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Editorial EYIEL 8 (2017)

The *EYIEL*, already in its eighth volume, focuses particularly on the EU and its international economic relations and thereby also on the EU's role in international trade negotiations as well as in international organisations.

Until a short while ago, the external economic relations of the EU attracted the attention of very few experts—as is still reflected by most textbooks on EU law. This has obviously changed. TTIP and CETA especially and other EU-FTAs in general, as well as popular issues such as investor-state dispute settlement and imports from China in particular, now attract the attention of tens of thousands of people and are discussed in parliamentary hearings at regional, national and European levels. National courts as well as the Court of Justice of the European Union decide on different elements of international trade and investment issues with regard to their (national) constitutionality as well as on their conformity with EU law.

The different contributions in this volume aim to shed light on the EU and its external economic relations from as many different angles as possible. The 2009 Treaty of Lisbon restructured the constitutional background of the EU common commercial policy to a large degree. The result of these developments is visible in the EU mode of negotiating agreements with third states, its appearance in international organisations and unilateral answers given by the EU institutions when adopting import or export regulations. *Marise Cremona* in her distinguished essay draws on "A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy" and thereby gives an insight into the current state of play and background of the EU common commercial policy.

The first part of this *EYIEL* volume highlights the primary and secondary EU law developments with a specific focus on federal, democratic and cooperative exercises and implementation of the EU common commercial policy by the EU and its Member States. As a consequence of the often discussed but more than complicated

vertical and horizontal distribution of competences between the EU and its Member States as well as among the EU institutions, *Thomas Cottier* proposes a possible solution to the now almost permanent discussion of mixed agreements by "Front-Loading Trade Policy-Making in the European Union: Towards a Trade Act". *Mattias Wendel* discusses "International Trade Agreements and Democratic Participation" and *Joris Larik* a "Sincere Cooperation in the Common Commercial Policy: Lisbon, a 'Joined-up' Union, and 'Brexit'". *Wendel* puts special focus on the widely debated transparency issue as a necessary element of democratic legitimisation. *Larik* considers the vertical relationship between the EU and its Member States and discusses the basic EU principle of *Unionstreue*. *Alessandra Asteriti* sheds light on non-economic objectives named in Article 21 TEU and their relevance for the EU's common commercial policy; she sees in this "A Test of Coherence", before *Christina Binder* and *Jane A. Hofbauer* analyse "The Perception of the EU Legal Order in International Law" and in this regard undertake "An In- and Outside View".

The authors in this part have then followed specific policy-related approaches and focus not only on the central and traditional issues of the common commercial policy but also on the more recent features of EU external relations law. This approach can be seen, on the one hand, through *Wolfgang Müller's* evaluation of "The EU's Trade Defence Instruments: Recent Judicial and Policy Developments", encompassing the traditional issues of the application of import rules, and, on the other hand, through the directly related issues of investment, competition, procurement and raw materials law, which are dealt with in individual contributions. In the field of investment law, as one of the more recent features of the EU external relations law, *Christoph Ohler* firstly discusses the "Democratic Legitimacy and the Rule of Law in Investor-State Dispute Settlement under CETA", and secondly *August Reinisch* puts the spotlight on the most recent idea of a permanent investment court system in his contribution—"The EU and Investor-State Dispute Settlement: WTO Litigators Going 'Investor-State Arbitration' and Back to a Permanent 'Investment Court'". In the field of competition law, another hot topic in EU external economic relations, *Florian Wagner-von Papp* closely analyses "Competition Law in EU Free Trade and Cooperation Agreements" and additionally covers the extraterritorial application of EU competition law and gives a firsthand analysis of "What the UK Can Expect after Brexit" in this field of law and politics. *Stephen Woolcock* then presents an in-depth treatment of "The European Union's Policy on Public Procurement in Preferential Trade Agreements", before *Karsten Nowrot* covers the more recent developments of EU raw materials law as part of the common commercial policy in his piece on "Good Raw Materials Governance: Towards a European Approach Contributing to a Constitutionalised International Economic Law", which in a turn of course takes Article 21 TEU as a normative starting point for its development.

The second part of *EYIEL* traditionally focuses on "regions"—this volume, therefore, places the ongoing bi- and multilateral negotiations of the EU under scrutiny. *Frank Hoffmeister* gives a detailed overview with "Bruxelles" insights when he summarises the "Bilateral Developments in EU Trade Policy Seven Years

After Lisbon: A Look into the Spaghetti-Bowl à la Bruxelloise (2010–2016)". In the articles following it, specific concluded agreements, ongoing negotiations and envisaged new agreements are discussed. *Armand de Mestral* starts out with some pronounced Canadian observations on the recently signed CETA and the current EU difficulties in negotiating such agreements at all in his contribution "Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties". *Yumiko Nakanishi* describes the Japanese perspective on "Characteristics of EU Free Trade Agreements in a Legal Context", before *Manjiao Chi* reflects on ongoing negotiations in "The China-EU BIT as a Stepping Stone Towards a China-EU FTA: A Policy Analysis" and thus also draws attention to future issues when relations with the "East" might become easier to sell to the citizens than those with longstanding allies from the "West". The Commission's 2015 "Trade for All" communication already has some ideas about which bilateral negotiations might be next in line; therefore, *Leon Trakman*, *Robert Walters* and *Bruno Zeller* discuss "The Proposed European and Australian Free Trade Agreement" especially from a small and medium-sized enterprise perspective. As a final contribution in this chapter—with an economics-based approach—*Roy Chun Lee* tackles an issue that might be still a long way down the road: "EU-Taiwan" as "New Partners in International Trade Negotiations".

While the second part of *EYIEL* generally deals with "regions", the focus of the third part is on international organisations. *Anna-Luise Chané* and *Jan Wouters* evaluate the relationship between the EU and the "United Nations Economic Governance Fora"; *Päivi Leino* then deals with more international financial matters when discussing "The Duty of Cooperation, Consistency and Influence in the External Relations of the Euro-Zone: Representation of EU and EU Member States in the International Monetary Fund". Finally, in the last contribution, *Jan Bohanes* and *Kholofelo Kugler* give an "Overview of WTO Jurisprudence in 2015 Involving the EU as a Main Party and Selected Cases with Third-Party Participation by the EU".

The editing of this volume would not have been possible without the help and assistance of *Anja Trautmann* who together with *Lukas Kleinert* and *Fabian Blandfort* had to take care of inter alia the final adaptation of manuscripts to form and style guidelines or had to remind some authors of deadlines. Last but not least, we thank *Brigitte Reschke* of Springer for cooperating with us once again and ensuring that this volume could be published as scheduled.

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March 2017

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Christina Binder is professor of international law and international human rights law at the University of the Federal Armed Forces in Munich and lecturer at the Department of European, International and Comparative Law at the University of Vienna. She was visiting fellow at the Lauterpacht Centre for International Law in Cambridge (2007–2008), at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg (2008–2010) and at McGill University in Montréal (summer 2015). She is a member of the Young Academy of the Austrian Academy of Sciences and of the ILA Committees on the Implementation of the Rights of Indigenous Peoples and on Feminism in International Law. Christina is member of the executive board of the European Society of International Law (ESIL).

Jan Bohanes has served as senior counsel at the Advisory Centre on WTO Law (ACWL) since 2010. He assists developing countries in WTO dispute settlement proceedings and has advised on a broad scope of WTO legal issues. Prior to joining the ACWL, Jan was associate attorney at the Geneva office of Sidley Austin LLP, where he advised governments and large commercial stakeholders on all issues of WTO law, including WTO dispute settlement. Between 2002 and 2006, he worked as legal officer at the Appellate Body Secretariat of the World Trade Organization, assisting Appellate Body members on appeals in the WTO dispute settlement system.

Anna-Luise Chané is a research fellow and Ph.D. candidate in law at the Leuven Centre for Global Governance Studies and at the Institute for International Law, University of Leuven. Her research focuses on the relationship between multilateral organisations, in particular the United Nations and the EU, on the EU and human rights and on human dignity in the case law of international courts and tribunals. She is a researcher on the large-scale FP7 project "Fostering Human Rights Among European Policies" (FRAME). Anna-Luise studied law at the University of Cologne and the University of Leuven and passed her first and second juridical state examination with distinction. She holds a master of laws degree from Harvard Law School, where she was an ERP scholar of the German Ministry of Economy and Technology and the German National Academic Foundation.

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Thomas Cottier is professor emeritus of European and international economic law at the University of Bern, a senior research fellow at the World Trade Institute and adjunct professor at the University of Ottawa, Faculty of Law, and a board member of EYIEL. He was the founder and managing director of the World Trade Institute from 1994 to 2015 and SNF National Centre of Competence NCCR on International Trade Regulation and, previously, the deputy director general of the Swiss Intellectual Property Office. He served on the Swiss negotiating team of the Uruguay Round and on EFTA-EU EEA negotiations. Thomas has been a member and chair of several GATT and WTO panels and has published widely in international economic law.

Marise Cremona has been a professor in the Law Department of the European University Institute since 2006. She is a codirector of the Academy of European Law and a general editor (with Profs. Nehal Bhuta and Claire Kilpatrick) of *The Collected Courses of the Academy of European Law*, Oxford University Press. Between November 2009 and June 2012, she was head of the Department of Law at

the EUI, and between June 2012 and August 2013, she was president ad interim of the EUI. Before joining the EUI, she held the chair of European Commercial Law at the Centre for Commercial Law Studies, Queen Mary University of London. She is a member of the International Advisory Board of the Centre for European Research, University of Göteborg; member of the Scientific Advisory Board of the Lichtenberg-Kolleg Institute for Advanced Study in Humanities and Social Sciences, University of Göttingen; member of the editorial board of the *Common Market Law Review*; member of the advisory board of the *European Foreign Affairs Review*; member of the editorial board of the *Studies in EU External Relations*, Martinus Nijhoff Publishers; and former member of the editorial board of the *European Law Review*. Marise's research interests are in the external relations law of the EU; she is particularly interested in the constitutional basis for EU external relations law and the legal and institutional dimensions of the EU's foreign policy, the interaction between national, regional and international legal and policy regimes, EU common commercial policy and the EU as an exporter of values and norms. She has published extensively on the external relations law of the EU, including *Developments in EU External Relations Law* (Oxford University Press, 2008); *EU Foreign Relations Law: Constitutional Fundamentals*, edited with Bruno de Witte (Hart Publishing, 2008); *The European Court of Justice and External Relations Law: Constitutional Challenges*, edited with Anne Thies (Hart Publishing, 2014); and *Private Law in the External Relations of the EU*, edited with Hans-W. Micklitz (Oxford University Press, 2016).

Jane Alice Hofbauer is currently a postdoctoral researcher and lecturer at the Department of European, International and Comparative Law at the University of Vienna. She is the managing editor of the *Austrian Review of International and European Law* (*ARIEL*). She was legal researcher at the Boltzmann Institute of Human Rights in Vienna, Austria (2014–2016), focusing particularly on the effects of the implementation of climate policies in third states. Previously, she studied in Vienna and Amsterdam and obtained her LL.M. from the University of Iceland, before writing her doctorate in legal anthropology and international law at the University of Vienna (with distinction). During this time, she also worked for the University of Vienna as a predoctoral researcher (2010–2014).

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Wolfgang Müller has been head of the Policy Unit of the European Commission's Trade Defence Directorate since 2015, which is part of DG Trade. He previously had various positions within DG Trade and within the Daimler Benz Group from 1989 to 1993. From 1987 to 1989, Wolfgang was a research assistant at the Universität Konstanz (Germany). He teaches at the Université Nice Sophia Antipolis (France) and has published extensively on trade remedies (the publication of a comprehensive article by article commentary on the WTO ASCM is scheduled for summer 2017).

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Part I
Special Focus External Economic Relations of the European Union

Distinguished Essay: A Quiet Revolution—The Changing Nature of the EU's Common Commercial Policy

Marise Cremona

Abstract This paper assesses the development of the EU's Common Commercial Policy (CCP) since the coming into force of the Lisbon Treaty. It argues that we have witnessed a "quiet revolution" in EU trade policy. Three major changes are identified. First, the extension of the CCP to include trade in services, the commercial aspects of intellectual property and foreign direct investment. Second is the embedding of EU trade policy into the Union's overall principles and objectives, providing a framework for the broad discretion left by the Treaty to trade policy-makers. Third is the change to the decision-making structures of trade policy. The Commission still plays a key strategic role, but the Commission's key interlocutors now include the European Parliament as well as the Council. The European Parliament has the power to consent to—or to withhold consent from—trade agreements and has proved willing to use its power.

Working together with a renewed political and public interest in trade policy, in the wake of several contentious agreements, this new dynamic has led to calls for, and significant progress towards, greater transparency in the negotiation of trade agreements.

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This is an updated, substantially revised and shortened version of the author's "A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon" SIEPS 2017:2.

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1 Introduction

The common commercial policy (CCP) has often been hailed as the most supranational, and the most successful, of the EU's external policies, through which it demonstrates real weight and influence in the world. This success has been attributed in part to the CCP's decision-making processes which were held up as a model of the "Community method", as well as to the fact that the CCP has been accepted as an exclusive competence since the early 1970s[1]; its description as a "common" policy is witness to a substantial degree of integration.[2] The Commission represents the Union in international trade negotiations, trade agreements are concluded by the Union alone without the need for lengthy Member State ratification, and internal decision-making under qualified majority voting is free of the threat of the national veto and ostensibly directed at Union—rather than narrow state or sectoral—interests.

