Sieps

Swedish Institute for European Policy Studies

2017:2

A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon

Marise Cremona

THE EU'S EXTERNAL RELATIONS

Marise Cremona

A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon

– SIEPS 2017:2 –

Report No. 2
May 2017

Published by the Swedish Institute for European Policy Studies

This publication is available at www.sieps.se
The opinions expressed in the publication are those of the author.

Cover design by LuxLucid
Printed by EO Grafiska AB

Stockholm, May 2017

ISSN 1651-8942
ISBN 978-91-86107-72-7

Preface

The Common Commercial Policy (CCP) is perhaps the most expressive incarnation of the EU external action. Conceived as a 'common policy' which the European Union can conduct on its own, its scope has significantly developed over the years so as to reflect, at least partly, the evolution of international trade. Encouraged by the European Court of Justice, the substantive expansion of the CCP was also confirmed by the Member States in recent Treaty revisions.

In particular, the Lisbon Treaty broadened the EU trade policy to cover foreign direct investment, trade in services and the commercial aspects of intellectual property. It also entrenched the CCP into the broader framework of the EU foreign policy objectives, while modifying its decision-making structures, notably by strengthening the role of the European Parliament.

With the benefit of hindsight, the report of Professor Marise Cremona offers a welcome legal analysis of the above modifications and of their impact, considering the recent case law of the European Court of Justice. It is the eighth report that SIEPS publishes in the context of its research project The *EU external action and the Treaty of Lisbon*.

Eva Sjögren
Director

About the author

Marise Cremona is Professor in the Law Department at European University Institute, Florence. Between 2009 and June 2012 she was Head of the Law Department and between June 2012 and August 2013 she was President ad interim of the EUI. She is a co-Director of the Academy of European Law and general editor (with Profs Claire Kilpatrick and Nehal Bhuta) of The Collected Courses of the Academy of European Law, Oxford University Press. Formerly Professor of European Commercial Law, Centre for Commercial Law Studies at Queen Mary University of London. Member of the International Advisory Board of the Centre for European Research, University of Göteborg, Sweden; 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, Studies in EU External Relations, Martinus Nijhoff Publishers.

Table of contents

Executive summary

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; its description as a 'common' policy is witness to a substantial degree of integration. The Commission represents the Community in international trade negotiations, trade agreements are concluded by the Community 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 the Community interest.

In reality the picture before the coming into force of the Lisbon Treaty was more mixed, as the scope of the CCP no longer matched modern trade agreements, and attempts to engage in incremental reform had resulted in a treaty provision that was baroque in its complexity. In addition, the formal exclusion of the European Parliament from involvement in trade legislation and the conclusion of trade agreements was anachronistic 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 represents 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. Six 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 those six 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 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, the first external competence to be declared exclusive (its exclusivity now enshrined in Article 3(1) TFEU) and therefore a foundational plank of the EU's external identity. The controversy surrounding recent trade negotiations both exemplifies its continuing importance 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.

The changes to the Common Commercial Policy brought about by the Lisbon Treaty have essentially been three-fold. First, the wider scope of the CCP, its extension to include trade in services, the commercial aspects of IPR and foreign direct investment (FDI). 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 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 effect has been to separate to a greater extent than hitherto the legal basis for external action from the basis for internal legislation and this is reflected in the fact that the external CCP competence is exclusive, whereas legislative competence as regards the internal market is shared, albeit subject to pre-emption.

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 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 2017 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.

1 Introduction[1]

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; its description as a 'common' policy is witness to a substantial degree of integration.[2] The Commission represents the Community in international trade negotiations, trade agreements are concluded by the Community 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 the Community interest.

In reality the picture before the coming into force of the Lisbon Treaty was 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.[4] The formal exclusion of the European Parliament from involvement in trade legislation and the conclusion of trade

---

[1] A shorter version of this paper will appear as 'The Internal Market and External Economic Relations' in Panos Koutrakos and Jukka Snell (eds) *Research Handbook of EU Internal Market Law,* Edward Elgar, forthcoming. The author thanks the anonymous reviewers for their illuminating and helpful comments.

[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'. Koutrakos points to the significance of the fact that 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: P Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defence Policy', in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law*, Oxford University Press, 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.

[4] H G Krenzler and C Pitschas, 'Progress or Stagnation? The Common Commercial Policy after Nice' (2001) *European Foreign Affairs Rev* 291; C Herrmann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job' (2002) *Common Market Law Rev* 7; M Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2002) *Cambridge Yearbook of European Legal Studies* 61. Opinion 1/08 EU:C:2009:739.

agreements was anachronistic 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 represents 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. Six 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 those six 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 if the CCP operates as a bridge between the internal market and external economic policy-making, it is not simply a conduit for transmitting internal policy priorities; we cannot see the CCP as simply an extension of the internal market into the external sphere. There are some fundamental differences between the policy structures for the internal market and external commercial policy as established in the Treaties. 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, the first external competence to be declared exclusive (its exclusivity now enshrined in Article 3(1) TFEU) and therefore a foundational plank of the EU's external identity. The controversy surrounding recent trade negotiations both exemplifies its

continuing importance 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.

2 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.[5] 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. We will here look at two dimensions to the scope of the CCP. First, the match between the CCP and the range of activity that may be covered by an external economic policy, seen in particular in terms of the scope of the internal market: trade in goods, provision of services, rights of establishment and investment and capital movement in particular. Second, the types of instrument that may be adopted within the framework of the CCP: liberalisation, trade restrictions, product and market regulation, prudential standards for regulated service sectors, and intellectual property protection.

Before turning to these issues, we may ask a preliminary question: why does it matter whether external action within the scope of the internal market falls within the scope of the CCP? The answer is not that the CCP determines the limits of EU external competence; under the doctrine of implied powers, external action may also be based on internal market powers, as long as the conditions set out in Article 216(1) TFEU are met.[6] Nor is it any longer a matter of Union decision-making procedures: whereas it used to be the case that the European Parliament was largely excluded from trade policy decision-making, since the coming into force of the Lisbon Treaty trade regulations are adopted

[5] PJ Kuijper, J Wouters, F Hoffmeister, G De Baere, T Ramopoulos, *The Law of EU External Relations*, OUP 2013, 373.

[6] According to Article 216(1) TFEU 'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' For an example of the use of the internal market legal basis Article 95 EC (now 114 TFEU) as the basis for signing an international agreement see Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ 2010 L 23/35.

according to the ordinary legislative procedure and trade agreements require the consent of the European Parliament.[7] It is rather that since *Opinion 1/75* it has been accepted that CCP powers are exclusive,[8] meaning that – in the words of Article 2(1) TFEU – 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.' This exclusive nature of the CCP is now enshrined in Article 3(1) TFEU. Where external action is based on powers implied from internal market competence, on the other hand, this will be a shared competence, albeit subject to pre-emption.[9]

2.1 The scope of the CCP and the internal market

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. Other 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. 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[10] requires common rules regulating the initial release of goods into free circulation within the Community market.[11] 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.[12] The CCP was even held to cover products otherwise falling within the Euratom and European Coal and Steel Community (ECSC) Treaties. In *Opinion 1/94* the Court held that since the Euratom Treaty contains no explicit provisions relating to external trade there was nothing to prevent the WTO agreements on trade in goods, concluded under CCP powers, from applying to international trade in Euratom products.[13] On the same occasion, the Court also found that international agreements applicable generally to all products, including coal and steel products, could be concluded under CCP powers notwithstanding specific provisions on external trade in the ECSC.[14]

---

7 Articles 207(2) and 218(6)(a)(v) TFEU.

8 Opinion 1/75, EU:C:1975:145.

9 Articles 2(2) and 4(2)(a) TFEU. See e.g. C-114/12 *Commission v Council*, EU:C:2014:2151.

10 See now Article 28 TFEU.

11 C-41/76 *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République*, EU:C:1976:182. Despite the establishment of the common external tariff in 1961 it wasn't until the completion of the internal market in the 1990s that all national-based quotas on goods imported from outside the Community were abolished.

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

13 Opinion 1/94, EU:C:1994:384, para 24.

14 Opinion 1/94, note 13, paras 25-27. Agreements that specifically concerned coal or steel products were, until the end of that Treaty's life, concluded under the ECSC Treaty.

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 (the General Agreement on Trade in Services, GATS) and intellectual property rights (the Agreement on Trade Related Intellectual Property Rights, TRIPS).[15] 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.[16] 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.[17] 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 fifteen years, the question of the scope of the CCP was revisited several times, in three Treaty revisions.[18] A suggestion at the time of the negotiation of the Amsterdam Treaty to revise the provision on the CCP so as to include trade in services and trade-related intellectual property rights did not succeed, that Treaty simply providing for the possibility of taking such a decision in the future.[19] The Nice Treaty a few years later 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

---

[15] For an account, see M Maresceau, 'The Concept "Common Commercial Policy" and the difficult road to Maastricht' in M Maresceau (ed), *The EC's Commercial Policy after 1992: The Legal Dimension* (Kluwer, 1993); P Eeckhout, *The European Internal Market and International Trade – A Legal Analysis*, Oxford University Press, 1994.

[16] Opinion 1/94, note 13, 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.

[17] Opinion 1/94, note 13, para 44.

[18] M Krajewski, 'Of Modes and Sectors – External Relations, Internal Debates and the Special Case of (Trade in) Services' in M Cremona (ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008.

[19] For discussion of the debate and its result see M Cremona, 'External Economic Relations' in D O'Keeffe and P Twomey (eds.) *Legal Issues of the Amsterdam Treaty* Hart Publishing 1999.

transfer of exclusive competence to the Community.[20] Among other difficulties, the Nice Treaty provisions on services and IPR applied only to the conclusion of international agreements, not to the adoption of autonomous measures. From this perspective the substantial revision introduced by the Lisbon Treaty is welcome.[21] Although inevitably raising some questions of interpretation, the revised text is certainly clearer. 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, but apart from being expressly stated in the Treaties, it now applies to the CCP as a whole, without any special sectoral exceptions.[22] 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.

In considering how to define the scope of the CCP in relation to trade in services, to IPR and to FDI, we may look in either of two directions, or combine these.

