of Transparency Initiative* (7 Jan. 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231> (accessed 14 Jun. 2022).

¹¹⁶ European Commission, *Report of the 15th EU-Japan FTA/EPA Negotiating Round Brussels, 29 February – 4 March 2016*, https://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf (accessed 14 Jun. 2022).

¹¹⁷ European Commission, *EU-Japan Economic Partnership Agreement (EPA) – Meetings and Documents*, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2042>; and ‘more documents on Japan’, https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=127 (accessed 14 Jun. 2022).

¹¹⁸ Kleimann, *supra* n. 14. The same has been observed in the context of the negotiations for an EU-Mercosur Agreement, see K. Pasquariello Mariano & B. Theodoro Luciano, *The Parliamentarization of EU Trade Policy: Unveiling the European Parliament’s Involvement in EU-MERCOSUR Trade Negotiations*, 20 Eur. Pol. & Soc. 604 (2018).

¹¹⁹ O. Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press 1994).

other cases pushed beyond the right to be informed throughout the negotiating stage and give consent. As regards civil society, there was a shift from transparency demands through leaks, to an engagement through law (as shown by the ECI in the context of TTIP and CETA), and mobilization of institutional actors acting through law, such as courts and national parliaments. By contrast, the trade negotiations with Singapore and Japan did not witness forms of engagement through law.

Substantive and procedural changes resulted when mobilization took place. As regards CETA, tangible add-ons to the substance of the agreement were the ICS and the JII. The EP and civil society also challenged procedural aspects of the negotiations, such as their secrecy and the impossibility to access documents. In the context of TTIP, the reading rooms for MEPs, the Expert Advisory Group for civil society, and the Commission's transparency initiatives are some examples of procedural changes. The EP also leveraged its new powers and even asserted new ones: its request to the Council not to adopt the mandate for EUJEP before the EP had issued an opinion, certainly sets an important precedent.

Where practices have changed, however, not all have been immune to criticism. Some scholars have argued that attempts by the Commission to increase transparency resulted in 'little participative content or democratic value'.¹²⁰ This is in line with Madner's argument that, while transparency is an essential element to enable democratic deliberation, the publication of the negotiating texts is 'neither sufficient nor adequate in order to stimulate an informed public debate'.¹²¹ According to Zürn, responses under the form of greater access to documents to non-state actors are only an attempt to keep hold of legitimacy.¹²² And indeed, the newly emerged practices of the Commission in TTIP appear to be in reaction to the contestation of TTIP, rather than a long-term commitment to transparency and a more legitimate treaty-making. These practices were replicated in the trade negotiations with Japan; nor were they applied retroactively to EUSFTA, e.g., by publishing the negotiating mandates and reports. While the negotiations with Singapore for the trade agreement largely preceded the contestation of TTIP and CETA, the negotiations with Japan appear to have cast the lessons of TTIP into oblivion. The TTIP Advisory Group, an initiative highly welcomed by civil society, also remains a unique instance of the TTIP negotiations. Its legacy, the Expert Group on Trade, is merely consultative, does not envisage access to documents and its mandate expired at the end of 2019.¹²³

¹²⁰ Organ, *supra* n. 39.

¹²¹ V. Madner, *A New Generation of Trade Agreements: An Opportunity not to Be Missed?*, in Griller et al., *supra* n. 36.

¹²² M. Zürn, *Opening Up Europe: Next Steps in Politicization Research*, 39 *West Eur. Pol.* (2015).

Among the responses to the procedural demands by the EP and civil society, many appear either not to have been replicated, or to be flawed, or temporary in nature. Importantly, challenges to procedures and practices of treaty-making shed light on some of the deficiencies of the current state of play. By showing where demands and needs stand when it comes to democratic treaty-making, they provide some examples of the future direction of EU trade law-making.

¹²³ See European Commission, *Expert Groups*, https://policy.trade.ec.europa.eu/analysis-and-assessment/expert-groups_en#:~:text=Expert%20group%20on%20trade%20agreements&text=Its%20role%20was%20to%20provide,at%20the%20end%20of%202019 (accessed 14 Jun. 2022).