In reality the picture before the coming into force of the Lisbon Treaty had long been more mixed. In terms of scope, the CCP no longer reflected the content of modern trade agreements, which therefore had to be concluded under multiple legal bases.[3] The decision-making processes and the interaction between the provisions applying to different sectors had become extremely complex as a result of amendments introduced by the Treaty of Nice; and that Treaty had also made inroads into the exclusivity of the CCP by introducing shared competence for some aspects of trade in services. The formal exclusion of the European Parliament from involvement in trade legislation and the conclusion of trade agreements was anachronistic

[1] Meunier and Nicolaidis (1999).

[2] Although the relevant chapter of the original Treaty of Rome was headed simply "Commercial Policy", Article 113 EEC referred from the start to the establishment of a "common commercial policy". Among the EU's external policies, only the common commercial policy, the common foreign and security policy and (since the Lisbon Treaty) the common security and defence policy are referred to as *common* policies: Koutrakos (2015).

[3] A high watermark of this fragmentation might be the Decision concluding the WTO agreements in 1994 which was based on 11 substantive legal bases, including the CCP (Articles 43, 54, 57, 66, 75, 84(2), 99, 100, 100a, 113, and 235 EC): Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ 1994 L 336/1.

given the expansion of co-decision elsewhere in EC decision-making and increasingly hard to justify as the CCP now covered at least some aspects of services trade (including sensitive sectors such as health and culture) and trade agreements routinely included substantial regulatory commitments.

The Lisbon Treaty represented a serious attempt to address these shortcomings, and it is in the provisions on the CCP that the Union's external policy underwent some of its most significant changes. Seven years after the coming into force of the Lisbon Treaty, we can assess those changes and whether they do in fact represent, or have facilitated, a revolution in EU trade policy-making. In these years some, but certainly not all, of the uncertainties over the revised Treaty provisions on the CCP have been resolved and new questions have emerged.

The Lisbon Treaty presents us, in fact, with an impetus in two different directions: on the one hand towards a greater coherence between internal and external policies and on the other towards a more fully integrated range of external policies operating under an express external mandate and with a set of overall governing principles and objectives. The CCP represents both these tendencies. The link between the CCP and internal policies (in particular the internal market) appears closer as a result of the Treaty of Lisbon, which expanded the scope of the CCP, introduced the ordinary legislative procedure into its decision-making, and attempted to ensure coherence between internal and external objectives. However the CCP is not simply a conduit for transmitting internal policy priorities into external policy-making; we cannot see the CCP as simply an extension of the internal market into the external sphere. The CCP has since the beginning had a close connection to the GATT, and now WTO. Much of the discussion on reforming the CCP over generations of Treaty revision has centred on the need to facilitate the EU's engagement with the GATT/WTO. So we can also see the CCP as concerned with guiding the EU's contribution to international trade and economic policy-making within the framework of the WTO, including a growing number of WTO-compatible bilateral free trade agreements.

The Lisbon Treaty, furthermore, for the first time mandates the Union to develop an external policy with its own set of wide-ranging objectives intended to uphold and promote its values and interests, and the CCP is embedded into this framework for external action. It is one of only two express external competences granted to the EEC from the very earliest days, was declared exclusive in 1975 (its exclusivity now enshrined in Article 3(1) TFEU) and was therefore a foundational plank of the EU's external identity. The controversy surrounding recent trade negotiations such as the Comprehensive Trade and Economic Agreement with Canada (CETA) and the Transatlantic Trade and Investment Partnership with the USA (TTIP) both exemplifies the continuing importance of trade policy and illustrates the close connection and potential tension between EU external economic policy, its broader foreign policy objectives and its own internal policy preferences. These controversies are also a manifestation of another shift in trade policy-making over the last few years. Once seen as the epitome of technocratic policy-making, dominated by trade diplomats and debated behind closed doors out of the public eye, external trade policy has been brought back into the arena of public

debate. The integration of the CCP into ordinary legislative and comitology procedures, with the resulting involvement of the European Parliament, is both a catalyst and a symptom of this shift, while trade policy has acquired renewed political salience in national (and even sub-national) parliaments. Trade negotiations are politicised as never before.

In autumn 2015 DG Trade adopted a new trade strategy, "Trade for All: Towards a more responsible trade and investment strategy".[4] While the policy, given new impetus in 2006, of negotiating ambitious preferential trade agreements (PTAs) with strategic and economically important trade partners has not changed, the title of this document tells a story. In the decade 2000–2010 the political debate largely concerned the type of trade agreement the EU was prepared to negotiate with developing countries in the framework of the Cotonou Convention. In the last decade and especially in the last 5 or 6 years, as the EU began to negotiate PTAs with highly developed economies such as South Korea, Singapore, Japan, Canada and the USA, the debate has turned to the impact of trade agreements on the EU itself, in both economic and regulatory terms. These concerns are reflected in the Trade Strategy. DG Trade recognises the need to explain its strategy to a wider audience, to make the case for its approach to trade liberalisation, and to be more transparent about what is being proposed and negotiated. We will discuss these different aspects of the Strategy in what follows; for now, we may note three features.

First, the document puts a strong emphasis on the economic benefits of trade and the contribution made by trade to jobs and growth in the EU. The Commission claims that over 30 million jobs (one in seven) in the EU are supported by exports. It is "trade for all" in this sense. Second, the Commission stresses the need to ensure that trade is "for all" in the sense of supporting developing economies and sustainable development. This is not only a matter of EU trade policy towards developing countries directly (through the Generalised System of Preferences (GSP) or the Economic Partnership Agreements (EPAs)), but also (and this is new) an awareness of the impact on developing countries of EU PTAs with advanced economies. Third, there is an emphasis on values, on a "responsible" trade and investment policy. This includes protecting the EU's own regulatory, social and environmental standards as well as the external dimension based on Articles 3(5) and 21 TEU: respect for human rights and the social (including labour rights) and environmental aspects of trade.[5]

In this context, we may note that the Council's mandate for the negotiation of TTIP requires that "[t]he Agreement should confirm that the transatlantic trade and investment partnership is based on common values, including the protection and

[4]European Commission, Trade for All—Towards a more responsible trade and investment policy, 14 October 2015 ("Trade for All").

[5]European Commission, Trade for All, p. 20.

promotion of human rights and international security".[6] More recently, Commissioner Malmström commented on the signing of CETA, "Trade will happen with or without trade agreements. But by signing a progressive, gold-standard trade deal that upholds our ideals and sets a new model for international commerce, we are demonstrating how to shape globalisation."[7] Trade policy is seen as one instrument to be deployed by the EU in promoting its "milieu goals": the shaping of its international environment.[8] The objectives of the EU's trade policy, and the translation of these objectives into its trade strategy, will be the subject of the next section. We will then turn to a consideration of the scope of the CCP and finally to some of the institutional issues raised by the making of trade policy.

2 The Objectives of the Common Commercial Policy

The Lisbon Treaty for the first time gives the EU an explicit mandate for external action, and a set of objectives to which that action should be directed and principles by which it should be guided. These provisions, which expressly apply to the CCP, are potentially of great significance, embedding it into the Union's broader foreign policy objectives and making it clear that the "uniform principles" on which it is based are not simply a necessary instrument for achieving a common policy (although they do serve that function). In fact, to some extent these changes reflect a long-standing understanding of the CCP as an autonomous external policy and the uses to which CCP powers may be put.

In this section we will examine CCP objectives from three different perspectives: the objectives of the CCP itself; the extent to which the Treaties mandate furtherance of, and compatibility with, internal objectives; and the relevance of the Union's general foreign policy objectives. Underpinning these questions is the greater emphasis on policy coherence in the post-Lisbon Treaties, and in particular on coherence between internal and external policies. Thus while the Treaties mandate the Union to develop an explicitly external commercial policy, they also require the Union to "ensure consistency between the different areas of its external action and between these and its other policies".[9]

[6]Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, Council doc. 11103/13, declassified 9 October 2014.

[7]Cecilia Malmström, Signing our trade agreement with Canada, blog post 30 October 2016, http://ec.europa.eu/commission/2014-2019/malmstrom/blog/signing-our-trade-agreement-canada_en (last accessed 1 March 2017).

[8]On milieu goals, see Tocci (2007), p. 5.

[9]Article 21(3) TFEU.

2.1 Specific Objectives for the Common Commercial Policy

In historical terms two objectives of the CCP may be said to have been explicitly mandated by the Treaty of Rome, and they are still present in the TFEU. The first is perhaps not so much an objective in itself as a reflection of the underlying rationale of the CCP: the CCP is to be based on "uniform principles". The purpose of the CCP was to ensure the functioning of the customs union, common market and later the internal market by ensuring the uniformity of external trade rules for all Member States. This was the basis from which the Court in opinion 1/75 derived the exclusive nature of CCP powers, in which the common market was linked to the common interest.[10]

Little was said in the Treaty of Rome about the content of the uniform principles on which the policy was to be based, except that the Union was to "aim to contribute" to the liberalisation of world trade. This second objective linked the nascent common market and its "common interests" to the aims of the GATT.[11] It has clearly influenced Community (and now Union) trade policy.[12] Agreements on trade liberalisation, whether multilateral (within the WTO), plurilateral (e.g. the Agreement on Government Procurement, or the Agreement on Trade in Services, TiSA) or bilateral, are the cornerstone of the EU's CCP. However it has always been recognised that trade liberalisation is not an absolute obligation for the EU and is subject to the policy discretion of the legislature; as the Court strikingly expressed it in 1998, "[the] objective of contributing to the progressive abolition of restrictions on international trade cannot compel the institutions to liberalise imports from non-member countries where to do so would be contrary to the interests of the Community".[13] This approach, balancing liberalisation against other EU interests, has enabled trade policy instruments to be used for non-trade purposes which are not necessarily facilitative of trade, ranging from environmental protection[14] to public health,[15] and even economic sanctions.[16]

[10]CJEU, opinion 1/75, *Local Costs*, ECLI:EU:C:1975:145.

[11]CJEU, joined cases 21 to 24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, paras. 10–13.

[12]The preambles of the early regulations establishing common rules for imports claimed that "the liberalization of imports [. . .] is the starting point for common rules in this field". See e.g. Council Regulation 288/82/EEC on common rules for imports, OJ 1982 L 35/1.

[13]CJEU, case C-150/94, *UK v Council*, ECLI:EU:C:1998:547, para. 67.

[14]See e.g. Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programs for office equipment, OJ 2001 L 172/1; CJEU, case C-281/01, *Commission v Council*, ECLI:EU:C:2002:761.

[15]See e.g. Council Decision 2004/513/EC concerning the conclusion of the WHO Framework Convention on Tobacco Control, OJ 2004 L 213/8.

[16]Before the introduction of a specific legal basis for economic sanctions, CCP powers were used for this purpose; see e.g. CJEU, case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England,* ECLI:EU:C:1997:8.

The Lisbon Treaty increases the level of commitment to liberalisation in Article 206 TFEU, by providing that "the Union *shall* contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers" (emphasis added). The wording is stronger,[17] but we cannot therefore conclude that trade liberalisation is necessarily an overriding objective. The requirement is to "contribute" to the development of world trade: the commitment is to participate in the process of reciprocal and balanced progressive removal of restrictions, through multilateral and bilateral agreements as well as autonomous trade measures. And the removal of restrictions is to operate in the "common interest" and as part of the Union's contribution to the "harmonious development" of world trade. This clearly leaves room to place liberalisation in a context of environmental regulation and sustainable development, as well as to take account of the social and economic needs of its trading partners. This in turn suggests that trade policy-makers will need to consider not only the specific priorities of the CCP but also the objectives of the EU's other policies, ranging from energy to public health, from environmental protection to migration, and its broader external policy framework.

2.2 Internal Policy Objectives

In a sense the very existence of the CCP reflects the needs of the common or internal market; without uniform rules on imports and exports, internal frontier-free movements of goods and services cannot be fully achieved. But does the CCP go beyond the need for uniformity in furthering internal market objectives? Hitherto, this has largely been a matter of political choice. In the last decade, increasing emphasis has been placed by the Commission on the contribution of trade policy to the EU's growth and competitiveness strategies. The focus has shifted from ensuring internal free movement (essentially, the treatment of imports) to assisting EU businesses by opening up third country markets, seeking to ensure that EU regulation does not create barriers for EU exporters and facilitating both inward and outward investment.[18] This message is also at the forefront of the Commission's 2015 trade strategy paper which argues that "trade and investment are powerful engines for growth and job creation".[19]

[17]Dimopoulos (2010), p. 161 argues that the strengthened obligation carries at least the obligation not to move backwards in terms of liberalisation.

[18]European Commission, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy, COM (2010) 612; Cremona (2010a).

[19]European Commission, Trade for All, p. 8.

This focus has now acquired a Treaty basis. The Treaties, as already mentioned, now explicitly require consistency between external and internal policies (Article 21(3) TFEU), and Article 207 contains a specific provision to this effect. Under Article 207(3) the Council and Commission are to ensure that the EU's international trade agreements are "compatible with internal Union policies and rules". Despite its peremptory wording this provision can be read as an injunction to maintain consistent objectives without establishing a priority rule—a reading supported by the ambiguity of the concept of "internal" policies as a legal category to be afforded priority. This is the sentiment behind the Commission's 2015 trade strategy: "While trade policy must deliver growth, jobs and innovation, it must also be consistent with the principles of the European model [. . .]. It must promote and defend European values".[20] More specifically, the Commission has pledged that "no EU trade agreement will lead to lower levels of consumer, environmental or social and labour protection than offered today in the European Union, nor will they constrain the ability of the EU and Member States to take measures in the future to achieve legitimate public policy objectives on the basis of the level of protection they deem appropriate."[21]

2.3 General External Objectives

The reference to "European values" in the 2015 trade strategy signals one of the most potentially significant changes introduced by the Lisbon Treaty to the governance of EU external policy. A series of Treaty articles establishes principles, values and general objectives which are to guide, or constrain, EU external action in general and its external economic policy in particular. According to Article 205 TFEU, EU external action—including the CCP—shall be "guided by the principles, pursue the objectives and conducted in accordance with the general provisions laid down" in Articles 21 and 22 TEU. And Article 207(1) TFEU provides that the CCP "shall be conducted in the context of the principles and the objectives of the Union's external action". A number of these principles and objectives are likely to be relevant to an external commercial policy, including free and fair trade, the protection and promotion of human rights, sustainable economic, social and environmental development, the eradication of poverty, the integration of all countries into world economy, the sustainable management of global natural resources, and good global governance.[22] Whereas in the past certain specific objectives (in particular environmental protection and development) were to be taken into account in the construction and implementation of other policies, this is a much more extensive attempt to ensure that overall external policy concerns permeate sectoral policies such as the CCP. How important is this change?