---

[20] See further H G Krenzler and C Pitschas, 'Progress or Stagnation? The Common Commercial Policy after Nice' (2001) European Foreign Affairs Rev 291; C Herrmann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job' (2002) Common Market Law Rev 7; M Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2002) *Cambridge Yearbook of European Legal Studies* 61. On the interpretation of this provision see Opinion 1/08 EU:C:2009:739, and C-13/07 *Commission v Council*, opinion of AG Kokott, 26 March 2009 (case withdrawn).

[21] For general comment, see M Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy' (2005) *Common Market Law Review* 91; A Dimopoulos, 'The Common Commercial Policy After Lisbon: Establishing Parallelism Between Internal and External Economic Policy' (2008) 4 *Croatian Yearbook of European Law and Policy* 102; M Bungenberg, 'Going Global? The EU's Common Commercial Policy After Lisbon' (2010) 1 *European Yearbook of International Economic Law* 123; M Krajewski, 'The Reform of the Common Commercial Policy' in A Biondi, P Eeckhout & S Ripley (eds) *EU Law After Lisbon* OUP 2011.

[22] 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.

The first direction is internal: to seek to map these concepts against the different elements of the internal market. This has the merit of linking internal policy fields to external action, and of giving a concept such as 'services' an equivalent meaning internally and externally. The second direction is external: to address their meaning in terms of their international trade context, the WTO, GATS and TRIPS in the case of services and IPR, and international investment law. This makes it easier to tie external competence to the types of international trade agreement the EU is likely to negotiate. The Court has been prepared to look in both directions, depending on the context; in each case, however, it has preferred a broader interpretation and in each case its approach has been governed primarily by the presence (or absence) of effects on trade, rather than a conceptualisation of what the 'external dimension' of services or IPR might entail or the presence of internal market legislation. As expressed by Advocate General Sharpston in her opinion in relation to the EU-Singapore Free Trade Agreement:

> What matters for the purposes of Article 207 TFEU is that the European Union's (internal or external) action should specifically relate to international trade, meaning trade with non-member countries (not trade in the internal market), in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade. Thus, the mere fact that an act of the European Union is liable to have implications for international trade is not enough for it to fall within the common commercial policy.[23]

Within the internal market, IPR have been particularly relevant in terms of their effect on goods in free circulation, the Court developing the doctrine of exhaustion of rights in its interpretation of what is now Article 36 TFEU, and harmonising legislation adopted on the basis of what is now Article 114 TFEU.[24] Externally, the question has been the extent to which the WTO TRIPS agreement falls within the scope of the CCP, or 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.[25] The Member States submitting observations in the case took the view, following earlier case law,[26] that intellectual property should be seen as a shared competence within the framework of the internal

---

[23] Opinion 2/15 (pending), opinion of AG Sharpston, 21 December 2016, ECLI:EU:C:2016:992, para 103 (footnotes omitted).

[24] Article 118 TFEU, a new legal basis for the adoption of legislation creating uniform IPR in the EU was added by the Treaty of Lisbon.

[25] C-414/11 *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520.

[26] Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001.

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.

The Court's approach to interpreting the phrase 'the commercial aspects of intellectual property' in Article 207 TFEU is striking. Instead of starting from the nature of IPR, seeking to distinguish aspects which may be classified as 'commercial aspects' from others, the Court started with the nature of the EU's trade policy, the CCP. In other words, it first defined the scope of the CCP and then moved from that to see which aspects of TRIPS (not IPR in general) fall within that scope. And the CCP, the Court said, is first of all concerned with trade with non-member countries, and not trade within the internal market. In this way it deflected a potential criticism that an over-broad interpretation of 'the commercial aspects of intellectual property' would empty of real meaning the concept of IPR as part of internal market law. The two are simply separate. Then the Court turned to its tried-and-tested formula[27] 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.[28]

Applying this to IPR, only those rules 'with a specific link to international trade' would fall within the scope of the CCP.[29] 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. This finding does not prevent future internal EU legislation on the harmonisation of IPR, based not on the CCP but on internal competences, albeit this should be carried out in conformity with the EU's obligations under TRIPS.

Thus the Court did not define 'commercial aspects' of IPR by reference either to TRIPS or to a systematic categorization of rules on IPR. It defined the phrase

---

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

[28] C-414/11 *Daiichi Sankyo Co. Ltd*, note 25, para 51.

[29] C-414/11 *Daiichi Sankyo Co. Ltd*, note 25, para 52.

by reference to its own previous definition of the CCP: measures which are intended to promote, facilitate or govern trade. Rules defining the scope of IPR which may have other purposes in other contexts could here be seen as linked to international trade. However this does not mean means that every international agreement in the field of IPR will likewise fall under the CCP. In Opinion 3/13, for example, the Court was asked 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.[30] Its first conclusion was that exclusive competence could not be based on CCP powers: its main purpose 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.[31] Although some provisions of the Treaty are concerned with cross-border exchange of goods, this 'cannot be equated with international trade for commercial purposes.'[32] 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 is indeed exclusive.[33]

In considering the scope of the CCP as regards IPR it is therefore clear that it is the purpose and content of the external agreement that is important, not the categorization of different aspects of IPR. Tellingly, in Opinion 3/15 the Court refused to accept an argument of the Commission that all rules relating to IPR, except those concerned with moral rights, fall within the CCP on the ground that this 'would lead to an excessive extension of the field covered by the common commercial policy by bringing within that policy rules that have no specific link with international trade'.[34]

Daiichi Sankyo also illustrates the relationship between the CCP and internal rules; the Court adopts a functional approach to defining the scope of the CCP which allows it to cover a broad spectrum of rules operating at the international level without however displacing the operation of the (shared) internal market competence where rules are adopted within the EU.[35]

We find a similar approach to the relation between the CCP and internal competences as regards services in *Commission v Council* (conditional access services).[36] The Court was asked to determine the appropriate legal basis for the

---

[30] Opinion 3/15 of 14 February 2017, EU:C:2017:114.

[31] Ibid., para 82.

[32] Ibid., para 91.

[33] See also C-114/12 *Commission v Council*, EU:C:2014:2151.

[34] Opinion 3/15 of 14 February 2017, EU:C:2017:114, para 85.

[35] 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 Opinion 1/94: Opinion 1/94 [1994] ECR I-5267, paras 30-33.

[36] C-137/12 *Commission v Council*, EU:C:2013:675.

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.[37] 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.

Both AG Kokott and the Court took the view that the mere fact that internal legislation is based on Article 114 TFEU does not mean that an external agreement covering the same ground should be based on implied external powers deriving from Article 114.[38] The Convention was concerned, not with trade in services between Member States, but with trade in services between Member States and third countries. 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. The predominant purpose of external trade was confirmed for the Court by the presence of a disconnection clause: in their mutual relations (i.e. within the internal market) the EU Member States are to apply EU rules where they exist, rather than the rules established by the Convention. As the Court expressed it:

> Article 11(4) of the Convention confirms that, since the approximation of the legislation of Member States in the field concerned has already been largely achieved by Directive 98/84, the primary objective of the Convention is not to improve the functioning of the internal market, but to extend legal protection of the relevant services beyond the territory of the European Union and thereby to promote international trade in those services.[39]

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.[40] Thus the presence of existing internal market legislation, instead of indicating

---

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

[38] Indeed AG Kokott took the view that Article 114 alone could not in any case provide the legal basis for external action and would need to be accompanied by Article 216(1) TFEU.

[39] C-137/12 *Commission v Council*, note 36, para 67.

[40] 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. C-377/12 *Commission v Council* EU:C:2014:1903.

that an internal market legal basis should be used for an international agreement covering the same ground, has the opposite effect: it demonstrates that the purpose of the Convention was not internal harmonisation but external markets (and imports from third countries into the EU market).

It will be recalled that at the time of Opinion 1/94 the Court took the view that of the four modes of supply of services to which the GATS refers, only Mode 1 (cross-border supply) fell within the CCP.[41] Article 207 does not distinguish between modes of supply,[42] and in the conditional access services case no distinction is made between the different modes of supply of services, either in the Convention at issue in the case or in the judgment of the Court.[43] The concept of 'trade in services' in Article 207 (unlike 'services' in Article 56 TFEU) is not a residual category and covers activity, such as the provision of services through commercial presence abroad, which within the internal market would be treated as establishment.

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 had a chance to address the question.[44] We cannot engage in a full discussion here,[45] but it seems clear both that measures that relate to pre-establishment market access are covered, and that portfolio investment falls outside the scope of the CCP since it cannot be regarded as 'direct'.[46] 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 has been argued that the reference in Article 206 TFEU to the Union's contribution to the 'progressive abolition of restrictions on international trade and on foreign

---

41 See above at note 16.

42 M Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' (2010) *European Yearbook of International Economic Law* 123 at 132; Y Devuyst, 'The European Union's Competence in International Trade After the Treaty of Lisbon' (2011) 39 *Georgia Journal of International and Comparative Law*, 639 at 654.

43 See above at note 36.

44 A request for an opinion concerning the EU's competence to conclude the proposed Free Trade Agreement with Singapore, which may throw light on this question, has been submitted by the Commission under Article 218(11) TFEU: Opinion 2/15, pending; the opinion of AG Sharpston was published on 21 December 2016, EU:C:2016:992.

45 See, inter alia, J Karl, 'The competence for foreign direct investment—New powers for the EU' (2004) 5 *Journal of World Investment and Trade*, 413; J Ceyssens, 'Towards a Common Foreign Investment Policy?—Foreign Investment in the European Constitution' (2005) 32 *Legal Issues of Economic Integration*, 259; A Dimopoulos, 'The Common Commercial Policy After Lisbon: Establishing Parallelism Between Internal and External Economic Policy' (2008) 4 *Croatian Yearbook of European Law and Policy* 102; M Bungenberg, note 42 above; F Ortino and P Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in A Biondi, P Eeckhout & S Ripley (eds.) *EU Law After Lisbon* OUP 2011; JA Bischoff, 'Just a little BIT of "mixity"? The EU's role in the field of international investment protection law' (2011) 48 *Common Market Law Rev* 1527.