[20]European Commission, Trade for All, p. 7.

[21]European Commission, Trade for All, p. 21.

[22]Articles 3(5) and 21 TEU.

We should first recall that the use of trade policy to achieve broader political and non-trade objectives has been part of its historical development.[23] In one sense, then, these provisions give a Treaty-based sanction to what has always been a characteristic of the CCP.

Second, although the EU has a tradition of linking trade to its broader policy agenda, this carries risks. If the Union is heavy in the non-economic demands it makes of its negotiating partners, it may need to make greater economic concessions in return. For these and other reasons we are probably more likely to see the impact of these general external objectives on the broader strategic framing of EU trade policy than used as a component of specific trade agreements. That said, "trade and sustainable development" chapters are a notable feature of the new generation of free trade agreements.[24]

Third, Article 205 TFEU refers us not only to the "principles and objectives" set out in Article 21 TFEU, but also to Article 22, according to which the European Council will, on the basis of these principles and objectives, "define the strategic interests and objectives" of the Union. Thus CCP policy choices will also be mediated through this strategic and more political agenda-setting. An example of this process can be found in the European Council Declaration on serious flooding in Pakistan attached to its conclusions of 16 September 2010. The European Council mandated ministers to agree a package of measures to support Pakistan, and included a "firm commitment to grant exclusively to Pakistan increased market access to the EU through the immediate and time limited reduction of duties on key imports from Pakistan in conformity with WTO rules, to be implemented as soon as possible".[25] The Commission was invited to present proposals. The resulting regulation refers in its preamble to the (not only humanitarian) policy reasons behind the trade preferences:

> The severity of this natural disaster demands an immediate and substantial response, which would take into account the geostrategic importance of Pakistan's partnership with the Union, mainly through Pakistan's key role in the fight against terrorism, while contributing to the overall development, security and stability of the region.[26]

[23] In CJEU, opinion 1/78, ECLI:EU:C:1979:224, para. 41 et seq., for example, the Court accepted that trade instruments could be used to advance development objectives. Trade powers may also be used to further environmental objectives (see e.g. CJEU, case C-281/01, *Commission v Council*, ECLI:EU:C:2002:761) and broader foreign policy objectives via the imposition of economic sanctions (see e.g. CJEU, case C-124/95, *R v HM Treasury and Bank of England ex parte Centro-Com*, ECLI:EU:C:1997:8). Such cases may prompt disputes over the appropriate legal basis for the measure; see further Koutrakos (2008), Cremona (2012).

[24] See for example the free trade agreements with Korea, Colombia and Peru, Singapore and Canada.

[25] European Council Conclusions, 16 September 2010, Council doc. EUCO 21/1/10 REV 1; CO EUR 16 CONCL 3, Annex II.

[26] Regulation 1029/2012/EU introducing emergency autonomous trade preferences for Pakistan, OJ 2012 L 316/43, recital 5. It may be noted that despite the emergency it took 2 years for this Regulation to be adopted, witness to the debate engendered in the European Parliament, as well as the need for a WTO waiver.

The explicit recognition we now find in the Treaties of the link between trade policy and strategic foreign policy considerations presents challenges in a context where trade policy has traditionally been seen as technocratic and de-politicized. As has already been argued, this has always been somewhat of a myth: EU trade policy has from the start carried a strong political dimension. But there is a difference between harnessing trade policy instruments for political objectives (a familiar practice) and ensuring that trade policy and foreign policy goals go hand-in-hand, a more complex and delicate task, especially when we consider that foreign policy in the sense of the Common Foreign and Security Policy remains a competence shared with the Member States. This is particularly the case, perhaps, when trade is embedded in a broader politically important agreement: the EU's Association Agreement with Ukraine including a "Deep and Comprehensive Free Trade Area" would be an obvious case in point.

Finally, the political institutions are recognised as having an extensive discretion when it comes to the CCP, and the way in which these "principles and objectives" are worded (general and non-prioritised) leaves much scope for that discretion in translating them into specific policy choices. From that perspective, it is significant that the Commission's 2015 trade strategy makes explicit reference to these objectives: "One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy."[27]

In June 2012 the Council adopted an EU Strategic Framework and Action Plan on Human Rights and Democracy,[28] in which it undertakes to "promote human rights in all areas of its external action without exception" and *inter alia* to integrate the promotion of human rights into its trade and investment policies. Listed in the Action Plan is a commitment to include human rights in Impact Assessments carried out for trade agreements with "significant economic, social and environmental impacts".[29] This commitment was reiterated in May 2014.[30] While this is a political commitment, this does not mean it is without effect. In March 2015 the European Ombudsman adopted a recommendation following a complaint that the

[27]European Commission, Trade for All, p. 22.

[28]EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Council doc. 11855/12.

[29]EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Council doc. 11855/12, Action Plan point 1.

[30]Council conclusions on a rights-based approach to development cooperation, Foreign Affairs (Development) Council, 19 May 2014, Council doc. 10020/14, para. 8. See further DG Trade Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, 2 July 2015, tradoc 153591. On Impact Assessment generally see Commission Staff Working Document, Better Regulation Guidelines, 19 May 2015, SWD (2015)111, pp. 16–32.

Commission had not carried out a human rights Impact Assessment in respect of the trade agreement under negotiation with Vietnam. The Ombudsman affirmed that good administration—which it is her role to supervise—includes observance of and respect for fundamental rights: "In fact, where fundamental rights are not respected, there cannot be good administration". Thus, the EU institutions "must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights [...] [and this applies] also with respect to administrative activities in the context of international treaty negotiations".[31] Citing Article 21 TEU, the Ombudsman takes the view that "it would be in the spirit of the legal provisions mentioned above to carry out an HR [human rights] impact assessment", as well as consistent with the Commission's current practice and with the 2012 Action Plan already mentioned.[32] The Ombudsman found that the refusal to carry out a human rights Impact Assessment was an instance of maladministration. In its response to the draft recommendation, the Commission rejected this view, arguing that the range of instruments that it uses to promote human rights (such as the human rights "essential elements" clause in its Partnership and Cooperation Agreement with Vietnam; the trade and sustainable development chapter in the free trade agreement under negotiation; and its human rights dialogue with Vietnam), fulfil the same purpose as an HR Impact Assessment.[33] In her final decision in the case the Ombudsman found these reasons unpersuasive and confirmed her finding of maladministration:

> The Ombudsman does not believe that it is sufficient to develop a range of general policies and instruments to promote human rights compliance while at the same time concluding a Free Trade Agreement which may, in fact, result in non-compliance with human rights requirements. In the view of the Ombudsman, it is far preferable, when negotiating such an Agreement, that any measures intended to prevent or mitigate human rights abuses should be informed by a prior human rights impact assessment.[34]

This case thus raises important questions as to the most appropriate "mix" of instruments in determining how the EU's non-trade objectives may be adequately addressed, including tools deployed in the adoption of trade instruments, such as *ex ante* impact assessments, and non-trade policy instruments such as human rights dialogues. It also shows that the integration of non-trade objectives and in particular the EU's human rights objectives into its trade policy-making processes may be liable to administrative assessment and challenge.[35]

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[31]Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, para. 21 et seq. The complainants were the International Federation for Human Rights (FIDH) and the Vietnam Committee on Human Rights (VCHR).

[32]Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, para. 24 et seq.

[33]See the joint FIDH-VCHR observations on the opinion of the Commission on the European Ombudsman's draft recommendation ref. 1409/2014/JN, 30 September 2015.

[34]Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, para. 28.

[35]See further Vianello (2016).

What of judicial assessment? In *Front Polisario*,[36] the applicant challenged the legality of the Council decision concluding an agreement with Morocco on trade in agricultural and fisheries products on grounds, *inter alia*, of breach of the EU's values (including fundamental rights) and breach of the principles governing the EU's external action. It was argued that the agreement would *de facto* be applied by Morocco to the territory of Western Sahara, sovereignty over which is disputed. While emphasising the wide discretion enjoyed by the Council in deciding to conclude such an agreement, the General Court nevertheless held that the exercise of that discretion was subject to review on grounds of a manifest error of appraisal, and in particular an assessment of whether the Council has, before taking its decision, carefully and impartially examined all the relevant facts.[37] Although, in the General Court's view, no rule of EU or international law prohibited the Council from concluding the agreement on the ground that it would be applied by Morocco in the disputed territory of Western Sahara, nevertheless the effect of the agreement on the fundamental rights of the population of Western Sahara was a factor which should have been taken into account. Its failure to do so led the Court to annul the decision insofar as it approved the application of the agreement to the Western Sahara. In his opinion on the Council's appeal against the General Court judgment, Advocate General *Wathelet* agreed that the EU institutions are under an obligation "to examine, before adopting the contested decision, the human rights situation in Western Sahara and the impact which the conclusion of the agreement at issue could have there in this regard."[38] However he disagreed with the General Court's application of the Charter of Fundamental Rights on the grounds that the territory of Western Sahara is not within the jurisdiction of EU law nor under the control of the EU or its Member States.[39]

The judgment of the General Court was reversed on appeal by the CJEU,[40] on the ground that there was no legal basis for interpreting the EU-Morocco agreement as applicable to the territory of the Western Sahara, and therefore the decision concluding it could not be of direct and individual concern to the applicant, who therefore lacked standing to bring the action.[41] The CJEU did not, as a result, rule

[36]GC, case T-512/12, *Polisario Front*, ECLI:EU:T:2015:953.

[37]GC, case T-512/12, *Polisario Front*, ECLI:EU:T:2015:953, para. 225.

[38]Opinion of AG Wathelet to CJEU, case C-104/16 P, *Polisario Front*, ECLI:EU:C:2016:677, para. 274.

[39]Opinion of AG Wathelet to CJEU, case C-104/16 P, *Polisario Front*, ECLI:EU:C:2016:677, paras. 270–274. The General Court referred to a number of rights contained in the EU's Charter of Fundamental Rights, including Article 1 (human dignity), Article 5 (prohibition of slavery and forced labour), Articles 31 and 32 (fair working conditions and prohibition of child labour).

[40]CJEU, case C-104/16 P, *Council v Front Polisario*, ECLI:EU:C:2016:973.

[41]Although not directly relevant to our discussion here, the Court's ruling is of legal and practical significance in holding that the EU's Association Agreement with Morocco does not apply to the Western Sahara, and therefore that the practice of accepting products from the region as of Moroccan origin will have to be altered.

on the General Court's review of the Council's discretion in matters of external economic policy or whether the Council's duty to take account of all relevant facts included the requirement to assess to human rights implications of concluding the agreement. However in the General Court judgment and the Advocate General's opinion, taken together with the Ombudsman's decision in the Vietnam case, we are starting to see some procedural principles emerge, guiding the policy-making process even in fields of external action where traditionally the institutions have the widest discretion. Note, however, that the standard applied is procedural and not substantive: the Council has an obligation to take account of the human rights implications of its trade policy, but the Court has not (yet) imposed a substantive human rights compliance threshold.[42]

This final point is of importance when considering the significance of Treaty-based CCP objectives more generally, such as sustainable development or the need to contribute to the development of world trade. We are some way from envisaging a review by the Court of whether any one of these objectives has been given sufficient priority. But the procedural requirement that is emerging is significant, and in requiring the Commission and Council to provide evidence of the facts on which policy decisions are based it gives support to more accountability in policy-making.

2.4 Turning Objectives into Strategy

Alongside its external mandate and objectives, the drafters of the Lisbon Treaty made a serious attempt to improve the institutional framework for foreign policy strategy, giving a strategic mandate for external policy to the European Council,[43] and introducing the European External Action Service (EEAS) under the High Representative.[44] Trade policy was not brought within the EEAS, and DG Trade continues to have a strong independent presence; it might be thought to be still operating according to its own strategic agenda. Certainly the major focus of DG Trade's strategy paper of 2010 was the contribution of trade policy to growth, job

[42]Nevertheless we see a move in this direction in the Court of Justice's judgment in *Polisario Front*: in its interpretation of the territorial application of the agreement with Morocco, and the effect of practice in implementing the agreement, the Court took account of principles of international law, including the principle of self-determination.

[43]According the Article 15(1) TEU the European Council is to "define the general political directions and priorities" of the EU in general terms; in the external context, Article 22(1) TEU provides that the European Council "shall identify the strategic interests and objectives of the Union in matters of foreign and security policy and other areas of the external action of the Union". The Foreign Affairs Council, according to Article 16(6) TEU, "shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent".

[44]Article 27(3) TEU; the EEAS was established by Council Decision 2010/427/EU.

creation and competitiveness within the EU; it contained only the briefest of references to the place of trade policy within the EU's overall foreign policy agenda, remarking that trade policy "has its own distinct economic logic and contribution to make to the external action of the Union" and that "the Union's trade and foreign policies can and should be mutually reinforcing".[45]

However there are signs that the Lisbon Treaty's attempt to integrate trade policy into the broader strategic objectives of EU foreign policy are having an effect, albeit gradually. The 2015 trade strategy, while stressing the contribution of trade policy to the EU's economy, also emphasises the synergies between trade policy and other external policies and the need for consistency with other instruments of EU external action.[46] In addition, while DG Trade of course takes primary responsibility, input from other institutional actors is becoming increasingly important. The use of trade preferences as a response to the floods in Pakistan has already been mentioned and it will be recalled that it was the European Council that initially made this commitment. The Global Strategy for EU foreign policy published by HR/VP Mogherini in June 2016 makes frequent references to trade policy.[47] The new generation of trade agreements, the "Deep and Comprehensive Free Trade Agreements", with their emphasis on regulatory cooperation, services, energy and sustainable development, require a greater involvement of sectoral expertise within the Commission. More significant, at least potentially, is the impact of the increased role of the European Parliament. Within Parliament, trade strategy is discussed not only by the international trade committee (INTA) but also by the foreign affairs committee (AFET). At present it is fair to say that the Parliament's input is primarily reactive to specific proposals, although its own initiative reports are becoming more important.[48] As it develops greater capacity, however, it could play a more important part in shaping EU trade strategy. What then have been the major trends in the EU's trade strategy since 2010?

First, as already mentioned, more attention is being paid to embedding trade policy into the EU's broader political strategies. There are two primary contexts here. The first is EU economic policy and competitiveness. Since (at least) 2010 we can point to a concern with the competitiveness of EU industry and the EU economy more generally, especially the ways in which trade can help the EU maintain its global competitive position in the wake of the economic crisis.[49] As

[45]European Commission, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy, COM (2010) 612, p. 15.

[46]European Commission, Trade for All, p. 22.

[47]Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union's Foreign And Security Policy, 28 June 2016.

[48]Recent examples include own-initiative reports on the Trade in Services agreement (TiSA) under negotiation (2015/2233 (INI)), and on future trade and investment strategy (2015/2015 (INI)).

[49]European Commission, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy, COM (2010) 612; Bendini R, The future of the EU trade policy, European Parliament In-Depth Analysis, DG EXPO/B/PolDep/Note/2015_227 EN, July 2015-PE 549.054, p. 7.

the 2015 Trade Strategy puts it, "[t]he recent crisis brought a realisation that trade could be a stabilising force in tough times."[50] The argument is both that the EU will need to forge trading links with new sources of economic growth, and that the EU's export industry depends on imported raw materials and components. The second policy context for trade is, as we have seen, foreign policy more generally: "An effective trade policy should [. . .] dovetail with the EU's development and broader foreign policies, as well as the external objectives of EU internal policies, so that they mutually reinforce each other."[51]

The second trend is a reinforcement of the importance of securing bilateral and plurilateral trade deals with key trading partners. Until a decade ago, the EU's bilateral agreements were primarily aimed at developing countries and forging close relationships with its neighbours; trade relations with developed trading partners operated through the WTO. This policy started to change in 2006 and the change has accelerated since 2010, the EU negotiating far-reaching trade agreements with strategic trading partners, including Korea, Singapore, Canada, Japan and the trade and investment agreement with the USA (TTIP) currently under negotiation. In addition to these bilateral agreements, the EU has put its support behind a major plurilateral agreement on services, designed to build upon the GATS (the so-called TiSA).

Third, these trade agreements have changed in character. They attempt to go beyond WTO levels of liberalisation, especially in services, and to include new trade-related policies such as regulatory cooperation, investment, competition, intellectual property and procurement. They also typically contain a chapter on trade and sustainable development in which measures may be included to promote trade in environmentally sustainable goods as well as commitments to maintain labour standards. In addition to the increased political debate surrounding this new generation of trade agreements, their broader scope, although partly reflecting the extended scope of the CCP (discussed further below) also raises the possibility of Member State participation, insofar as they may include commitments going beyond the scope of the (exclusive) CCP. Trade agreements thus become very large packages, cumbersome both to negotiate and to steer through the institutional process of signature, provisional application and conclusion.

Fourth, and perhaps also reflecting the degree to which this new generation of trade agreements are taking over the initiative from multilateral liberalisation within the framework of the WTO: since the signature of the FTA with Korea in 2010 the Union has progressively adopted a practice of explicitly denying direct effect to trade agreements. The decision concluding the WTO agreements in 1994 stated in its Preamble that "by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts".[52] However it was not

[50]European Commission, Trade for All, p. 8.

[51]European Commission, Trade for All, p. 7.

[52]Council Decision 94/800/EC, OJ 1994 L 336/1.

until 2010 that such a statement found its way into the operative provisions of the decision.[53] Such a provision in the Council decision of course only affects the Union; however more recent trade agreements have included a similar provision in the text of the agreement itself.[54] For example, the EU's agreement with Columbia and Peru provides in Article 336 that

> Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.[55]

The Union's new generation of trade agreements, then, will share with the WTO the inability to be directly invoked in Member State or Union courts. Their enforcement will be governed by their provisions on dispute settlement which typically contain detailed provision for arbitration to resolve disputes between the parties. The move is away from enforcement via ordinary courts. From this perspective the possibility of investor-state arbitration, included in the Vietnam, Singapore and Canada agreements, would result in individual enforcement being possible only for those defined as "investors" and only via arbitration. This is a long way from the possibility of individual enforcement in the courts pioneered in such cases as *Kupferberg*.[56]

The exclusion of direct effect, and therefore of enforcement by individuals, has an additional significance if we take into account the fact that recent studies show a distinct reluctance on the part of the EU and its trade partners to use the dispute settlement procedures established in trade agreements. Evenett demonstrates a decreasing use of WTO dispute settlement by the EU since 2008.[57] According to Mavroidis and Sapir, the signing of a preferential trade agreement by the EU (and the US) is strongly correlated with an absence of trade litigation, both under

[53]Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part OJ 2011 L 127/1. Article 8 of the decision provides: "The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals." Decision 2015/2169/EU of 1 October 2015 on the conclusion of the FTA (OJ 2015 L 307/2) contains an identical provision.

[54]See further Semertzi (2014), p. 1125.

[55]Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354/3. See also the agreement with Central America, Article 356; the agreement with Singapore, Article 17.5. In the Association Agreement with Ukraine, a footnote to chapter 14 of Title IV (the DCFTA) provides: "For the avoidance of doubt, this Title shall not be construed as conferring rights or imposing obligations which can be directly invoked before the domestic courts of the Parties." The Council decision 2014/668/EU, OJ 2014 L 278/1, Article 7 on the signature and provisional application of this agreement includes a similar statement as regards the agreement as a whole, not merely its trade provisions.

[56]CJEU, case 104/81, *Hauptzollamt Mainz v Kupferberg*, ECLI:EU:C:1982:362.

[57]Evenett S (2016) Paper tiger? EU trade enforcement as if binding pacts mattered. New Direction – The Foundation for European Reform, http://europeanreform.org/index.php/site/publications-article/paper-tiger-eu-trade-enforcement-as-if-binding-pacts-mattered (last accessed on 1 March 2017).

the trade agreement's dispute settlement procedures and in the WTO.[58] This suggests that enforceability of trade agreements, whether through courts or via arbitration or other quasi-judicial dispute settlement processes, is not a priority in EU trade policy.

3 The Scope of the Common Commercial Policy

In the evolution of the CCP from the Treaty of Rome to the Treaty of Lisbon, two issues have shaped the debate. One is the identification of the CCP as the policy competence enabling the EU to engage with and play a part in the development of the governance of international trade, especially within the GATT and then the WTO. The other is the extent to which CCP should become the external face of the common and then the internal market.[59] The two are not mutually exclusive, and indeed are in practice closely connected as the process of economic integration both within the EU and at a multilateral/bilateral level has broadened and deepened to cover a wider range of economic activity and different types of regulatory trade barrier. To what extent is there a match between the scope of the CCP and the range of activity that may be covered by an external economic policy: trade in goods, provision of services, rights of establishment and investment and capital movements in particular?

3.1 From Goods to Services and Intellectual Property Rights

In its earliest incarnation the CCP was concerned with trade in goods. It was indeed the policy competence granted as a necessary corollary to the establishment of the customs union and internal free movement of goods. A common external tariff requires that the EU not only adopts autonomous legislation on customs and tariffs but also negotiates tariff and trade agreements. Internal free movement encompassing goods in free circulation[60] requires common rules regulating the initial release of goods into free circulation within the Community market.[61] Other

[58]Mavroidis and Sapir (2015), p. 357: "our data supports the view that the EU and the US become 'doves' after the signature of an FTA. [. . .] We are not suggesting that the EU and the US become 'doves' because of the signing of the FTA. We are simply stating that they become 'doves' after this event."

[59]Kuijper et al. (2013), p. 373.

[60]See now Article 28 TFEU.

[61]CJEU, case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la Ré publique*, ECLI:EU:C:1976:182. Despite the establishment of the common external tariff in 1961 it was not until the completion of the internal market in the 1990s with its removal of internal border controls that all national-based quotas on goods imported from outside the Community were abolished.

components of the common (now internal) market such as rights of establishment or the provision of services did not feature as part of the CCP at this stage. The CCP has always had a broad reach in terms of trade in goods. Goods that are subject to specific regimes internally, such as agricultural and fisheries products, nevertheless fall within the CCP as far as external trade is concerned.[62] The CCP was even held to cover products otherwise falling within the Euratom and European Coal and Steel Community (ECSC) Treaties.[63]

The possible extension of the CCP to cover trade in services came to the fore in the early 1990s in the context of the increased importance of services within the internal market legislative programme and the Uruguay Round negotiations leading to the formation of the WTO, which included agreements on both trade in services (GATS) and intellectual property rights (TRIPS).[64] In opinion 1/94 on the conclusion of the WTO Agreements the Court adopted the WTO/GATS distinction between different "modes of supply" of services and while refusing to exclude trade in services as a matter of principle from the CCP, found that only one of these modes of supply—direct cross-border supply not involving the movement of persons—fell within the CCP as it then stood.[65] The WTO negotiations also raised the issue of trade-related intellectual property rights covered by the TRIPS agreement. Again, the Court in opinion 1/94 found that although some aspects of intellectual property enforcement which related to cross-border trade—in particular those concerned with preventing the release into free circulation of counterfeit goods—could be said to fall within the CCP as it then stood, the TRIPS agreement as whole did not.

Over the course of the next 15 years, the question of the scope of the CCP was revisited several times, in three Treaty revisions.[66] The Nice Treaty did address both trade in services and what was referred to as the "commercial aspects" of intellectual property rights (IPR), in a treaty revision which resulted in a formidably complex set of provisions, special rules on decision-making and limits on the transfer of exclusive competence to the Community.[67] The substantially revised

[62]Although the CCP provides the basis for entering into international commitments, their implementation may be adopted under the EU's agricultural policy competence.

[63]CJEU, opinion 1/94, *WTO*, ECLI:EU:C:1994:384, paras. 24–27. Agreements that specifically concerned coal or steel products were, until the end of that Treaty's life, concluded under the ECSC Treaty.

[64]For an account, see Maresceau (1993), Eeckhout (1994).

[65]CJEU, opinion 1/94, *WTO*, ECLI:EU:C:1994:384, paras. 38–47. The other modes of supply are: consumption abroad, where the consumer moves to the country in which the services are supplied; commercial presence, i.e. the presence of a subsidiary or branch; and the supply of services through the presence of natural persons. The reasons for defining the CCP to include this mode of cross-border supply of services were not very clear, the Court saying simply that it was "not unlike" trade in goods and that there was "no particular reason" why such a supply should not fall within the CCP.

[66]Krajewski (2008).

[67]See further Krenzler and Pitschas (2001), Herrmann (2002), Cremona (2002).

text introduced by the Lisbon Treaty, although inevitably raising some questions of interpretation, is certainly clearer.[68] Under Article 207(1) TFEU:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

As well as trade in services and the commercial aspects of intellectual property, it will be noticed that the revised CCP also includes "foreign direct investment" (FDI), an important extension discussed below. The CCP is expressly declared in Article 3(1) TFEU to be an exclusive competence of the EU. This is a codification of the Court's case law on the CCP going back to the 1970s,[69] and apart from being expressly stated in the Treaties, it now applies to the CCP as a whole, without any special sectoral exceptions.[70] As a result, establishing the scope of the newly-extended CCP is particularly significant. The Court has had an opportunity to define its approach to the interpretation of trade in services and the commercial aspects of intellectual property, but not yet at the time of writing the scope of foreign direct investment, the most difficult to delimit in terms of both the international regimes involved and its relation with other competences.

As far as IPR is concerned the question has been the extent to which the WTO TRIPS agreement falls within the scope of the CCP, or instead of other implied external powers based on the existence of internal legislation. In *Daiichi Sankyo* the issue came before the Court in terms of its jurisdiction to interpret the TRIPS in the context of patents for pharmaceuticals, and the Court took the opportunity to consider the impact of the Lisbon Treaty on the CCP.[71] The Member States submitting observations in the case took the view, following earlier case law,[72] that intellectual property should be seen as a shared competence within the framework of the internal market and that the Court's jurisdiction to interpret the TRIPS depends on the degree to which the Union has exercised its competence in the field covered by the agreement. The Commission in contrast argued that the whole of the TRIPS now falls within the EU's exclusive competence under the CCP as being concerned with "the commercial aspects of intellectual property" and must therefore be subject as a whole to the interpretational jurisdiction of the Court.