46 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. C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue,* EU:C:2006:774, paras 180-182.

direct investment' limits the CCP to measures involving the liberalisation of FDI (market access).[47] However 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',[48] a formulation broad enough to cover post-establishment regulation.[49]

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 and the CCP. The Treaty provisions on movement of capital apply to direct investment,[50] and unlike those on establishment and services they expressly refer to capital movements between the EU and third countries. These provisions certainly have implications for the Member States' bilateral investment treaties,[51] but what part do they play in the EU's own external policy on investment? To what extent does the inclusion of FDI within the CCP exclude the use of Articles 63 – 66 TFEU as the basis for external action? Or, alternatively, 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 agreements in this area would be implied.'[52] Thus for the Commission, matters typically included in international investment agreements will fall within exclusive competence, either as part of the CCP (FDI) or by virtue of implied powers. Other authors take the view that it is not possible to imply a complete competence over all aspects of portfolio investment from the Treaty provisions on capital and payments, and that given the absence of secondary legislation adopted under Article 64(2) TFEU an exclusive competence cannot be derived from Article 63.[53] This latter view was espoused by AG Sharpston in her opinion on the EU-Singapore Free Trade Agreement.[54]

---

47 See e.g. M Krajewski, 'The Reform of the Common Commercial Policy' in A Biondi, P Eeckhout & S Ripley (eds.) *EU Law After Lisbon* OUP 2011, 305.

48 C-137/12 *Commission v Council*, note 36, para 57.

49 This was the position adopted by AG Sharpston, Opinion 2/15, pending, opinion of AG Sharpston, 21 December 2016, EU:C:2016:992, paras 330-336.

50 See above note 46.

51 C-205/*06 Commission v Austria*, 3 March 2009; C-249/06 *Commission v Sweden*, 3 March 2009; C-118/07 *Commission v Finland*, 19 November 2009.

52 Commission Communication, 'Towards a comprehensive European international investment policy', COM (2010) 343, p.8.

53 See e.g. F Ortino and P Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in A Biondi, P Eeckhout & S Ripley (eds.) *EU Law After Lisbon* OUP 2011, 315-8.

54 Opinion 2/15, opinion of AG Sharpston, 21 December 2016, EU:C:2016:992, paras 350-359.

In either case, it seems clear that as regards investment and capital movements the CCP does not alone represent the external dimension to the internal market. The Treaty chapter on capital and payments, although lacking an explicit reference to the conclusion of international agreements, contains an explicit liberalisation commitment on the movement of capital between the EU and third countries, as well as the possibility of imposing restrictions. International agreements on investment concluded by the EU on the basis of Article 207 TFEU would need to comply with the primary law rules laid down by Articles 63-66 TFEU.[55]

There are other ways in which the CCP cannot act alone as the external 'face' to the internal market. In terms of the four freedoms, labour mobility falls within the scope of the Union's migration policy and is subject to the Member States' retained right under Article 79(5) TFEU to 'determine volumes of admission of third country nationals' coming from outside the Union and seeking entry to Member State labour markets.[56] The external dimensions of the internal market's 'flanking policies' including competition policy and social policy are based upon implied powers.[57] 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.[58] The Court argued that the Treaties deliberately 'anchor' external powers in the field of transport to the internal competence-conferring provisions: '[the Treaty] seeks to maintain, with regard to international trade in transport services, a fundamental parallelism between internal competence whereby Community rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining – as previously – anchored in the title of the Treaty specifically relating to the common transport policy.'[59] The Lisbon Treaty has not altered this position.[60]

---

[55] In terms of hierarchy of norms, the EU Treaties take precedence over international agreements (see e.g. Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para 308.); see also Article 207(3) TFEU.

[56] For an example of EU legislation in this field, see Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, OJ 2009 L 155/17.

[57] 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.

[58] *Opinion 1/08*, 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 M Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon,' (2010) 35 *European Law Rev* 678.

[59] *Opinion 1/08*, EU:C:2009:739, para 164.

[60] Opinion of AG Sharpston, note 54, paras 114-115.

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 and FDI are both highly significant. However, the CCP does not provide a complete 'external face' for the internal market, nor does it 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,[61] 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.[62]

2.2 Types of instrument[63]

The CCP may be implemented by means of autonomous measures adopted by the EU and through international agreements. As expressed by the Court in *Opinion 1/75*, the Union's CCP powers include the ability to adopt 'internal rules' and to conclude agreements with third countries: 'A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others.'[64] Article 207(1) makes some reference to the types of measure which may be taken by the Union as part of its CCP, including setting tariffs, trade liberalisation, export policy and trade protection measures. This is not an exhaustive list, however, and from the early days of the CCP the Court has recognised the need for the Community and now Union to adapt its policy instruments to changing needs. In *Opinion 1/78* it held that the CCP was not limited to measures designed to affect the 'volume and flow of trade' (such as tariffs and quotas) but could also cover an instrument designed to regulate an international commodity market:

> Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a

[61] 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)).

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

[63] Parts of this section are based on M Cremona, 'Expanding the Internal Market: an external regulatory policy for the EU?' in B Van Vooren, S Blockmans and J Wouters (eds.) *The EU's Role in Global Governance: The Legal Dimension*, Oxford University Press 2013.

[64] *Opinion 1/75*, EU:C:1975:145, [1975] ECR 1356 at 1363. The term 'autonomous' (also used by the Court in the same Opinion) is preferred here to 'internal' because of the ambiguity of the term 'internal' in this context; the measures in question are external in scope, i.e. concerned with external trade, although adopted through 'internal' legislative procedures.

> commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade.[65]

Within the internal market we find instruments of liberalisation, combined with regulation as a condition of market access. The provisions on the CCP as originally drafted did not contain any explicit provision for the adoption of regulatory measures affecting external trade, but as this passage from *Opinion 1/78* recognises, an external regulatory competence needs to accompany liberalisation if the Union is to carry on a 'worthwhile' commercial policy. The uniform principles which the Treaty mandates (Article 207(1) TFEU), together with powers derived from the internal market provisions themselves, have in fact provided a basis for the development of an external regulatory policy through autonomous measures and the conclusion of international agreements. Thus alongside the Tokyo Round Agreements of 1979, which were concluded by the EEC under CCP powers,[66] legislation was adopted on the basis of the old Article 113 EEC regarding the application of technical regulations and standards to third country goods.[67] Harmonised standards apply equally to goods of non-EU origin and where standards have not been harmonised at Union level Member States are to apply national standards on a national treatment basis.[68]

In *Opinion 1/94* the Court of Justice dismissed an argument that the WTO agreements on Sanitary and Phytosanitary measures (SPS) and Technical Barriers to Trade (TBT) fell outside the scope of the CCP.[69] Since the aim of the SPS agreement was to establish 'a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade', it could be concluded on the basis of CCP powers alone, although its implementation may require the adoption of internal measures in the framework of the agricultural policy.[70] As regards the TBT agreement, despite the Dutch government's argument that Member States retained competence in the field since harmonisation of technical standards was incomplete, the Court held that the TBT agreement was designed to ensure that technical regulations and standards and conformity assessment procedures 'do not create unnecessary obstacles to international trade' and therefore fell within the scope of the CCP.[71] So insofar as regulatory measures are directly concerned with external trade, in

---

65 Opinion 1/78, EU:C:1979:224, para 44.

66 Decision 80/271/EEC concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, OJ 1980 L 71/1.

67 Decision 80/45/EEC laying down provisions on the introduction and implementation of technical regulations and standards, OJ 1980 L 14/36.

68 Where the EU establishes only minimum harmonisation, direct imports from third countries will be subject to the relevant national regulations; the right of market access on the basis of the EU minimum standards is applicable only to third country goods already in free circulation.

69 Opinion 1/94 note 13.

70 Opinion 1/94 note 13, paras 29- 31.

71 Opinion 1/94, note 13, para 33.

the sense of promoting, facilitating or governing trade, they may be adopted on the basis of the CCP. With the amendments made to Article 207 TFEU by the Lisbon Treaty, this provision may now form the basis for external regulatory measures concerning services, commercial aspects of intellectual property and FDI as well as goods.

However some uncertainty remains about the precise boundary between Article 207 and other 'internal' legal bases for regulatory measures. The fact that goods or services of third country origin are covered by an EU regulatory measure does not necessarily *require* the use of Article 207 TFEU, or prevent a regulatory measure from being adopted on an internal market legal basis if the regulation of external trade has a clear link to the internal market or is simply ancillary to the main internal market objective. Where imports or exports of goods from or to third countries, or services offered by external providers, are only affected incidentally by an autonomous regulatory measure directed primarily at the internal market then an internal legal basis should be used. Thus although Directive 2001/37 on the production, marketing and labelling of tobacco products had been adopted on the basis of internal market and CCP powers,[72] the Court held that the CCP legal basis was unnecessary. The prohibition on manufacture of non-compliant products did affect products designed for export to third countries but its main objective was the protection of the internal market from illegal re-imports and it was held that Article 95 EC was an adequate legal basis.[73] Regulation 1007/2009 on trade in seal products is based only on Article 95 EC (now Article 114 TFEU) and is framed as essentially an internal market measure, applying to seal products imported from third countries '[i]n order to ensure that the harmonised rules provided for in this Regulation are fully effective'.[74] In the field of services, Directive 2013/36/EU on the authorisation and supervision of credit institutions is based on Article 53 TFEU and contains a Title dealing with relations with third countries including the establishment of third country banks in the EU and possible agreements with third countries on

[72] Directive 2001/37/EC Directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ 2001 L 194/26, was adopted on a joint legal basis of Article 95 and 113 EC. Its predecessors had been based on an internal market legal basis alone but since Directive 2001/37 also covered tobacco products to be exported from the EU the CCP legal basis was added: see recital 11, and Article 3 which sets maximum tar, carbon monoxide and nicotine yields for all cigarettes manufactured in the EU whatever their destination.

[73] Case C-491/01 *The Queen v Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, paras 81-91. The Court went on to find, however, that since the co-decision procedure required by Article 95 EC had in fact been used to adopt the directive, the addition of Article 133 EC as a legal basis did not invalidate the directive.

[74] Regulation 1007/2009/EC on trade in seal products OJ 2009 L 286/3, recital 13. For a discussion critiquing the legal basis to the Regulation see T Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges' (2013) 62 *International and Comparative Law Quarterly* 373 at 381-387.

both authorisation and consolidated supervision of credit institutions.[75] It would seem that where the predominant purpose of the measure is the regulation of (for example) the post-establishment treatment of third country service providers, Article 207 should be the appropriate legal basis, either alone or (perhaps more likely) together with an internal legal basis such as Article 53 or 114 TFEU. However such practice as there is since the Treaty of Lisbon rather suggests that internal legal bases are used alone also in these cases.[76]

What of regulatory provisions in international agreements? From the case law on trade in goods it would seem that international agreements fall within Article 207 where they concern the 'development, adoption and enforcement' of standards, so as to avoid 'unnecessary obstacles to international trade'.[77] Thus trade agreements that include provisions on regulatory cooperation and mutual recognition of standards are concluded on the basis of Article 207 TFEU (normally with the inclusion of additional legal bases to cover transport services).[78] In saying that the TBT and SPS agreements were 'confined to' these issues, *Opinion 1/94* could be read as suggesting that agreements which go beyond them to include substantive harmonisation of standards should not be based on CCP powers alone but would require an additional internal market legal basis. Indeed the decision concluding the WHO Convention on tobacco control, which as well as provisions on trade in tobacco products,[79] does establish some harmonised rules on the packaging and labelling of tobacco, was based on Article 95 as well as Article 133 EC (now Articles 114 and 207 TFEU).[80] However, we should note the provision in Article 207(6) that the exercise of the competence conferred by Article 207 'shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Treaties exclude such harmonisation.' *A contrario*, it would appear that insofar as the

---

[75] Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ 2013 L 176/338; for the provisions on relations with third countries see Title VI, Articles 47-48. Other recent legislation regulating the financial services sector and adopted on internal market legal bases also covers institutions established in third countries and offering services in the EU: for example, Regulation 513/2011/EU on credit rating agencies OJ 2011 L 145/30; Directive 2011/61/EU on alternative investment fund managers OJ 2011 L 174/1.

[76] See for example Council Decision 2011/467/EU of 19 July 2011 on the position to be taken by the European Union within the EU-Swiss Joint Committee established by Article 14 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, as regards the replacement of Annex III (Mutual recognition of professional qualifications) OJ 2011 L 195/7. The substantive legal bases for the Decision are Articles 46, 53 and 62 TFEU.

[77] Opinion 1/94, note 13 above.

[78] For example, see Council Decision 2015/2169/EU on the conclusion 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 2015 L 307/2.

[79] WHO Framework Convention on Tobacco Control, Article 15 on illicit trade in tobacco products.

[80] Council Decision 2004/513/EC of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control OJ 2004 L 213/8. All EU Member States are also parties.

Treaties do *not* exclude such harmonisation, Article 207 can be used as a basis for external measures involving harmonisation, and this would apply to services, IPR and FDI as well as goods.

This exclusionary clause in Article 207(6) limits the scope of the CCP as regards regulatory harmonisation in some sectors, for example in relation to health,[81] in such a way as to preserve a parallelism between internal and external powers. However Article 207(6) also provides that the exercise of powers conferred by Article 207 'shall not affect the delimitation of competences between the Union and the Member States'. What does this mean? Since the exclusivity of the CCP is now treaty-based (Article 3(1) TFEU) the reference cannot be to this aspect of the delimitation of competences. Piris has argued that this provision limits the scope of the CCP, i.e. that Article 207 cannot operate to extend EU external powers beyond the scope of internal powers granted elsewhere in Treaty. This would limit CCP powers in certain service sectors, such as health, where internal powers are only supporting or coordinating.[82] Gosalbo Bono on the other hand suggests that such an interpretation simply duplicates the prohibition on harmonisation in the same paragraph, rendering it redundant.[83] He also argues that this reading would conflict with Article 207(4)(b) since Article 207 does here appear to grant an external competence beyond that which is given internally, i.e. to conclude agreements which may affect the responsibility of Member States to deliver health services.[84] The sentence in Article 207(6) may thus more feasibly be intended not to limit the scope of external powers granted by Article 207 but rather to preclude the extension of internal powers as a result of such external action, and thus to prevent a 'reverse AETR effect': i.e. to prevent the operation of pre-emption internally as a result of external (exclusive) action.[85] As Gosalbo Bono points out, the provision thus does not affect the scope of EU competence under the CCP but rather the consequence of its exercise.[86] Article 207(6) thus confirms that although the CCP is based on uniform principles, and although exclusive competence over the CCP now extends into fields (such as IPR) not entirely covered by internal EU rules, Article 207 does not entail that only the EU may adopt internal rules over fields covered by the CCP, nor that those internal rules should necessarily be based on Article 207.[87] This reading of

---

[81] Article 168(5) TFEU.

[82] J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press 2010, pp.282-3.

[83] R Gosalbo Bono, 'The Organisation of the External Relations of the European Union in the Treaty of Lisbon' in P Koutrakos (ed), *The European Union's external relations a year after Lisbon*, CLEER Working Paper 2011/3.

[84] c.f. Article 168(7) TFEU.

[85] J Wouters, D Coppens and B De Meester, 'The European Union's External Relations after the Lisbon Treaty', in S Griller and J Ziller (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* Springer 2008.

[86] R Gosalbo Bono, note 83, p.17.

[87] A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Rev* 153, at 159.

Article 207(6) is given support by *Daiichi Sankyo* in which the Court held that 'it remains altogether open to the European Union, after the entry into force of the FEU Treaty, to legislate on the subject of intellectual property rights by virtue of competence relating to the field of the internal market'.[88] As a matter of principle, therefore, an agreement concluded under Article 207 TFEU, and thus within exclusive EU competence, may contain provisions which will be implemented internally by the Member States, or by the EU under shared powers.[89]

This point is significant if we recall that since the EU's internal regulatory powers (such as Article 114 TFEU) are shared powers, this leaves room for the Member States to regulate insofar as the EU has not done so. The exclusivity attached to Article 207 on the other hand is not based on pre-emption (the existence of internal legislation) but operates *a priori* from the Treaty itself and any Member State action within its scope requires Union authorisation.[90] In the case of trade in goods, the general regulations on import and export include a provision based on Article 36 TFEU which allows the Member States to impose national regulations on imported goods, or good for export, insofar as the Union has not yet dealt with the issue;[91] this is subject to the measure already mentioned which requires Member States to apply national standards in the non-harmonised sectors to third country origin goods on the basis of national treatment.[92] As regards FDI, the Member States have been authorised, under certain conditions, to maintain and conclude bilateral investment treaties (BITs) with third countries, until a BIT between the EU and that third country enters into force.[93] This apart, in the case of trade in services, trade-related aspects of IPR, or FDI there is no general authorisation allowing the Member States to act externally insofar as no Union measure exists; however Article 207(6) preserves this power as far as internal regulation is concerned.

We may conclude that the EU possesses competence to regulate goods and services either coming from or destined for a third country, as well as the

---

88 C-414/11 *Daiichi Sankyo Co. Ltd*, note 25, para 59. See now also AG Sharpston in Opinion 2/15, note 54, paras 107-109.

89 For an example, see the Convention on conditional access services, discussed at note 36 above, which was eventually concluded on the basis of Article 207 TFEU: Council Decision 2015/1293/EU on the conclusion, on behalf of the European Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access OJ 2015 L 199/ 3.

90 Article 3(1) TFEU.

91 Regulation 2015/478 EU on common rules for imports OJ 2015 L 83/16, Article 24(2)(a); Regulation 2015/479/EU on common rules for exports OJ 2015 L 83/34, Article 10.

92 See note 67 above.

93 Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ 2012 L 351/40. See also Regulation 912/2014/EU establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party OJ 2014 L 257/121.

competence to engage in external regulatory activity affecting goods, services, IPR and FDI: regulatory dialogue and cooperation, participation in the formation of international standards, and even harmonisation of standards. We have also seen that although competence under Article 207 TFEU is exclusive, it is by no means certain when Article 207 should be included as a legal basis for regulatory measures or even agreements, and when other legal bases (especially internal market legal bases) should be used. It has also been argued that the exclusive nature of the CCP does not mean that agreements concluded under CCP powers will necessarily be implemented exclusively by the EU, and that the extension of the CCP to cover external action relating to trade in services, trade-related IPR and FDI does not imply that internal regulatory competence in these fields has also become an exclusive EU competence.

3 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 its 'uniform principles' are not simply a necessary instrument for achieving an internal market (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 we may say that the Treaties now mandate the Union to develop an explicitly external regulatory policy, they also require the Union to 'ensure consistency between the different areas of its external action and between these and its other policies'.[94]

3.1 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 EC Treaty, 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:

> [The CCP] is conceived in that article in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member

[94] Article 21(3) TFEU.

> States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.[95]

Little was said in the Treaty of Rome about the content of the uniform principles on which the policy was to be based (for this purpose it is uniformity that is important), except that the Union was to 'aim to contribute' to the liberalisation of world trade. This second objective linked the nascent common market with its 'common interests' to the aims of the GATT.[96] It has clearly influenced Community (and now Union) trade policy: 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'.[97] Multilateral (through the WTO), plurilateral (e.g. the Agreement on Government Procurement, or the negotiation of an Agreement on Trade in Services, TiSA) and bilateral agreements on trade liberalisation 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'.[98] 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[99] to public health,[100] and even economic sanctions.[101]

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

---

[95] *Opinion 1/75*, note xx above, at 1363.

[96] C-21-24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* ECLI:EU:C:1972:115, paras 10-13.

[97] See e.g. Council Regulation 288/82/EEC on common rules for imports OJ 1982 L 035/1.

[98] C-150/94 *UK v Council*, EU:C:1998:547, para 67.

[99] 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, and case C-281/01 *Commission v Council*, EU:C:2002:761.

[100] See e.g. Council Decision 2004/513/EC concerning the conclusion of the WHO Framework Convention on Tobacco Control, note 80 above.

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

stronger,[102] but we cannot therefore conclude that the EU's external trade policy objectives now mirror those of internal free movement or that trade liberalisation is necessarily an overriding objective. The objective is that of the Union, but 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 (for example) 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.

3.2 Internal policy objectives

In a sense, as we have seen, 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.[103] This message is also at the forefront of the Commission's most recent trade strategy paper, published in October 2015, which argues that 'trade and investment are powerful engines for growth and job creation'.[104]

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'. What

[102] Dimopoulos argues that the strengthened obligation carries at least the obligation not to move backwards in terms of liberalisation: A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Rev* 153 at 161.

[103] 'Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy' COM (2010) 612; M Cremona, 'The Single Market as a Global Export Brand' (2010) *European Business Law Review* Special Issue 5.