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[68]For general comment, see Krajewski (2005), Dimopoulos (2008), Bungenberg (2010), Krajewski (2011).

[69]CJEU, opinion 1/75, *Local Costs*, ECLI:EU:C:1975:145.

[70]Some specific sectoral rules still persist, however, in the manner of decision-making, with unanimity required in the Council for agreements "in the field of" certain services sectors: Article 207(4) TFEU, see further below.

[71]CJEU, case C-414/11, *Daiichi Sankyo Co. Ltd.*, ECLI:EU:C:2013:520.

[72]CJEU, joined cases C-300/98 and C-392/98, *Dior and others*, ECLI:EU:C:2000:688; CJEU, case C-431/05, *Merck Genéricos – Produtos Farmacêuticos*, ECLI:EU:C:2007:496.

Instead of seeking to identify aspects of IPR which may be classified as "commercial", the Court started with the nature of the EU's trade policy. The CCP, the Court said, is first of all concerned with trade with non-member countries. Then the Court turned to its tried-and-tested formula[73] for the scope of the CCP:

> [A] European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.[74]

Applying this to IPR, only those rules "with a specific link to international trade" would fall within the scope of the CCP.[75] The next step was to focus on the TRIPS, the Court taking the view that the whole of TRIPS has a "specific link to international trade". It is an integral part of the WTO system and is linked to the other WTO agreements *inter alia* through the possibility of cross-retaliation. The Court rejected the argument that those parts of TRIPS which deal with the *substance* of IPR fall rather within the scope of the internal market. The objective of those rules in TRIPS, it said, is the liberalisation of international trade and not the harmonisation of Member State laws. However this ruling that TRIPS as a whole falls within the CCP does not mean means that every international agreement in the field of IPR will likewise fall under the CCP. In opinion 3/15, for example, the issue before the Court was whether the EU had exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind or visually impaired.[76] Its first conclusion was that exclusive competence could not be based on CCP powers: the main purpose of the agreement is not commercial, nor "to promote, facilitate or govern international trade in accessible format copies" but to improve access to published works for blind and visually impaired people.[77] Although some of its provisions are concerned with cross-border exchange of goods, this "cannot be equated with international trade for commercial purposes."[78]

The Court in *Daiichi Sankyo* adopts an approach to defining the scope of the CCP which allows this external policy to cover a broad spectrum of rules operating at the international level without however displacing the operation of the internal competence where rules are adopted within the EU.[79] We find a similar approach to

[73] A formulation hitherto used primarily in the context of discussion of the purposes for which trade instruments may be used; see e.g. CJEU, case C-411/06, *Commission v Parliament and Council*, ECLI:EU:C:2009:518.

[74] CJEU, case C-414/11, *Daiichi Sankyo Co. Ltd.*, ECLI:EU:C:2013:520, para. 51.

[75] CJEU, case C-414/11, *Daiichi Sankyo Co. Ltd.*, ECLI:EU:C:2013:520, para. 52.

[76] CJEU, opinion 3/15, *Marrakesh Treaty*, ECLI:EU:C:2017:114.

[77] CJEU, opinion 3/15, *Marrakesh Treaty*, ECLI:EU:C:2017:114, para. 82.

[78] CJEU, opinion 3/15, *Marrakesh Treaty*, ECLI:EU:C:2017:114, para. 91. The Court then went on to consider competence to conclude the Treaty under implied powers based on the existence of secondary legislation dealing with copyright, finding that on this basis EU competence was indeed exclusive.

[79] It thus reflects Article 207(6) TFEU, which although not referred to by the Court can be sensed in the background to this judgment (see further below). It is an approach which follows the same logic as that applied by the Court in relation to the SPS and TBT agreements in CJEU, opinion 1/94, *WTO*, ECLI:EU:C:1994:384, paras. 30–33.

the relation between the CCP and internal competences as regards services in the *conditional access services* case.[80] The Court was asked to determine the appropriate legal basis for the signature of a Convention on the legal protection of those offering conditional (i.e. authorised) access to television, radio and information society services. The Council had concluded the Convention on the basis of implied external competence relating to the internal market (Article 114 TFEU), whereas the Commission argued that the Convention fell within the scope of the CCP and thus exclusive competence.[81] Internal legislation, coinciding in part with the scope of the Convention, had been adopted under Article 114 and it was clear that the Convention would have the effect of extending this internal market harmonisation to third country parties, as well as providing for additional measures on enforcement and remedies for unlawful activity, which went beyond the current internal EU legislation.

The Court follows the line of reasoning it used in *Daiichi Sankyo*, defining the scope of the CCP and then analysing the Convention to see whether it is concerned with international trade. It found that the Convention was concerned, not with trade in services between Member States, but with trade in services between Member States and third countries. Although aspects of the Convention go beyond the existing EU legislation, and thus can be seen as aimed at improving the functioning of the internal market, the Court held that these were "incidental" effects and not its main purpose.[82] Article 207 does not distinguish between modes of supply,[83] and in *conditional access services* no distinction is made between the different modes of supply of services, either in the Convention at issue or in the judgment of the Court. The concept of "trade in services" in Article 207 (unlike "services" in Article 56 TFEU) is not a residual category; it covers activity, such as the provision of services through commercial presence abroad, which within the internal market would be treated as establishment.

3.2 And Foreign Direct Investment

The precise scope of "foreign direct investment" (FDI) in Article 207(1) TFEU has given rise to much debate and at the time of writing the Court has not yet addressed

[80]CJEU, case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675.

[81]The Commission challenged the validity of Council Decision 2011/853/EU on the signature of the Convention, which was based on Article 114 TFEU.

[82]The legal basis of an international agreement will represent its main or predominant purpose; incidental elements need not be reflected in a separate legal basis; see e.g. CJEU, case C-377/12, *Commission v Council*, ECLI:EU:C:2014:1903.

[83]Bungenberg (2010), p. 132; Devuyst (2011), p. 654.

the question.[84] We cannot engage in a full discussion here,[85] but it seems clear that portfolio investment falls outside the scope of the CCP since it cannot be regarded as "direct",[86] while measures that relate to pre-establishment market access are covered. Less clear is whether Article 207(1) also includes post-establishment investor protection, including non-discrimination, fair and equitable treatment and protection against expropriation. It will be remembered that the Court has already held that the concept of trade in services goes beyond market access to cover also an agreement establishing a regulatory framework for specific services, and that a measure will fall within the CCP is it is "intended to promote, facilitate or govern trade and has direct and immediate effects on trade",[87] a formulation broad enough to cover post-establishment regulation.[88]

The extension of the CCP to cover FDI raises the question of the relationship between the free movement of capital under Articles 63–66 TFEU, which apply to direct investment, and the CCP. Unlike those on establishment and services the Treaty provisions on movement of capital expressly refer to capital movements between the EU and third countries. These provisions certainly have implications for the Member States' bilateral investment treaties,[89] but what part do they play in the EU's own external policy on investment? To what extent could Articles 63–66 TFEU cover aspects of investment agreements (including provisions on portfolio investment) that would not fall within the CCP? Here again views differ, with the Commission arguing that the Treaty provisions on capital and payments provide not just implied but exclusive treaty-making powers: "to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude

[84]A request for an opinion concerning the EU's competence to conclude the proposed Free Trade Agreement with Singapore, which should throw light on this question, has been submitted by the Commission under Article 218(11) TFEU: CJEU, opinion 2/15, *Singapore Agreement*, pending. The opinion of AG Sharpston was delivered on 21 December 2016, ECLI:EU:C:2016:992.

[85]See, inter alia, Karl (2004), Ceyssens (2005), Dimopoulos (2008), Bungenberg (2010), Ortino and Eeckhout (2011), Bischoff (2011).

[86]The concept of direct investment, as contrasted with portfolio investment, has been interpreted by the Court in the context of the Treaty rules on free movement of capital; see e.g. CJEU, case C-446/04, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, ECLI:EU:C:2006:774, paras. 180–182.

[87]CJEU, case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, para. 57.

[88]A position also adopted by AG Sharpston to CJEU, opinion 2/15, *Singapore Agreement*, ECLI:EU:C:2016:992, paras. 330–336.

[89]CJEU, case C-205/06, *Commission v Austria*, ECLI:EU:C:2009:118; CJEU, case C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119; CJEU, case C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715.

agreements in this area would be implied."[90] Thus for the Commission, matters typically included in international investment agreements will fall within exclusive competence, if not as part of the CCP then by virtue of implied powers as a result of Article 3(2) TFEU. Other authors take the view that given the absence of secondary legislation adopted under Article 64(2) TFEU an exclusive competence cannot be derived from Article 63,[91] and this view was also adopted by Advocate General Sharpston in the context of the request for an opinion on the competence to conclude the Free Trade Agreement with Singapore.[92]

3.3 Limits to the Common Commercial Policy

There are other ways in which the CCP may not be able to provide the sole legal basis for modern trade agreements. Agreements in the field of transport are expressly excluded from the CCP by Article 207(5) TFEU and are thus also covered by implied powers. The equivalent exclusion in Article 133(6) EC was interpreted in opinion 1/08 to cover any agreement which deals with transport, including general services agreements which cover transport services, even if transport is not the predominant purpose of the agreement.[93] The Lisbon Treaty has not altered this position.[94] The external dimensions of competition policy and social policy are based upon implied powers,[95] and the question whether a separate legal basis would be needed will depend on whether the relevant provisions in the agreement impose "obligations so extensive that they constitute distinct objectives that are neither secondary nor indirect" in relation to the agreement's predominant (trade) objectives.[96]

Our conclusion must be therefore, that the Lisbon Treaty has introduced a very considerable expansion of the CCP, and its extension to include trade in services

[90]European Commission, Towards a comprehensive European international investment policy, COM (2010) 343, p. 8. The Commission has relied on this argument in its submissions in opinion 2/15, seeking to establish that if competence is not exclusive on the basis of Article 207 TFEU, then it should nevertheless be exclusive on the basis of Articles 63 and 3(2) TFEU. Exclusivity of the type described in the last phrase of Article 3(2) TFEU (effect on common rules) has not so far been founded directly on a Treaty provision rather than secondary legislation.

[91]See e.g. Ortino and Eeckhout (2011), pp. 315–318.

[92]Opinion of AG Sharpston to CJEU, opinion 2/15, *Singapore Agreement*, ECLI:EU:C:2016:992, paras. 350–359.

[93]CJEU, opinion 1/08, *GATS*, ECLI:EU:C:2009:739, paras. 152–173. This is a departure from the Court's standard "predominant purpose" approach to the legal basis of international agreements; see further Cremona (2010b).

[94]Opinion of AG Sharpston to CJEU, opinion 2/15, Singapore Agreement, ECLI:EU:C:2016:992, para. 114 et seq.

[95]Thus, international agreements in the field of competition are based upon Article 103 TFEU; for a recent example see Council Decision 2014/866/EU on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws OJ 2014 L 347/1.

[96]CJEU, case C-377/12, *Commission v Council*, ECLI:EU:C:2014:1903, para. 48.

and FDI are both highly significant. However, the CCP does not necessarily offer a complete "one-stop-shop" for wide-ranging contemporary trade and investment agreements. Whatever the final answers to the scope of FDI in Article 207 TFEU, it is clear that the introduction of investment into the EU's trade agreements will have an undeniable (but so far not fully foreseeable) impact on EU policy: it is the investment chapters of new agreements that have proved to be the most controversial for the EU public and European Parliament,[97] and this involvement in international investment has led the Union to seek to lead international initiatives for reform of investment protection and investor-state dispute settlement.[98]

4 Decision-Making

The decision-making procedures under the pre-Lisbon CCP were something of a paradox. While held out as an exemplar of the "Community method", in fact the CCP was subject to special decision-making rules and did not include the normal features of the "Community method", in particular co-decision and comitology. The Lisbon Treaty has integrated the CCP into the ordinary legislative and comitology procedures, a change which represents an important shift in the institutional balance in trade policy making. Although the procedures for the adoption of internal legislation in the field of CCP have posed some challenges, for reasons of space we will here focus on two developments that impact the conclusion of international agreements: the increased role of the European Parliament, and the changes to the voting rules for decision-making in the Council.

4.1 The European Parliament: Consent, Transparency and Public Debate

The position of the European Parliament in relation to trade agreements has radically changed. Article 218(6)(a)(v) TFEU provides that the conclusion of an international agreement requires the consent of the European Parliament where it covers a field to which the ordinary legislative procedure applies, and this now includes the CCP. In this, and other cases where the Parliament must now give its consent, the Parliament has shown itself willing to exercise that veto. Its rejection of the Anti-Counterfeiting Trade Agreement (ACTA) illustrates graphically just how much things have changed: the Parliament is now able to veto agreements based on

[97] See e.g. European Parliament, resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, P8_TA(2016)0299, A8-0220/2016 (2015/2105(INI)).