[104] European Commission, 'Trade for all - Towards a more responsible trade and investment policy', 14 October 2015, 8.

exactly does this mean? It is clearly intended to avoid conflict, but a number of questions arise. Were a conflict in fact to occur, how should this provision be read in the light of the general priority given to international agreements over secondary law?[105] Could it mean that the Union should not negotiate commercial policy agreements which would require for their implementation an amendment of secondary legislation? This is implausible. More plausible is to interpret the provision as, on the contrary, requiring the Commission and Council to ensure compatibility by bringing internal legislation into line with agreements negotiated under the CCP, which would merely be an awkward restatement of Article 216(2) TFEU. There are difficulties here too, however: the wording does not suggest that conflicts should be resolved in this direction;[106] there is no reason why the CCP should be singled out for a restatement of the need to implement international agreements; and (most important) the 'Council and Commission' do not represent the Union's legislature.

Alternatively, the provision could be read as referring to 'internal Union policies and rules' as contained in primary rather than secondary Union law. Although nothing in the wording suggests this limitation and 'internal rules' is perhaps more apt to describe secondary legislation, this interpretation does at least reflect the Union's normal rules of hierarchy and does not contradict Article 218(11) TFEU. Perhaps most convincingly, despite its peremptory wording Article 207(3) 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'.[107] 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.'[108]

3.3 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 establish principles,

---

[105] Article 216(2) TFEU; C-344/04 *R v Department of Transport ex parte IATA*, ECLI:EU:C:2006:10, para 35; see also C-61/94 *Commission v Germany,* ECLI:EU:C:1996:313, para 52.

[106] Compare the wording of Article 218(11) TFEU which refers to the compatibility of international agreements with primary law.

[107] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 7.

[108] Ibid., 21.

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.[109] 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?

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.[110] 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.[111]

---

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

[110] In *Opinion 1/78*, for example, the Court accepted that trade instruments could be used to advance development objectives: *Opinion 1/78*, ECLI:EU:C:1979:224, paras 41-42. Trade powers may also be used to further environmental objectives (see e.g. 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. 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 P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals,* Hart Publishing, 2008; M Cremona, 'Coherence and EU external environmental policy' in E Morgera (ed) *The External Environmental Policy of the European Union*, Cambridge University Press, 2012.

[111] See for example the free trade agreements with Korea, with Columbia and Peru and with Singapore.

Third, Article 205 TFEU refers us not only to the 'principles and objectives' of 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'.[112] The Commission was invited to present proposals. The resulting regulation refers in its preamble to the 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.'[113]

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 CFSP 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, we have already seen that 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.

---

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

[113] Regulation 1029/2012/EU of the European Parliament and of the Council of 25 October 2012 introducing emergency autonomous trade preferences for Pakistan OJ 2012 L 316/43, recital 5. It may be noted that it took two 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.

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.'[114]

In June 2012 the Council adopted an EU Strategic Framework and Action Plan on Human Rights and Democracy,[115] 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'.[116] This commitment was reiterated in May 2014.[117] 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 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'.[118] 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.[119] The Ombudsman found that the refusal to carry out a human rights Impact Assessment was an instance

[114] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 22.

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

[116] EU Strategic Framework and Action Plan on Human Rights and Democracy, note 115, Action Plan point 1.

[117] Council conclusions on a rights-based approach to development cooperation, encompassing all human rights, 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. This requires an assessment of 'regulatory fitness' including the possibility of amendment to reduce 'Impact on human rights in the partner country in relation to its obligations arising from international treaties' (Ibid., p.32).

[118] Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, paras 21-22. The complainants were the International Federation for Human Rights (FIDH) and the Vietnam Committee on Human Rights (VCHR).

[119] Ibid., paras 24-25.

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.[120] 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.'[121]

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.[122]

What of judicial assessment? In *Front Polisario*,[123] 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 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

[120] 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.

[121] 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.

[122] See further I Vianello, 'Guaranteeing the Respect for Human Rights in EU External Relations: What role for Administrative Law?', paper presented to the Jean Monnet Conference 'Human rights in EU Foreign Affairs', University of Pisa, 1-2 October 2015.

[123] T-512/12 *Front populaire pour la liberation de la saguia-elhamra et du rio de oro (Front Polisario) v Council*, ECLI:EU:T:2015:953.

decision, carefully and impartially examined all the relevant facts.[124] 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, AG 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.'[125] 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.[126]

The case is potentially – if the judgment is upheld by the Court of Justice – of great significance, in that it recognises that the policy discretion of the institutions, even in a field such as the CCP where that discretion has always been treated with deference by the Court of Justice, is subject to a duty to base decisions on an assessment of all the relevant facts, and the relevant facts include the fundamental rights consequences of the Union's actions. Note, however, that the standard applied by the Court 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 imposed a substantive human rights compliance threshold.

The judgment of the General Court was reversed on appeal by the CJEU,[127] 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.[128] The CJEU did not, as a result, rule on the General Court's review of the Council's discretion

[124] T-512/12, note 123, para 225 : '…in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached.

[125] Case C-104/16 P, Polisario Front, opinion of AG Wathelet, ECLI:EU:C:2016:677, para. 274.

[126] Case C-104/16 P, *Polisario Front*, note 125, 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).

[127] C-104-16P *Council v Front Polisario,* ECLI :EU:C:2016:973.

[128] 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.

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 mentioned above, 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.[129]

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. This invites us to turn in the next section to the decision-making procedures themselves.

[129] 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.

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. In what follows, we will look at three different aspects of policy and decision-making: the formulation of overall strategy; the adoption of internal legislation; and the conclusion of international agreements.

4.1 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,[130] and introducing the European External Action Service (EEAS) under the High Representative.[131] The EEAS had a difficult start; it is now operating more smoothly and relations with the Commission are better, witnessed by more joint communications, but improvement is still needed.[132] The perceived absence of pro-active and strategic thinking from the EEAS has begun to be addressed.[133] 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 creation and competitiveness within the EU; it contained only the briefest of

[130] 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'.

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

[132] M Lefebvre and C Hillion, *The European External Action Service: towards a common diplomacy?* SIEPS 2010:6epa; European Parliament, *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunitie*s, Directorate-General for External Policies, Policy Department, 2013; House of Lords European Union Committee, *The EU's External Action Service*, 11th Report of Session 2012-13; S Blockmans and C Hillion (eds), *EEAS 2.0:A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service,* SIEPS (2013:1)*;* S Duke, 'Reflections on the EEAS Review' (2014) 19 *European Foreign Affairs Rev* 23.

[133] The first stage in a strategic reflection launched by the HR/VP, a paper on 'The European Union in a Changing Global Environment', was published in June 2015, with a view to producing a global strategy by June 2016.

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'.[134]

Nevertheless 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: 'The EU Treaties demand that the EU promote its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action.'[135] 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.[136] The Global Strategy for EU foreign policy published by HR/VP Mogherini in June 2016 makes frequent references to trade policy.[137] 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.[138] 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, 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

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

[135] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 22.

[136] See note 112.

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

[138] 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)).

global competitive position in the wake of the economic crisis.[139] As the 2015 Trade Strategy puts it, 'The recent crisis brought a realisation that trade could be a stabilising force in tough times.'[140] 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.'[141]

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 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 of course 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.[142]

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 'trade and sustainable development' chapter in which measures may be included to promote trade in environmentally sustainable goods as well as commitments to maintain labour standards.

Fourth, and perhaps 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, the EU will now typically rule out the direct effect of free trade agreements: this important development is discussed further below.

4.2 Internal legislation

Article 207(2) TFEU specifies that autonomous measures which 'define the framework' for implementing the CCP are to take the form of regulations

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

[140] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 8.

[141] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 7.

[142] The so-called TiSA.

adopted according to the ordinary legislative procedure. They may relate to the whole field of the CCP as defined in Article 207(1) TFEU.[143] The use of regulations reflects modern practice, although prior to the Lisbon Treaty the possibility of adopting other types of legislative act under CCP powers was left open and was occasionally used.[144] As indicated by Article 207(2), regulations are used to 'define the framework' for implementing the CCP; more specific measures may be adopted through implementing and delegated acts.[145] This represents a significant change in the decision-making procedures. Under the pre-Lisbon provisions, the same procedure (a Council regulation) could be used both for the framework legislation, such as the main import or anti-dumping regulations and for specific measures, such as regulations adjusting trade preferences or imposing a specific anti-dumping duty. Following the Lisbon Treaty, the ordinary legislative procedure was designed for framework legislation; it would not be feasible to use it for the day-to-day management of trade policy. Thus decision-making in individual cases has passed from the Council to the Commission, acting under implementing or delegated powers.

Two major legislative measures have been adopted, after much negotiation, establishing the appropriate implementation (comitology) procedures and delegated powers under trade regulations. The first (so-called 'Omnibus I') establishes the new procedures for those trade regulations where comitology procedures were not previously applied.[146] It covers a number of trade regulations, including regulations on textile imports and the market access regulation applicable to developing countries with Economic Partnership Agreements (EPAs). The second (Omnibus II) establishes the new implementing and delegated procedures for trade regulations which had previously been subject to comitology procedures, including the trade defence instruments, the generalised system of preferences (GSP), and the regulations on common rules for imports and exports.[147] For example, Regulation 2015/755 on common rules for imports from certain third countries grants delegated powers to the Commission to amend the Annex listing the countries (non-members of the WTO) to whom the

[143] As noted above, while the Nice Treaty extended the scope of the CCP to cover trade in services and commercial aspects of IPR, this applied only to the conclusion of international agreements, not to the adoption of internal legislation.

[144] As an example of a Directive adopted under CCP powers, see Directive 98/29/EC on the harmonisation of the main provisions concerning export credit insurance OJ 1998 L 148/22.

[145] On delegated acts see Article 290 TFEU; on implementing acts see Article 291 TFEU and Regulation 182/2011/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ 2011 L 55/13.

[146] Regulation 38/2014/EU of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the granting of delegated and implementing powers for the adoption of certain measures OJ 2014 L 18/ 52.

[147] Regulation 37/2014/EU of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures OJ 2014 L 18/1.

Regulation applies; it also provides for the Commission to impose surveillance and safeguard measures in individual cases under implementing powers.[148]

Delegated powers allow the Commission to supplement or amend non-essential elements of the legislation.[149] They are granted, and may be revoked, by the European Parliament and the Council, and the Parliament or Council may object to measures adopted by the Commission under delegated powers. Implementing powers are exercised in the framework of the committee procedure established by the Comitology Regulation.[150] The committee is of Member State representatives, chaired by the Commission, and operated under two procedures, advisory and examination. As a general rule, the heavier examination procedure is used for trade measures, decisions in the committee being taken by qualified majority vote.

The application of the ordinary legislative procedure to the adoption of legislation under Article 207(2) TFEU includes legislation adopted in order to implement international agreements. We will consider the impact of the European Parliament's role in the conclusion of trade agreements in the next section; here we may note that through its involvement in such implementing legislation the Parliament can influence the EU's trade relations. In the negotiations for the EU-Korea Free Trade Agreement, for example, concern was expressed in the Parliament over the need for effective safeguard mechanisms to protect EU industry from Korean imports. The safeguard clause in the agreement itself is standard, but the Parliament insisted that the FTA should not (even provisionally) enter into force until the internal legislation on the safeguard mechanism had been adopted.[151] This outcome is striking since under Article 218 TFEU the decision on provisional application is taken by the Council without any formal Parliamentary involvement. The Parliament was also able through its INTA Committee to influence the content of that internal measure (which was adopted by the ordinary legislative procedure).

4.3 Trade agreements

In this section we will touch upon three institutional aspects of the conclusion of EU trade agreements post-Lisbon. The first two are treaty-based changes: the

[148] Regulation 2015/755/EU of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries OJ 2015 L 123/ 33.

[149] Article 290 TFEU.

[150] Article 291 TFEU and Regulation 182/2011/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ 2011 L 55/13.

[151] 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. Art 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.'

increased role of the European Parliament, and the changes to the voting rules for decision-making in the Council. The third concerns institutional practice: the EU's position as regards the enforcement of trade agreements through the courts.

(a) The European Parliament: consent, transparency and public debate

The position of the European Parliament in relation to trade agreements has been 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 as we have seen this 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.[152] 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 trade policy powers where five years ago, before the Lisbon Treaty, it did not even possess the formal right to be consulted. 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.[153] On the provision of information, the Commission undertakes to inform the Parliament in the same way as the Council or its special committee:

> 'In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the

[152] See e.g. its initial rejection of the so-called 'SWIFT' agreement with the USA on the transfer of financial data for the purposes of tracking terrorist financing: 'Risk in Three Dimensions: The EU-US SWIFT Agreement on the processing and transfer of Financial Messaging Data' in T Tridimas and H-W Micklitz (eds) *Risk and EU Law*, Edward Elgar, 2015.

[153] 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.

> agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.'[154]

The ACTA exemplifies some of the difficulties in putting these principles into practice.[155] It was a multilateral agreement negotiated over several years by the EU and its Member States and a relatively small group of 10 countries.[156] The Council adopted a decision on the signing of ACTA in December 2011,[157] and it was signed by the EU and 22 of its Member States in January 2012.[158] The consent of the Parliament required under Article 218(6)(a)(v) TFEU was withheld in July 2012.[159] In practice it appears that any possibility of the EU concluding the ACTA has disappeared, and with it, probably, any possibility of the ACTA coming into force.[160] The ACTA was highly controversial, both in the USA and in the EU. In the EU the controversy related to both substance and procedure; it centred on the European Parliament, with five committees involved,[161] and two opinions from the Parliament's Legal Service, unusually made public.[162] The European Data Protection Supervisor (EDPS) has issued

[154] Ibid., Annex 3, para 5.

[155] See further M Cremona, 'The EU's International Regulatory Policy, Democratic Accountability and the ACTA: a Cautionary Tale' in M Cremona and T Takács (eds) *Trade liberalisation and standardisation – new directions in the 'low politics' of EU foreign policy,* EUI/AEL Working Paper 2014/01.

[156] Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

[157] Council doc. 12192/1/11, REV 1.

[158] The ACTA was not signed by Germany, Cyprus, Estonia, the Netherlands and Slovakia. In total 31 states plus the EU signed the ACTA.

[159] European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, 12195/2011 – C7-0027/2012 – 2011/0167(NLE)) P7_TA-PROV(2012)0287.

[160] So far only Japan has ratified the ACTA; it would come into force once ratified by six countries.

[161] The international trade (INTA) committee as lead committee, together with the legal affairs, civil liberties, industry, and development committees; the EP also commissioned a report on the ACTA: 'The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment', EXPO/B/INTA/FWC/2009-01/Lot7/12, published June 2011.

[162] In July 2011 the EP's Legal Affairs Committee asked the EP Legal Service for an opinion on the compatibility of the ACTA with the Treaties, general principles of EU law and the existing *acquis*, including the ECHR and the Charter of Fundamental Rights; a further request was made on 4 October 2011. The two opinions of October and December 2011 were later made public by the Legal Affairs Committee: SJ-0501/11 of 5 October 2011 and SJ-0661/11 of 8 December 2011, available at <http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf>.

two own-initiative Opinions on the ACTA.[163] It has also involved civil society: the Parliament received a petition signed by 2.4 million people calling for the ACTA's rejection on the ground that it threatens the freedom of the internet.[164] A group of European academics issued an opinion on the draft agreement in February 2011, calling upon the EU institutions, and in particular the European Parliament, to consider a number of issues relating to fundamental rights and to trade in generic drugs; the Commission published a response.[165] The Commission defended the ACTA, publishing its replies to the many questions it received from MEPs,[166] and in February 2012 decided to refer the ACTA to the Court of Justice under Article 218(11) TFEU, for an opinion on its compatibility with the EU Treaties and the Charter of Fundamental Rights. However in December 2012 (5 months after the Parliament's vote) the Commission announced that it was withdrawing the request for an opinion, thereby signalling that there was no political will to seek Parliament's approval a second time.

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.[167] The Commission argued

---

[163] Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 22 February 2010, *OJ* 2010 C 147/1; Opinion of the European Data Protection Supervisor on the proposal for a Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, 24 April 2012 (Summary) *OJ* 2012 C 215/7.

[164] The petition's text read, 'To all Members of the EU Parliament: As concerned global citizens, we call on you to stand for a free and open Internet and reject the ratification of the Anti-Counterfeiting Trade Agreement (ACTA), which would destroy it. The Internet is a crucial tool for people around the world to exchange ideas and promote democracy. We urge you to show true global leadership and protect our rights.' Text available at: <http://www.europarl.europa.eu/news/en/headlines/content/20120220FCS38611/>.

[165] The academics' opinion is available here: <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf>. For the Commission's response, see tradoc. 147853, 27 April 2011.

[166] Tradoc. 149102, covering the period January 2010 – January 2012.

[167] EP resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058. See also EP 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.

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. [168] The Parliament's Resolution of November 2010 does recognise the efforts that have been made by the Commission and the greater transparency of the later stages of negotiation.[169]

These political exchanges were accompanied by legal moves. During the earlier SWIFT negotiation,[170] and then in the ACTA case, MEPs used the EU's regulation on public access to documents to challenge Council and Commission refusals to grant access to information during negotiations.[171] In July 2009 MEP Sophie In't Veld made a request under Regulation 1049/2001 requesting 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 request was refused; the Council argued both that disclosure would negatively impact the EU's negotiating position, thereby undermining 'the protection of the public interest as regards international relations' (Article 4(1)(a) of Regulation 1049/2001) and that the document contained legal advice on the sensitive issue of the legal basis and competence to conclude the agreement (Article 4(2) of Regulation 1049/2001).[172]

In't Veld brought an action before the Court challenging that refusal. The General Court granted access to the document except insofar as the opinion revealed the specific content of the envisaged agreement or the negotiating mandate of the Council, which could have revealed the EU's strategic objectives.[173] In its view disclosure of the arguments concerning the appropriate legal basis for the agreement would not in this case have posed a threat to the EU's international relations interests. International negotiations fall in principle within the domain of the executive and the Council is not acting in its legislative capacity; thus public participation in the procedure 'is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations'. Nevertheless, the Court held that 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

[168] 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.

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

[170] See note 149.

[171] Article 15(3) TFEU; Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents OJ 2001 L 145/43; for the Commission's proposal to amend this Regulation see COM (2011)137.

[172] The Council granted access only to the introductory paragraphs of the opinion which set out the context of the proposed agreement; see Council doc. 11897/09 EXT 1; the declassified document was made available on 16 February 2015 as Council doc. 11897/09 DCL 1.

[173] T-529/09 *In 't Veld v Council,* judgment 4 May 2012.

activity.[174] In this particular case, where the agreement would have an impact on the protection of personal data, a fundamental right, the Court concluded:

> 'there was an overriding public interest in the disclosure … since it would contribute to conferring greater legitimacy on the institutions and would increase EU citizens' confidence in those institutions by making it possible to have an open debate on the points where there was a divergence of opinion.'[175]

The Court of Justice dismissed the Council's appeal against this ruling of the General Court.[176] It agreed that the revelation of a legal basis dispute could not *per se* be regarded as a threat to the EU's international relations interests within Article 4(1)(a) of the transparency regulation. As far as the exception relating to legal advice under Article 4(2) is concerned, the Court also agreed with the General Court that the so-called 'Turco test' should be applied although the document in question does not concern a legislative procedure.[177]

These cases concerned the Legal Service opinion. What of documents containing the negotiating mandate and negotiating positions? Here we return to ACTA: in July 2010, MEP In 't Veld brought an annulment action against the Commission's refusal under Regulation 1049/2001 to grant her full access to the ACTA negotiating documents.[178] Her action was partially successful but the Court generally supported the Commission argument 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 even if a treaty negotiation could be assimilated to a legislative process, this does not preclude the application of the exception to transparency based on the public interest in the effective conduct of international relations, and in any event 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.'[179]

---

[174] T-529/09 *In 't Veld v Council,* judgment 4 May 2012, para 89.

[175] Ibid. para 93.

[176] C-350/12 P *Council v In't Veld*, judgment 3 July 2014.

[177] Joined cases C-39/05 P and C-52/05 P *Sweden & Turco v Council* [2008] ECR I-04723, paras 38-44. The Court in C-350/12P summarises the three-stage test thus: 'Accordingly, the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.' (para 96)

[178] Case T-301/10 *In 't Veld v Commission* judgment 19 March 2013.

[179] Case T-301/10, para. 181.

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? This is a question for national parliaments as well as the European Parliament. 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 support cannot be taken for granted.[180] 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.

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 has the negotiating mandate been released,[181] but the Commission has also made public many of its position papers and textual proposals.[182] 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.[183] 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'.[184] 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.

---

[180] J Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications' (2010) 15 *European Foreign Affairs Rev* 143, at 148.