[98] See e.g. European Commission, Investment in TTIP and beyond – the path for reform, 12 May 2015.

trade policy powers where 7 years ago, before the Lisbon Treaty, it did not even possess the formal right to be consulted.[99] However the negotiation of the ACTA also illustrates that the right to consent to an agreement's conclusion raises questions as to the role of the Parliament in the earlier stages of negotiation. Article 218 (10) TFEU requires that the Parliament is to be kept informed at all stages of the procedure, and Article 207(3) TFEU requires the Commission to report regularly on the progress of negotiations both to the Parliament and to a committee of Member State representatives appointed by the Council. Questions arise as to what being "immediately and fully informed"—as required by Article 218(10)—entails. A 2010 inter-institutional agreement between the Parliament and the Commission contains rules for the implementation of these provisions, including a commitment from the Commission to facilitate the inclusion of Parliamentary observers within the Union delegation in treaty negotiations.[100] On the provision of information, the Commission undertakes to inform the Parliament in the same way as the Council or its special committee.[101]

Among the issues raised by the ACTA, and symptomatic of the direction in which modern trade policy is moving, are those surrounding the pursuit of regulatory objectives via international treaties. Since the procedure for negotiating treaties is not the same as for the adoption of domestic legislation, the use of treaties to shape new regulatory norms raises the question of the need for public debate over international agreements which will have a quasi-legislative impact and may carry fundamental rights implications, as well as the difficulty in balancing this need with the traditional processes of international negotiations, seen as executive rather than legislative activity. Here we turn to the basic procedural complaint of the European Parliament in the case of ACTA: the lack of transparency in the negotiation process and limited possibilities for Parliamentary input. During the ACTA negotiations the Parliament expressed concern over the lack of information on the negotiating text, pointing out that in due course it would need to consent to the agreement.[102] The Commission argued that the negotiation of international trade agreements is generally confidential since the parties do not wish their negotiating positions to be made public in advance of the final result, but that within those constraints it had in fact kept the Parliament informed of the progress of negotiations.[103] The

[99]See further Cremona (2014).

[100]Framework Agreement on relations between the European Parliament and the Commission, 20 October 2010, P7_TA(2010)0366, paras. 23–27 and Annex 3 deal with international negotiations; Annex 2 deals with Parliamentary access to classified information.

[101]Framework Agreement on relations between the European Parliament and the Commission, 20 October 2010, P7_TA(2010)0366, Annex 3, para. 5.

[102]European Parliament, resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058. See also European Parliament, declaration of 9 September 2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content, P7_TA(2010)0317.

[103]Reply by Commissioner De Gucht on behalf of the Commission to Written question E-0147/10 by Alexander Alvaro (ALDE); see also Transparency of ACTA Negotiations, MEMO 12/99, 13 February 2012.

Parliament's Resolution of November 2010 did recognise the efforts that have been made by the Commission and the greater transparency of the later stages of negotiation.[104]

These political exchanges were accompanied by legal moves. During the earlier SWIFT negotiation, and then in the ACTA case, MEPs used Regulation 1049/2001 on public access to documents to challenge Council and Commission refusals to grant access to information during negotiations.[105] In a first case involving the SWIFT agreement,[106] the General Court held that since international negotiations fall in principle within the domain of the executive and the Council is not acting in its legislative capacity, public participation in the procedure "is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations". Nevertheless, the principle of the transparency of the decision-making process of the European Union "cannot be ruled out in international affairs", especially where the international agreement may have an impact on the EU's legislative activity. The ACTA cases concerned documents containing the negotiating mandate and EU negotiating positions. In July 2010, MEP *In't Veld* brought an annulment action against the Commission's refusal to grant her full access under Regulation 1049/2001 to the ACTA negotiating documents.[107] Her action was partially successful but the Court generally supported the Commission position that public disclosure of negotiating positions and discussions during a negotiation could compromise the EU's position and be contrary to its interests. The Court argued that the negotiations "do not in any way prejudice the public debate that may develop once the international agreement is signed, in the context of the ratification procedure."[108]

The Court here takes a traditional view of international treaty negotiation and public debate: that the time for debate is not during negotiations but once they are completed and the treaty needs parliamentary ratification. But is this the most appropriate approach in the case of quasi-legislative treaties? It is not only that in the case of such treaties technical discussion may mask fundamental policy choices. It is also that if the Parliament is expected to assent (or not) without having been involved in the ongoing discussion it will not feel any "ownership" of the resulting text. It is worth recalling, too, that the European Parliament is not subject to the same parliamentary-majority-based disciplines as national Parliaments and its

[104]European Parliament, resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), P7_TA(2010)0432.

[105]Article 15(3) TFEU; Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

[106]GC, case T-529/09, *In't Veld v Council*, ECLI:EU:T:2012:215; CJEU, case C-350/12 P, *Council v In't Veld*, ECLI:EU:C:2014:2039. The General Court, upheld by the Court of Justice partially annulled the Council's refusal to allow access to the opinion of the Council's Legal Service concerning the Commission's recommendation to the Council to authorise the opening of the SWIFT negotiations. The declassified document was made available on 16 February 2015 as Council doc. 11897/09 DCL 1.

[107]GC, case T-301/10, *In't Veld v Commission*, ECLI:EU:T:2013:135.

[108]GC, case T-301/10, *In't Veld v Commission*, ECLI:EU:T:2013:135, para. 181.

support cannot be taken for granted.[109] In an era of widespread communication and social media, it is in practice impossible to keep such negotiations under wraps until they are complete. As the Commission has discovered, campaigns mobilise and take on a life of their own; all kinds of leaks occur; myths may proliferate; it is difficult at the end of such a process to put the agreement to a take-it-or-leave-it vote and expect to have a balanced and well-informed debate. By that stage it is too late. This is a question for national parliaments as well as the European Parliament as the recent difficulties over Belgian acceptance of the signature of the CETA illustrate.

All these factors are no doubt behind the Commission's change of practice. Faced with the widespread and sceptical public debate on the trade and investment agreement under negotiation with the USA (TTIP), not only was the negotiating mandate released,[110] but the Commission also made public many of its position papers and textual proposals.[111] Some of this material had already been the subject of an access to documents request under Regulation 1049/2001 and a consequent complaint to the Ombudsman.[112] The 2015 trade strategy paper contains a chapter on transparency which summarises the Commission's new approach. It undertakes to invite the Council to disclose FTA negotiating directives as soon as they are adopted; to "make its closer engagement with the European Parliament in the context of TTIP the rule for all negotiations"; and to "extend TTIP practices of publishing EU texts online for all trade and investment negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach".[113] In the medium term, these changes will impact the quality and level of the public debate on trade policy. Although transparency could certainly be improved and practice is still evolving, it is important that the hitherto barely-challenged argument that all trade negotiations must be conducted in near-secrecy has been abandoned. The increased role given to the Parliament by the Lisbon Treaty was of course not the only driver of change but it has had a catalytic effect.

4.2 The Member States: Exclusivity and Unanimity

Two hall-marks of the CCP since the 1970s have been its nature as an exclusive competence and qualified majority voting. The Nice Treaty amendments, while

[109]Monar (2010), p. 148.

[110]Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, Council doc. 11103/13, declassified 9 October 2014.

[111]These have been made available on the DG Trade web pages, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 (last accessed 1 March 2017).

[112]European Ombudsman, case 119/2015/PHP, opened 18 February 2015, decision 4 November 2015. The Ombudsman has also undertaken an own-initiative inquiry into the transparency of the TTIP negotiations, see European Ombudsman, case OI/10/2014/RA, opened 29 July 2014, decision 6 January 2015.

[113]European Commission, Trade for All, p. 18 et seq.

bringing agreements on trade in services and IPR within the CCP, made significant inroads into the principle of exclusivity through a complex set of linked provisions designed to maintain the presence of the Member States in negotiations involving these new fields.[114] The Lisbon Treaty, in contrast, while extending the scope of the CCP even further, returns to the principle of exclusivity. The CCP is one of the few policy fields declared to be exclusive by Article 3(1) TFEU and there are no sectoral exceptions within the policy field. On the other hand, the Lisbon Treaty protects the interests of the Member States in a different way; instead of participation via shared competence there is provision for unanimous voting in three circumstances—each relating to the conclusion of international agreements (not the adoption of autonomous measures) in "new" CCP fields of services, IPR and FDI.

The first of these requires agreements "in the fields of" trade in services, commercial aspects of IPR and FDI to be subject to unanimous voting in the Council where they contain provisions for which unanimity is required for the adoption of internal rules.[115] Examples would include language arrangements for IPR under Article 118 TFEU; measures which involve "a step backwards" as regards liberalisation of movement of capital involving direct investment under Article 64(3) TFEU; and conditions of employment for third country nationals in Union territory under Article 153(1)(g) and (2) TFEU, if applicable in the context of the supply of services under Modes 3 or 4 (commercial presence and presence of natural persons respectively). Although the precise meaning of "in the field of" is not clear, in this case the necessary clarity is provided by the additional requirement that the agreement must contain "provisions" for which unanimity would be required internally. The same is not true of the other two cases where unanimity is required:

> (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
>
> (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.[116]

What does it mean to say that an agreement is "in the field of" cultural services, or health services? Interpreting a similar phrase in the context of the pre-Lisbon Article 133 EC in opinion 1/08, the Court refused to limit its application to cases where the agreement was exclusively or predominantly concerned with specific services sectors and held that it also covers agreements which deal with trade in services generally, but which include these sensitive sectors.[117] It seems likely that a similar interpretation would prevail here. However, the unanimity rule requires a second condition to be met: that the agreement "risks prejudicing" the Union's cultural and linguistic diversity, or "risks seriously disturbing" the national organisations of social, education or health services. These conditions imply complex

[114] On their interpretation, see CJEU, opinion 1/08, *GATS*, ECLI:EU:C:2009:739.

[115] Article 207(4) para. 2 TFEU.

[116] Article 207(4) para. 3 TFEU.

[117] CJEU, opinion 1/08, *GATS*, ECLI:EU:C:2009:739.

judgments and immediately raise the question: who decides when they are fulfilled? There is, in Article 207(4), no emergency brake of the kind provided by Article 48 TFEU in relation to social security, which makes it clear that one Member State may declare its interests affected. Should the decision therefore be a collective decision of the Council? The unanimity rule itself suggests that there may be a need to protect the sensitivities of one or more Member States against a qualified majority; it is then somewhat counter-intuitive to require unanimity for a decision to apply the unanimity exception. It is notable that while paragraph (a) refers to the *Union's* cultural and linguistic diversity, paragraph (b) refers clearly to the *national* organisations of specific public services. This might suggest that a decision to act by unanimous vote under paragraph (a) should be a collective one within the Council as the interest to be protected is identified as belonging to the Union; whereas it should be possible for any one Member State to call on paragraph (b) on the grounds of the impact of the agreement on its national organisation of social, education or health services.

These voting rules, designed to protect the interests of Member States, operate against a background of exclusive Union competence. The extension of exclusive competence over trade in services, IPR and FDI no doubt represents a major competence shift; however, it has been limited in its effect both by the Treaty and by institutional practice. First, Article 207(6) TFEU provides that the granting of an exclusive *external* competence does not imply that internal legislative powers are also exclusive. Thus, an international agreement concluded by the Union, Article 207(4) implies, *may* affect the provision of national social services (in which case its negotiation and conclusion must be decided unanimously); however this does not mean that the Union has an exclusive competence to adopt internal legislation regulating social services. Implementation of such an agreement would be a matter of shared competence under internal decision-making rules.

Second, the move to exclusive external competence over FDI created potentially serious problems for the many hundreds of bilateral investment treaties (BITs) concluded by the Member States. As a transitional measure the Member States have been authorised, under certain conditions, to maintain and conclude BITs with third countries.[118]

And third, given the broad scope of modern PTAs, it is not a foregone conclusion that the CCP's exclusive competence will cover the whole agreement. In the case of CETA the Commission came under political pressure to agree that it should be signed as a mixed agreement. The question of whether the Singapore FTA falls under exclusive competence has been referred to the Court in opinion 2/15.[119] It seems likely that the Member States will continue to be involved in the conclusion of wide-ranging PTAs, a circumstance which poses increasing challenges for EU negotiators.

[118]Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ 2012 L 351/40.

[119]AG Sharpston's opinion in the case concludes that although substantial parts of the FTA are within exclusive competence, either via Article 207(1) TFEU or via Article 3(2) TFEU, some aspects fall within shared competence. See opinion of AG Sharpston to CJEU, opinion 2/15, *Singapore Agreement*, ECLI:EU:C:2016:992.

The "Lisbon settlement", whereby extended exclusivity in the CCP was balanced by requiring the assent of the European Parliament and unanimous voting in Council in some cases, has in practice led to a situation in which both the European Parliament and national parliaments may act as veto players. In the past the trade provisions of mixed agreements were sometimes brought into force early, as exclusively EU agreements which were then automatically terminated on the coming into force of the full agreement. More recent practice has preferred to agree the provisional application of (parts of) an agreement on signature and pending full ratification. A couple of points are of note here. First, although the Treaty rules on provisional application do not require this, the Commission and Council have in some cases agreed that no decision on provisional application will be taken without European Parliamentary approval.[120] Second, difficulties may be encountered in ratifying an agreement which has been signed and is being provisionally applied, raising questions as to the propriety of an indefinite extension of provisional application.[121]

5 Conclusion

How may we evaluate the changes to the Common Commercial Policy brought about by the Lisbon Treaty? To what extent do they represent a revolution? The changes have essentially been three-fold. First, the wider scope of the CCP, its extension to include trade in services, the commercial aspects of intellectual property and foreign direct investment. These are significant, in part because of the link to the scope of the WTO agreements, in part because of the significance of direct investment for modern commercial policy and the consequent ability of the EU to develop a trade and investment policy. The scope of FDI, insofar as it falls within the scope of the CCP, is still contested and we await a definitive judgment on this issue. The Court of Justice has given readings of trade in services and IPR which focus on the effects on trade with third countries rather than on any conceptualisation of the field.

The second major change has been the embedding of EU trade policy into the Union's overall principles and objectives, especially as they refer to external action. The Treaty provisions on trade policy have always left very wide scope for the

[120]CETA is a recent example. See European Commission, Press release, 30 October 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1569 (last accessed 1 March 2017). In the case of the FTA with Korea, the Council agreed that the agreement should not be given provisional application before the adoption of internal legislation of safeguard measures: Council Decision 2011/265/EU, OJ 2011 L 127/1. Article 3(2) provides: "The Council shall coordinate the effective date of provisional application with the date of the entry into force of the proposed Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement."