[181] Council doc. 11103/13 DCL 1.

[182] These have been made available on the DG Trade web pages: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

[183] Case 119/2015/PHP, opened 18 Feb 2015, decision 4 Nov 2015. The Ombudsman has also undertaken an own-initiative inquiry into the transparency of the TTIP negotiations: case OI/10/2014/RA, opened 29 July 2014, decision 6 Jan 2015.

[184] 'Trade for all - Towards a more responsible trade and investment policy', note 104, 18 and 19.

(b) 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 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.[185] 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 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.[186] 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).[187] 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.'[188]

[185] On their interpretation, see Opinion 1/08, EU:C:2009:739.See also literature at note 4.
[186] Article 207(4) para 2 TFEU.
[187] See note 16.
[188] Article 207(4) para 3 TFEU.

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 1/2008, 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, including these sensitive sectors.[189] 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 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, as we have already seen above,[190] 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. 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

[189] Opinion 1/08 EU:C:2009:739.
[190] See text at note 85.

have been authorised, under certain conditions, to maintain and conclude BITs with third countries.[191]

(c) The courts: judicial review and direct effect

It is not my purpose here to discuss the role of courts or dispute settlement in relation to trade agreements in general, but rather to point to two developments in post-Lisbon practice which may have considerable impact on trade agreements.

The first relates to *ex post* judicial review of the Council decision to conclude (or sign) an agreement.[192] Such review is based on the fact that the Council concludes an agreement by way of a legal act (a decision) which is subject to judicial review under Article 263 TFEU as an act of secondary law over which the EU Treaties take precedence. A challenge to the validity of the Council decision concluding the agreement may lead to the annulment of the decision, on grounds of lack of competence (rare but not unknown[193]), incorrect legal basis, breach of an essential procedural requirement, or substantive incompatibility. The annulment of the concluding decision does not affect the validity of the agreement itself (in international law) but the agreement will no longer be binding on the institutions and Member States as a matter of EU law (c.f. Article 216(2) TFEU). Depending on the defect, the decision may then be re-adopted and the Court may decide to preserve the legal effects of the wrongly-based decision until this has been done.[194] Such actions have been brought by the Commission, the Parliament and Member States, so-called 'privileged applicants' under the Article 263 judicial review procedure. For the first time, in the recent *Front Polisario* judgment of the General Court, an application by a non-privileged applicant for the judicial review of a Council decision concluding a trade agreement was deemed applicable.[195] In the view of the General Court the Front Polisario was both directly and individually concerned in the decision, those being the conditions under which a challenge may be brought by a natural or legal person

---

[191] Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ 2012 L 351/40. See above note 93.

[192] A form of *ex ante* review is possible via Article 218(11) TFEU: the Court of Justice may be asked for an opinion on the compatibility of an 'envisaged' international agreement with the Treaties. Compatibility includes competence, legal basis and procedural questions as well as substantive compatibility. The opinion is binding; an adverse opinion means that the agreement cannot enter into force unless either it is amended or the Treaties are revised. The agreement must be 'envisaged', by which is meant that if it has already been concluded this procedure can no longer be used: Opinion 3/94. It must be 'envisaged by one or more EU institutions on which powers are conferred for the purposes of the procedure provided for in Article 218 TFEU' (Opinion 1/13); the opinion of the Court may therefore be sought by the Commission in cases where it has proposed the conclusion of an agreement, even though the Council (e.g. because it disputes the Union's exclusive competence) has not accepted the proposal. If the agreement is not yet in final form, the Court may not be able to answer all questions: Opinion 2/94.

[193] For an example see Joined Cases C-317/04 and C-318/04 *European Parliament v Council*.

[194] E.g. case C-137/12 *Commission v Council*

[195] T-512/12 *Front populaire pour la liberation de la saguia-elhamra et du rio de oro (Front Polisario) v Council*, EU:T:2015:953. See text at note 123 above.

against a legal act.[196] The case is an unusual one, and the position of the Front Polisario is very specific in relation to the territory of the Western Sahara which was at issue in the case. It does not signal, even if upheld, that it will be easy in other cases for non-privileged applicants (such as NGOs) to demonstrate direct and individual concern with respect to a Council decision concluding a trade agreement. Nevertheless it does show that it is, at least in principle, possible. However in its argumentation the General Court interpreted the requirement of direct concern in an unorthodox way which, were it upheld, might create significant barriers to the possibility of individual challenge in cases involving international agreements. Direct concern is generally interpreted by the Court as requiring that the act 'must directly affect the legal situation of [the] parties and leave no discretion to the authorities responsible for implementing that act, such implementation being purely automatic and resulting from European Union law alone, without the application of any other intermediate rules.'[197] The General Court adopts this phrasing of the test,[198] but it then (inexplicably) goes on to amplify it by setting out and applying the test for the *direct effect* of international agreements.[199] There are a number of problems with this approach. The test of direct effect referred to by the General Court is used in quite a different context: it is a pre-condition for reliance by an individual on the provision of an international agreement, either before a national court[200] or in order to challenge the legality of a Union measure which, it is argued, fails to comply with the Union's international obligations under the agreement in question.[201] Direct effect characterises the nature of the legal norm; this is quite different from the requirement of *locus standi* to challenge the legality of a legislative act. In addition, and even more pertinent here, the direct effect of an international agreement is subject to the will of the parties. If the parties have not expressly stated their intentions in the agreement itself, the Court of Justice will interpret its provisions in order to determine whether the agreement may have direct effect within the Union's legal order. But the parties are perfectly free to determine that an agreement shall not have direct effect.[202] While it is clear that natural or legal persons will not often have the standing to challenge the legality of a Council

[196] The Court also held that on the specific facts of the case, the Front Polisario meets the conditions of being a 'legal person' within the meaning of Article 263 TFEU, albeit it has not been constituted as a legal entity under the law of any state.

[197] Case C-133/12 P *Stichting Woonlinie and Others v European Commission*,EU:C:2014:105, para 55.

[198] Case T-512/12 *Front populaire pour la liberation de la saguia-elhamra et du rio de oro (Front Polisario) v Council*, EU:T:2015:953, para 105.

[199] Ibid., para 107. The Court cites the test as stated in case C240/09 *Lesoochranárske zoskupenie*, EU:C:2011:125, para 44: the provision of an international agreement may be directly effective 'when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.

[200] E.g. case C265/03 *Simutenkov*

[201] E.g. case C240/09 *Lesoochranárske zoskupenie*, EU:C:2011:125.

[202] Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, para 17; case C-149/96 *Portugal v Council*, para 34.

decision concluding an international agreement, it surely cannot be the case that their ability to do so is subject to the political determination of the authors of the agreement themselves?

This point becomes particularly relevant when we turn to the second development in post-Lisbon practice. 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'.[203] However it was not until 2010 that such a statement found its way into the operative provisions of the decision.[204] 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.[205] For example, the EU's agreement with Columbia and Peru provides in Article 336:

> '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.'[206]

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, being canvassed for the TTIP, would result in individual enforcement being possible only for those defined as 'investors' and only via arbitration. This is a long way from the

---

[203] Decision 94/800/EC, note 3 above.

[204] 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.

[205] See further A Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *Common Market Law Rev* 1125.

[206] 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 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: Council decision 2014/668/EU OJ 2014 L 278/1, Article 7.

possibility of individual enforcement in the courts pioneered in such cases as *Kupferberg*.[207]

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. [208] 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 the trade agreement's dispute settlement procedures and in the WTO.[209] 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.

[207] See note 199.

[208] SJ Evenett, 'Paper Tiger? EU Trade Enforcement As If Binding Pacts Mattered', New Direction – The Foundation for European Reform, 2016.

[209] PC Mavroidis and A Sapir, 'Dial PTAs for Peace: The Influence of Preferential Trade Agreements on Litigation between Trading Partners' (2015) 49 *Journal of World Trade* 351 at 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.'

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 IPR and foreign direct investment (FDI). 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 effect has been to separate to a greater extent than hitherto the legal basis for external action from the basis for internal legislation and this is reflected in the fact that the external CCP competence is exclusive, whereas legislative competence as regards the internal market is shared, albeit subject to pre-emption.

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 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 2017 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.

Svensk sammanfattning

Den gemensamma handelspolitiken har ofta beskrivits som det mest överstatliga – och framgångsrika – av EU:s utrikes politikområden och som något som visar på EU:s tyngd och inflytande i världen. Framgången har delvis tillskrivits såväl den beslutsprocess som har framhållits som en modell för den s.k. gemenskapsmetoden som det faktum att området sedan det tidiga 1970-talet har omfattats av exklusiv befogenhet. Att det handlar om en ”gemensam” politik visar också att det rör sig om ett betydande mått av integration. Europeiska kommissionen företräder gemenskapen i internationella handelsförhandlingar, och handelsavtal ingås endast av gemenskapen utan inblandning av utdragna ratificeringsprocesser i medlemsländerna. Beslutsfattande med votering enligt kvalificerad majoritet gör att det gemensamma intresset heller inte hotas av nationella veton.

Innan ikraftträdandet av Lissabonfördraget var bilden mindre entydig, då den gemensamma handelspolitiken inte motsvarande moderna handelsavtal och försök att stegvis genomföra reformer ledde till att fördragsbestämmelsen blev näst intill befängd i sin komplexitet. Att dessutom Europaparlamentet, enligt den gamla ordningen, inte var en självklar part när det gäller lagstiftning på handelsområdet och slutande av handelsavtal var inte i linje med utvecklingen att man på andra områden i EU allt mer övergick till medbeslutande. Den ordningen blev också allt svårare att försvara när handelspolitiken täckte åtminstone en del aspekter av tjänstehandel (inklusive känsliga sektorer som hälsa och kultur) och handelsavtal rutinmässigt kom att innefatta betydande regelverk och därmed åtaganden.

Lissabonfördraget var ett allvarligt försök att ta itu med de bristerna och det var också inom handelsområdet som unionens utrikespolitik genomgick de viktigaste förändringarna. Sex år efter Lissabonfördragets ikraftträdande kan vi nu bedöma huruvida de förändringarna verkligen har inneburit – eller möjliggjort – en revolution när det gäller EU:s handelspolitik. En del, men långt ifrån alla, osäkerheter när det gäller de nya fördragsbestämmelserna för handelspolitiken har förvisso fått en lösning under dessa sex år, men samtidigt har nya frågor tillkommit.