[121]The Association Agreement with Ukraine is a case in point; a mixed agreement, it is currently being provisionally applied. Following a negative referendum, ratification by the Netherlands has been delayed, raising questions as to the future of the agreement.

discretion of the policy-makers; now this discretion should be exercised within the framework of the Treaties' general external objectives, which include sustainable development, "free and fair trade" and the promotion of human rights. The implications are still not worked out, but there are signs, both from the Commission and from the Court, that this normative framework is being taken seriously.

The third change is to the decision-making structures of trade policy. The Commission still plays a key strategic role, but the adoption of the ordinary legislative procedure means that the Commission's key interlocutors now include the European Parliament as well as the Council. The European Parliament has the power to consent to—or to withhold consent from—trade agreements and has proved willing to use its power. Working together with a renewed political and public interest in trade policy, in the wake of several contentious agreements, this new dynamic has led to calls for, and significant progress towards, greater transparency in the negotiation of trade agreements. On the other hand, the Union's recent practice has been to attempt to exclude the courts from the direct enforcement of these agreements, a marked change of practice for bilateral agreements and perhaps an indication of the degree to which the new generation of bilateral trade agreements are seen as at least as—or more—significant than the WTO.

We cannot yet look back from 2016 to 2009 and see a true revolution in trade policy. But the Lisbon Treaty put in place mechanisms which could progressively lead to a "quiet revolution"—a trade policy that looks very different from the paradigm of the last 40 years. Whether this happens, and indeed what such a trade policy might look like, will depend on the choices made by the Commission over the next few years, but also on the ways in which the Parliament rises to the challenge to exercise a strategic influence, and the degree and nature of public engagement in the policy choices to be made.

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Front-Loading Trade Policy-Making in the European Union: Towards a Trade Act

Thomas Cottier

Abstract The shift to non-tariff measures and regulatory behind-the-border issues in commercial policy—and thus to matters traditionally pertaining to domestic law of Member States and the European Union—call for enhanced inclusiveness in policy-making. Such inclusiveness, under current rules of exclusive powers and mixed agreements, mainly focuses on the final stages of negotiations. It undermines the authority and treaty-making powers of the Union, frustrating legitimate expectations and trust of trading partners. Instead, major issues and debates on trade policy should be front-loaded and not taking place at the stage of consent and signature, prior to ratification and the adoption of implementing legislation. In assessing current procedures and its shortcomings under the practice of mixed agreements, the paper suggest developing and introducing a European Trade Act, perhaps called International Trade, Investment and Co-operation Regulation (ITICR). In comparison with, and referring to, the United States Trade Act, the paper expounds the potential scope and functions of a European Trade Act under the Lisbon Treaties and its assistance in achieving the goal of front-loading trade policy and investment policy debates within the Union. A Trade Act reduces the risks under the bifurcated system of exclusive and mixed competences of the Union in international economic law. It bears the potential to enhance inclusiveness and thus democratic legitimacy while at the same time supporting effective treaty-making powers of the European Union.

Contents

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1 The Problem

The bifurcated nature of external relations of the European Union is an endemic problem. Powers of the Union in foreign affairs and international trade do not match the canon of exclusive competences, even in the traditional field of trade policy which ever since has been one of the few exclusive powers due to the Customs Union. International negotiations inherently tend to go beyond the boundaries defined internally, thus requiring to resorting to the format of mixed agreements.[1] Unlike agreements concluded under exclusive powers, mixed agreements depend upon consent of all Members States, their parliaments prior to the entry into force, in addition to qualified majority approval by the Council and consent by a simple majority of European Parliament. The increasing importance of addressing non-tariff measures (NTMs) and other regulatory behind-the-border issues pertaining to domestic legislation of Member States further reinforces the category of mixed agreements, rather than reducing it. Commercial policy as a field of exclusive competence is outfoxed by the process of globalization and the need to respond to it and to harness it. True, it does not affect the negotiating powers of the Union, and of the Commission in particular. There is no difference in negotiating agreements under exclusive and mixed powers. Under a mandate of the Council and thus Member States, the Commission negotiates upon regular consultations with Member States, taking into account feedback obtained in the process. Internal consultations do not distinguish between exclusive and mixed powers. Member

[1]For a recent discussion of mixed agreements and further references see Cottier (2016).

States are consulted at all stages on all issues alike. For example, in WTO negotiations it does not matter and does not influence the formal standing and role of Member States for practical purposes whether an issue forms part of exclusive or shared powers, albeit the potential of a mixed agreement obliges to take concerns of each of the Member State on its own and does not allow to work with majorities. Whether or not a mixed agreement results often can only be determined results are achieved. The difference between exclusive and mixed agreements thus often arises at a late stage prior to signature and the process of parliamentary approval and ratification. The discussion held on the Comprehensive Economic and Trade Agreement with Canada (CETA) with the Commission reluctantly conceding to a mixed agreement is just a recent example in point.[2]

It may be argued that the requirement of unanimity—otherwise limited to very few areas today of economic regulation, in particular taxation—offers an opportunity to strengthen treaty-making powers of the European Union vis-à-vis the rest of the World. The Commission is in a position to fend-off claims and demands by pointing to difficulties to pass them in all parliaments of Member States back home. The resulting rigidity may be considered an advantage in defending European interests, for example in addressing agricultural policy, environmental or labour migration or labour standards. The reality, however, is that European interests in making progress in international law are often impaired, hampered and paralysed. The need to submit results to Parliaments of all Member States for consent undermines the treaty-making powers of the Union. Partners are not willing to engage in costly negotiations knowing that any result may be taken hostage by the whims and manoeuvers of domestic politics in Member States. Obviously, it is tempting for politicians to generate electoral support by opposing impending negotiations and to create pressures to extract concessions which may not be directly related to the issue. The increasing trend to hold referenda on international agreements further reinforces such temptation. The rejection of the EU-Ukraine Trade Agreements by Dutch voters on 6 April 2016 in a ratio of 61.28% is a recent example in point.[3] Mainly motivated by domestic affairs and the opportunity to express mistrust vis-à-vis the own Government and Cabinet, the negative vote amplified international problems and undermines the credibility of the Union to engage and do business on the basis of mutual trust. The legal complaint lodged in September 2016 before the German Constitutional Court to stop signing the

[2]European Commission, Press Release, European Commission proposes signature and conclusion of EU-Canada trade deal, IP-16-2371, 5 July 2016: "The deal is set to benefit people and businesses – big and small – across Europe as of the first day of its implementation. To allow for a swift signature and provisional application, so that the expected benefits are reaped without unnecessary delay, the Commission has decided to propose CETA as 'mixed' agreement. This is without prejudice to its legal view, as expressed in a case currently being examined by the European Court of Justice concerning the trade deal reached between the EU and Singapore. With this step, the Commission makes its contribution for the deal to be signed during the next EU-Canada Summit, in October."

[3]Marmon (2016).

Comprehensive Economic and Trade Agreement (CETA) with Canada shortly before closing negotiations, requesting in vain urgent and provisional measures, and prohibiting approval of the agreement by the German Government, came at an odd and very late stage in the process.[4] Likewise, the temporary opposition of the Wallonia Parliament in Belgium (representing 3.6 million out of 545 in the Union or 0.66%) to approve CETA with Canada on 24 October 2016 not only upheld the conclusion and signature of the Agreement.[5] It seriously questions the treaty-making powers of the Union and its ability to deliver and implement results in light of the Belgian declaration issued on CETA and option to submit the agreement to the European Court of Justice. A comment was timely entitled the *Age of Vetocracy*.[6]

The same problem is likely to be repeated with increasing resistance to the complex Transatlantic Trade and Investment Partnership (TTIP) with the United States. The cliff-hanger experience with CETA may be a precursor to even more serious challenges to EU treaty-making powers in areas which ever since have been an exclusive competence and stronghold of the EEC and the European Union, in particular technical barriers to trade. Like CETA, TTIP entails new and novel concepts not inherently covered by exclusive powers, in particular regulatory cooperation beyond technical barriers to trade. Thus for legal, but also political reasons, they are qualified to be of a mixed nature. The repeated opposition to TTIP by cabinet members in particular in Germany[7] and Austria[8] during ongoing negotiations in 2016 strongly undermine both the authority and credibility of national governments previously committed to the project, and of the credibility of the European Union as a negotiating partner. Potential early harvests, such as the revision of the 1998 Mutual Recognition Agreement and the recognition of best manufacturing practices in the pharmaceutical sector were put at risk. Again, mainly domestic political motives translate into complicating international relations, weakening the standing of Europe in the World.

[4]German Constitutional Court, Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful; Press Release No. 71/2016 of 13 October 2016.

[5]BBC News, Belgium Walloons block key EU Ceta trade deal with Canada, 24 October 2016. The Wallon Parliament, upon further negotiations with capital and the EU agreed to consent on 27 October 2016 and CETA was signed on 30 October 2016; The Guardian, Belgian politicians drop opposition to EU-Canada trade deal, 27 October 2016.

[6]Charlemagne, The age of vetocracy, The Economist, 29 October 2016, p. 26.

[7]TTIP has failed – but no one is admitting it, says German Vice-Chancellor Sigmar Gabriel: Germany's Vice-Chancellor said in 14 rounds of talks neither side had agreed on a single common chapter out of the 27 being deliberated, Independent, 28 August 2016.

[8]Austrian economy minister adds his "nein" to TTIP debate, EurActive.com, 31 August 2016, https://www.euractiv.com/section/trade-society/news/austrian-economy-minister-adds-his-nein-to-ttip-debate/ (last accessed 1 March 2017).

2 Forum Shifting in Law-Making

It is not a matter of deploring such interventions, or even taking a moralising stand. They essentially relate to the fact of forum shifting in the process of globalization. The phenomenon of *vetocracy* is not an accident of history. It indicates apparent deficiencies in inclusiveness and democratic legitimacy of traditional processes. Matters formerly pertaining to domestic law and parliamentary debate and decision-making, and thus controlled by the electorate, have been shifting to the European and international realms. These shifts mainly took place by recourse to modes of diplomatic negotiations, eventually translating and developing into more inclusive procedures within the European Union. Working on non-tariff barriers—the origin of what we call behind-the-border issues—eventually developed into expert committees open to participation by industry and eventual civil society within the internal market. The extension into other areas of law-making accelerated the rise of the European Parliament to become on par with the Council in terms of internal legislation. The increase in treaty-making powers in external relations also strengthened the position of parliament, albeit not to a comparable extent. It will be seen that the same shift to non-tariff measures, much earlier, triggered the 1974 Trade Act in United States. Importantly, these shifts need to catch up in terms of procedures with the substance and to create appropriate substance-structure pairings are long-term constitutional processes.[9] In Europe, they have not been sufficiently developed and realised in the field of external economic relations and foreign policy in general terms.

The main approach addressing the extension of subject matter in international negotiations ever since the conclusion of the Uruguay Round of the WTO has been to enlarge exclusive trade policy prerogatives of the Union. Following the landmark Advisory Opinion 1/94 relating to the WTO agreements, powers were extended in a complex and somewhat contradictory manner by the Treaty of Amsterdam. New areas of services and intellectual property were included but partly subjected to unanimity. Others remained explicitly excluded. The Treaty of Lisbon made further progress in consolidation of trade policy prerogatives of the Union, adding new powers on investment protection, yet short of portfolio investment. Areas subject to unanimity in domestic affairs, such as taxation, are equally subject to unanimity, as well as other enumerated areas, in particular audio-visual services, social and educational services. The provision of Article 207(6) TFEU carefully avoids that trade policy and international negotiations affect the allocation of internal allocations of powers relating to the internal market.

As indicated, the problem with enumerative powers in the field of external economic policy is that they will always fall short of international developments and efforts to harness globalization. Each of the agreements inherently adds subject matter which constitutionally still pertains to Member States. It is for that reason

[9]For the evolutionary interdependence of substance and decision-making structures see Cottier (1993).

that the Commission conceded that CETA is a mixed agreements—exposing it thus to unanimity of national parliaments (including regional bodies in Belgium). The same is likely to be true for TTIP, the other water-front treaty in the making. Allocating all foreign powers to the Union, of course, would be the best solution in terms of safeguarding effective treaty-making powers. Yet this would imply a shift to a federacy and formal federal structures, away from the *sui generis* legal nature of the EU as a confederation and what in German law is called *Staatenverbund* under past and current treaty law.[10] There is, at this point in time of devolution and fragmentation, no political will to move towards unitary powers in foreign affairs.[11] Importantly, such a move may not sufficiently address the constitutional problem behind shared powers and mixed agreements: the challenge to secure and bring about sufficient inclusion and thus democratic legitimacy of internationally negotiated rules affecting legislative powers which traditionally pertain to national or regional parliaments, legislators or executive branches.

3 The Challenge of Inclusive Participation

The shift from reducing tariffs to non-tariff measures in the late 1980s, and ever since the inclusion of services and intellectual property protection in the WTO, has not been accompanied by more inclusive processes of policy making in international law. Nothing has changed in the *modus operandi* of WTO talks ever since non-tariff barriers were firstly addressed in the Kennedy Round in 1964. They are essentially diplomatic and governmental, at the exclusion of civil society, at least in formal stages. More inclusive procedures all depend upon domestic reform and approaches. It is up to each of the Members of the WTO to define the impact of their parliaments, business and of civil society in the preparatory phase of a negotiation, during and upon completion of the process.

[10]For example German Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08—*Lisbon Treaty*, headnote 1: "Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation." The notion of *Staatenverbund* was introduced in case law in assessing the Maastricht Treaty, BVerfGE 89, 155 (Judgment of 12 October 1993).

[11]"Mixity is there to stay", Rosas (2010), p. 367. For further references see Cottier (2016), p. 12, fn. 1.

3.1 International Law and Diplomacy

There are no international standards on inclusiveness as international law is not concerned with the political process at home, except for transparency and the obligation to provide judicial review of trade-related administrative decisions. International law at this stage, and based upon the principle of sovereignty and self-determination, does not know a right to democracy and essentially has remained a black box open to all forms of government. Keeping peace among nations cannot afford to exclude authoritarian governments, even dictatorships, from the international community. The structure of contemporary international law is not inclusive and thus badly prepared to absorb the shift of fora in the wake of globalisation and the need to harness it.

Matters addressing non-tariff barriers and measures traditionally pertaining to domestic law thus today are addressed and settled by way of diplomatic negotiations, often perceived to be exclusive and not sufficiently transparent and accountable. This creates suspicion and resistance. The legitimacy of the WTO and of international agreements negotiated by governments has been increasingly challenged, ever since the 1999 Seattle Ministerial Conference.[12] The shift to preferential trade agreements ever since the end of the Cold War and the accession of China to the WTO in 2001 extended the issue of legitimacy to preferential trade agreements and plurilateral, critical mass agreements formally negotiated and concluded outside the WTO. The decline of the Doha Development agenda eased criticism of the WTO, and turned criticism to agreements like CETA and TTIP. The public perception of these processes and projects, perhaps, is more important than reality which lacks appropriate communication to the public. In reality, diplomatic processes follow strict protocols. They operate on the basis of government instructions and reporting. They are much more rational and interest driven and operating with variable coalitions than generally perceived by the public at large. Indirectly, negotiating tasks and directions in democracies are democratically legitimate as they are founded and supported by prevailing views in Parliament and the executive branch. Yet, these linkages often are not sufficiently visible to outsiders in the tradition of confidential negotiations behind closed doors.

It will take a long time to build more transparent processes on the international level, equivalent to domestic democracy. A proper balance of confidentiality and transparency needs to be found. This is difficult. But it is not impossible within multilevel governance as domestic processes respond to the same needs. Neither are domestic procedures in democracy fully transparent nor confidential, but ideally operate in a way to maintain checks and balances domestically. Primarily, domestic procedures within States and the EU need to be developed and extended to international affairs and thus trade and investment related policies. The matter primarily pertains to each member of the international community to develop appropriate tools of inclusiveness as a matter of home work. Obviously, they will

[12]For a discussion see Cottier (2009a).

move with different speed and needs. Eventually a common ground for international standards of inclusiveness may emerge. We expect the European Union to develop a leading role, given its bifurcated structure and pressing needs to address the issue with a view to safeguard its authority and treaty-making powers.

3.2 European Union Law Treaty-Making

Within the European Union, structures of decision-making in foreign affairs have not fundamentally changed up to now—despite the shift of fora described in the field on non-tariff measures. Democratic control in treaty-making mainly rests upon ex post consent or refusal of negotiated results. The decision to take up negotiations is a matter for the Council, upon proposal by the Commission. Likewise, the Council adopts the negotiating mandate based upon which the Commission engages the negotiating process. The European Parliament is consulted, but not required to consent. During negotiations, Member States and the European Parliament may influence processes politically, but cannot formally influence directions. Adjustments to the negotiating mandates are taken by the Council alone. The European Parliament and National Parliaments of Member States are essentially limited to ex-post controls in the process of consent and ratification and implementation. Given this configuration, it is not astonishing that Member States and their representatives—during ongoing negotiations seek to informally using appropriate means of political communication, and to advance their own interests in doing so. Objections made by civil society, national or regional parliaments, at the time to the WTO Agreements, and more recently to preferential trade agreements with Ukraine, Canada and likely the United States thus are not accidental, but inherent to a system which largely excludes these actors in conceptualising future agreements and in defining their scope and boundaries.

In this vacuum of appropriate structures of inclusive participation prior and during the negotiating phase, it cannot be astonishing that Governments of Member States insist on their treaty-making powers and thus upon the anomaly of mixed agreements within the European Union. Mixity remains the main instrument to influence new and emerging subjects under negotiations. Unless a model of unitary powers can be found and developed in practice which offers enhanced inclusiveness, mixed agreements indeed are likely to stay in trade policy and other areas of foreign affairs of the Union and its Member States.

4 Front-Loading of Trade and Investment Policy-Making

At this point in time, it is not a matter of suggesting on my part to remove mixed agreements, but to complement treaty-making under the Lisbon Treaty with procedures and structures enabling Member States to effectively defend their interests

at all critical stages of the negotiating process, in particular at its inception when directions are set. It is a matter of framing the process in a manner that these concerns are effectively heard at the outside and settled prior to engaging talks on the international level, or during such talks. Moreover, it is important to shape these procedures in a way to create the necessary trust and confidence with partners that engaging in talks is worthwhile and obstacles to success remain reasonably limited at the exclusion of arbitrary and capricious captivation of negotiations for whatever political ends. It is submitted that the emphasis of participation should be upon the preparation and inception of negotiations in broadly defining the objectives, scope and strategy of talks. In other words, international trade policy making should be front-loaded, rather than primarily assessed ex-post in internal processes. There should be a broad and robust debate on scope, objectives, goals and conditions of EU commercial policy, upon which international negotiations would build upon. Legal foundations to this effect are currently lacking.

4.1 The Lack of Specific Objectives in Primary Law

Normative goals in primary EU law on commercial policy remain generic and very general. They do not offer more specific guidance as to the conduct of external economic relations and as to how broadly define goals and its interests should best be protected and promoted. Articles 206 and 207 TFEU do not offer much guidance in terms of detailed goals, objectives and conditions of EU commercial policy. Article 206 TFEU commits the Union to contribute to harmonious development of world trade, the progressive abolition of restrictions on international trade and foreign investment and the lowering of customs and other barriers. The provisions refers to Article 21 TEU, stating the general objectives of external action which shall be guided by the principles which had inspired the creation of the Union domestically, in particular democracy the rule of law, human rights and fundamental freedoms. It seeks to build international partnerships and intensive international cooperation with a view to preserve its core values, its interests and security, independence and integrity and, inter alia, to promote the integration of countries into the World economy by lowering trade barriers and to foster sustainable developments. Likewise, Article 208 TFEU on development co-operation refers to Article 21 TEU and generally focuses on poverty alleviation.

Article 207 TFEU is limited to a detailed regulation of powers in external economic relations, the role of EU bodies and EU Member States in trade and investment policy making; it does not state particular goals.[13] One would assume that more precise goals can be found and traced in different regulatory chapters of EU law. Yet, neither the provisions on the internal market and in particular on trade in agricultural, nor on fundamental freedoms (except freedom of capital in

[13]See Cottier and Trimberg (2015).

Articles 63–66 TFEU) offers more precise guidance as to third party relations. In fact, related powers were defined in early developments as implied powers[14] and subsequently assessed and codified in trade policy provisions.

It can be argued that there are good reasons to leave the constitutional level with generic goals and terms, given the difficulty to amend primary law due to the requirement of unanimity in treaty-making. Moreover, it constitutionally grants flexibility and adjustment to new needs and developments without changing the treaty in a cumbersome manner. Most States have been operating on this model emphasising executive powers in foreign affairs. Yet at the same time, the provisions are unable to arbitrate in setting goals and defining interests at stake more precisely. Such decisions could be expected to be found in secondary law and the regulations relating to the conduct of commercial policy. But the level of secondary law has been limited, so far, to implement the results of agreements concluded, in particular within the World Trade Organization. Except for the Trade Barriers Regulation, defining procedural rights of private actors with view to instigate WTO and PTA dispute settlement mechanism on the level of international law,[15] these instruments translate existing treaties and instruments into domestic law, allocating powers and jurisdictions.

4.2 The Role of Negotiating Directives

Defining more precise goals therefore has remained with the elaboration of mandates of negotiations and the negotiating process. Proposed by the Commission, directives are subject to discussion by the European Parliament's Trade Policy Committee and approval and adoption by the Council as prepared by the Trade Policy Committee (*Comité 113*) in accordance with Article 207(3) para. 1 TFEU. Directives of negotiations (negotiating mandates), for a long time, were classified and not made available to the public at large. Goals and objectives for a long time were not meant to be officially known to the negotiating partner and own constituencies, maximising leeway for the Commission. For example, the mandate relating to CETA was adopted on 24 April 2009, revised in 2011, but only released on 15 December 2015.[16] Recently, this has significantly changed and the Trade Policy

[14]CJEU, case 22/70, *Commission v. Council (AETR)*, ECLI:EU:C:1971:32.

[15]Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization Regulation (EC) No 3286/94 – procedures to ensure the exercise of the EU's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ 2014 L 189/50.

[16]Council of the European Union, Partial Declassification 9036/09, 14 December 2015.

Committee adopted an ad hoc approach. Under new policies of transparency, developed within TTIP negotiations, the mandate adopted on 17 June 2013 eventually was declassified and made available within 16 months on 9 October 2014.[17] It was a major shift towards greater transparency. It was part of the overall (but not complete) release of preparatory documents stating EU positions and proposals in greater detail. TTIP negotiations thus brought about an unprecedented, unilateral and welcome shift towards greater transparency of negotiating documents.[18] The policy so far has not been reciprocated by the United States and agreed texts thus remain confidential until negotiations are concluded.

Directives of negotiations of the European Council essentially follow the structure of WTO law. Taking the example of directives for negotiations on TTIP,[19] they sets out the contours of a free trade agreement compatible within Article XXIV GATT and Article V GATS and other WTO rules (para. 2), yet without engaging in detailed instructions for most of its parts. A number of issues are addressed more precisely. For example, the directives call for investor state dispute settlement (ISDS, para. 22), European standards on investment protection (para. 23), regulatory coherence and regulatory compatibility without prejudice to existing health standards, for the inclusion of geographical indications (para. 29), government procurement to extend to local authorities (para. 24), the inclusion of core labour standards, the inclusion on disciplines on competition policy (para. 36) and the inclusion of trade in energy (para. 37). The directives explicitly reserve "the most sensitive tariffs" (para. 10) and exclude negotiations on audio-visual services (para. 21).

Interestingly, the TTIP directives do not address specific trade issues looming large in transatlantic relations which one would expect to be addressed. Issues in agricultural policies are not addressed except for sensitive tariffs. Specific subsidies are not addressed. To name a few: the directives remain silent on dual use goods and restrictions for national security and coordination on economic counter measures outside of UN sanctions; investment in key areas of infrastructure for national interest, data protection and trade in genetically modified organisms (GMOs), parallel trade and competition in the field of IPRs, in particular trademarked goods, common rules on transfer of technology, of increasing importance in the age of climate change mitigation and adaption, carbon subsidies, control of electronic data, internet and safe havens for providers, restrictions on exports of oil and gas, and highly controversial liberalization of services in education and health, or the issue of strategic investment in infrastructure and its control.

[17]Council of the European Union, Declassification 11103/B DCL 1, 9 October 2014.

[18]European Commission, DG Trade, TTIP, http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/ (last accessed 1 March 2017).

[19]Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, Council of the European Union, Doc. 11103/13 DCL 1, 17 June 2013.

The TTIP directives thus merely provide a broad framework without defining instructions to negotiators in a precise manner. They contain 18 pages of text only. The laconic approach bears the advantage of flexibility and adjustment to US claims. But it also bears the disadvantage of missing *ex ante* clarification of important issues in preparing the negotiations. Increasing attention and resistance to TTIP negotiations during the process indicate that major issues have not been addressed prior the launch of the talks, but eventually emerged during negotiation and the process of impact assessment the result of which partly complements negotiating directives. There certainly is the need to adjust a negotiating mandate during negotiations, reflecting the needs of the negotiating partner or due to domestic pressures, as it was the case on investment protection. Even large markets and powers cannot fully control outcomes of negotiations. Yet, they can define topics and redlines *ex ante* to a considerable amount in domestic processes including impact assessment prior to engaging the talks as such.

4.3 The Challenge Ahead

The lack of sufficiently precise operational goals in primary and secondary legislation and a tradition of fairly general directives for negotiations results in postponing domestic debate to the stage of negotiations, and thus complicating and delaying the process. To some extent this is unavoidable as new issues and perceptions and needs emerge in due course. However, more internal decision-making and detailed agenda setting could be front-loaded prior to engaging the talks. For example, in hind side, it would have been highly beneficial to have a more extensive internal debate and decision-making on the future of investment protection and its modalities of dispute settlement in relations among industrialised countries prior to taking up negotiations on the subject matter on the basis of a laconic negotiating mandate including investor-state arbitration. Basic operational goals of general importance should be defined ex ante, and directives of negotiations should also include difficult issues where internal consensus takes more time to build.

With a view to front-load the agenda of negotiations and major operational goals in general and with a view to prepare specific talks, it is interesting to draw attention to the US Trade Act as a potential model for European trade policy-making. The size of the European market implies substantial negotiating power allowing for such comparison with a model which emerged for domestic reasons when the United States still largely dominated international trade policy and was able to impose its domestic and legally defined objectives. While domestic concerns vary according to differences in constitutional law, the US and the EU share common goals in combining inclusive and effective treaty-making powers. It is an exercise of combining and interfacing democracy, predictability, reliance and trust. It may be added, though, that the model may also be of interest to other Members of the WTO facing comparable challenges in trade-policy making.