Med Lissabonfördraget fick EU för första gången mandat att forma en utrikespolitik med målsättningen att underbygga och sprida unionens värderingar och intressen, och det är inom ramen för den som handelspolitiken är inbäddad. Befogenheten är en av endast två uttryckliga befogenheter på utrikesområdet som har funnits med sedan dåvarande EEC och den första befogenhet inom utrikesområdet som har förklarats exklusiv. Exklusiviteten är nu fastlagd i artikel 3(1) TFEU) och utgör därmed en grundbult i EU:s politik för yttre förbindelser.

De kontroverser som har präglat den senaste tidens handelsförhandlingar är ett exempel på områdets fortsatta betydelse. Samtidigt illustrerar de det nära sambandet och de potentiella spänningar som finns mellan EU:s yttre ekonomiska politik, målsättningarna för den bredare utrikespolitiken och interna policyval. Kontroverserna är också bekräftelser på en annan förändring som har skett inom handelspolitiken de senaste åren. Från att tidigare ha förkroppsligat teknokratiskt beslutsfattande – präglat av handelsdiplomati bakom stängda dörrar – har utrikeshandeln nu återförts till den offentliga arenan. Integrationen av den gemensamma handelspolitiken i det ordinarie lagstiftningsförfarandet och kommittologin – med åtföljande inblandning av Europaparlamentet – har varit såväl katalysator för som symtom på denna förändring.

Lissabonfördraget förändrade den gemensamma handelspolitiken på i huvudsak tre sätt. För det första ökade dess omfattning när den kom att innefatta också tjänstehandel, de kommersiella aspekterna av intellektuella rättigheter och utländska direktinvesteringar. Det är viktiga förändringar. Dels på grund av kopplingen till WTO-avtal, dels på grund av den betydelse direktinvesteringar har för modern handelspolitik och därmed också för EU:s förmåga att utveckla en politik för handel och investeringar. EU-domstolen har uttalat sig om såväl handel med tjänster som intellektuella rättigheter – med fokus på effekterna av handel med tredje land – med resultat att man i större utsträckning än tidigare har skiljt den juridiska grunden för agerande på utrikesområdet från grunden för lagstiftningen på inremarknadsområdet. Det återspeglas i det faktum att EU:s handelspolitik omfattas av exklusiv befogenhet, medan lagstiftningskompetensen när det gäller inre marknaden är delad, om än med företrädesrätt.

Den andra stora förändringen är att EU:s handelspolitik har införlivats med unionens övergripande principer och målsättningar, särskilt när det gäller de som handlar om yttre agerande. I handelspolitiken har fördragets bestämmelser alltid medgett stort utrymme för beslutsfattarnas egna omdömen, men nu ska man också ta hänsyn till fördragets allmänna målsättningar för utrikespolitiken och därmed sådant som hållbar utveckling, ”fri och rättvis handel” och understödjande av mänskliga rättigheter. Vad det får för konsekvenser är ännu inte helt klart, men det finns tecken på att såväl EU-kommissionen som EU-domstolen tar det normativa ramverket på betydande allvar.

Den tredje förändringen handlar om de beslutsfattande strukturerna för handelspolitiken. EU-kommissionen har alltjämt en strategisk nyckelroll, men det ordinarie lagstiftningsförfarandet innebär att kommissionens samarbetsparter numera inkluderar såväl Europaparlamentet som ministerrådet. Europaparlamentet har makt att godkänna – eller vägra att godkänna – handelsavtal och har också visat sig berett att använda sig av den makten. I kölvattnet på ett antal kontroversiella handelsavtal och ett ökande intresse för handelspolitik, har en ny dynamik också lett till krav på ökad transparens när det gäller förhandlingar om handelsavtal och framsteg har även gjorts i den

riktningen. Samtidigt har EU:s agerande den senaste tiden snarast präglats av försök att exkludera domstolarna när det gäller att driva igenom dessa avtal, en betydande förändring jämfört med vad som tidigare har varit praxis för bilaterala avtal. Möjligen är det också ett tecken på att den nya generationen bilaterala handelsavtal ses som åtminstone lika, eller kanske till och med mer, betydelsefulla som Världshandelsorganisationen (WTO).

Det är för tidigt att avgöra om det har skett en verklig revolution inom handelspolitiken sedan Lissabonfördraget trädde i kraft. Men med fördraget kom mekanismer som stegvis kan leda till en ”tyst revolution” – en handelspolitik som på ett avgörande sätt skiljer sig från det paradigm som har gällt de senaste 40 åren. Huruvida detta verkligen kommer att ske, och hur en sådan handelspolitik skulle kunna se ut, beror på de val EU-kommissionen gör de närmaste åren. Men det beror också på hur Europaparlamentet väljer att förvalta möjligheten att utöva strategiskt inflytande över området, liksom i vilken utsträckning allmänheten engagerar sig i kommande politiska beslut.

Sieps publications in English

2017

2017:2
A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon
Author: Marise Cremona

2016

2016:13
Secrecy Inside and Outside: EU External Relations in Focus
Authors: Deirdre Curtin and Christina Eckes

2016:11
Linked National Public Authorities – a Study on IMI
Author: Gustaf Wall

2016:10
Success Factors in EU Agricultural Negotiations
Authors: Ole Elgström and Malena Rosén Sundström

2016:8
Turnout in the EP Elections 2014: A Comparative Study of the EU Member States
Authors: Hermann Schmitt and Sebastian Adrian Popa

2016:7
Efficient Solidarity Mechanisms in Asylum Policy
Authors: Jesús Fernández-Huertas Moraga and Hillel Rapoport

2016:6
SME Financing in a Capital Markets Union
Authors: Morgane Fouché, Katja Neugebauer and Andreas Uthemann

2016:5
See you in Luxembourg? EU Governments´ Observations under the Preliminary Reference Procedure
Authors: Per Cramér, Olof Larsson, Andreas Moberg and Daniel Naurin

2016:4
The EU and US criminal law as two-tier models: A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights
Author: Maria Kaiafa-Gbandi

2016:3
Humanitarian aid policy in the EU´s external relations: The post-Lisbon framework
Authors: Peter van Elsuwege, Jan Orbie and Fabienne Bossuyt

2016:1
Is there flexibility in the European Semester process? Exploring interactions between the EU and member states within post-crisis socio-economic governance
Author: Sonja Bekker

2016:15epa
Sweden and the Euro: The Neglected Role of EU Membership
Authors: Nauro F. Campos, Fabrizio Coricelli and Luigi Moretti

2016:14epa
The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value
Author: Eleni Karageorgiou

2016:13epa
The EU and Belarus: seizing the opportunity?
Author: Elena A. Korosteleva

2016:12epa
Regional Productivity Convergence in Advanced and Emerging European Economies
Authors: Kadri Männasoo, Heili Hein and Raul Ruubel

2016:11epa
The Eurasian Economic Union and the European Union: Geopolitics, Geo-Economics and Opportunities for Europe
Author: Sijbren de Jong

2016:10epa
Responses to the "refugee crisis": What is the role of self-image among EU countries?
Author: Rebecca Thorbrurn Stern

2016:8epa
Leaving the European Union, the Union way: A legal analysis of Article 50 TEU
Author: Christophe Hillion

2016:7epa
A brief on the politics and economics of the Transatlantic Trade and Investment Partnership
Author: Håkan Nordström

2016:5epa
The EU and Russia: managing the new security environment in the wider Europe
Author: Derek Averre

2016:4epa
The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden
Authors: Joel Dahlquist, Hannes Lenk and Love Rönnelid

2016:3epa
A Critical Insight into Europe´s Criminalisation of Human Smuggling
Author: Ilse van Liempt

2016:2epa
Irregular Immigration in the European Union
Authors: Pia M. Orrenius and Madeline Zavodny

2016:1epa
Overseeing the rule of law in the European Union: Legal mandate and means
Author: Christophe Hillion

2015

2015:6
The EU-China Strategic Partnership: Challenges and Prospects in a Changing World
Authors: Anna Michalski and Zhongqi Pan

2015:5
Energy Union and EU global strategy: The undefined link
Authors: Shahrazad El Far and Richard Youngs

2015:4
Union regulatory criminal law competence
Author: Jacob Öberg

2015:3
The accession of the EU to the European Convention on Human Rights
Author: Joakim Nergelius

2015:2
Investor-state arbitration under TTIP
Author: Hannes Lenk

2015:1
Homophobia and genderphobia in the European Union: Policy contexts and empirivcal evidence
Author: Judit Takács

2015:1op
Same, same but different: The Nordic EU members during the crisis
Authors: Pernilla Bäckman (ed.), Julie Hassing Nielsen, Juha Jokela, Jakob Lewander (ed.) and Göran von Sydow (ed.)

2015:27epa
The challenge om completing the EU internal market for natural gas
Author: Tim Boersma

2015:26epa
Big Brussels is Watching You? Enhancing Transparency in EU External Energy Deals
Author: Sijbren de Jong

2015:25epa
Completing the Union: Is the European Energy Union Really Real?
Author: Harold James

2015:23epa
The constitutional and historical relevance of the AFSJ and the CFSP/ESDP
Author: Massimo Fichera

2015:22epa
Intelligence and decision-making within the Common Foreign and Security Policy
Author: Björn Fägersten

2015:20epa
The Regulatory Cooperation Chapter of the TTIP Challenges and Opportunities
Author: Alberto Alemanno

2015:19epa
Low Inflation and Deflation in EU Countries Outside the Euro Area Should Policymakers be Concerned?
Authors: Plamen Iossifov and Jiří Podpiera

2015:18epa
Could it be Brexpulsion rather than Brexit?
Author: Iain Begg

2015:17epa
Social Housing in Europe
Authors: Kathleen Scanlon, Melissa Fernández Arrigoitia and Christine Whitehead

2015:15epa
The Balance of Power over the EU Budget: European Expenditure since the Lisbon Treaty
Author: Giacomo Benedetto

2015:14epa
The Usefulness of the Scoreboard of the Macroeconomic Imbalances Procedure in the European Union: Potentials for Reform
Author: Tobias Knedlik

2015:13epa
The impact of mega regional agreements on international investment rules and norms
Author: Steve Woolcock

2015:12epa
The Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Spanish Regions – A Preliminary Analysis
Authors: José Villaverde and Adolfo Maza

2015:11epa
Transatlantic Market Integration, Business and Regulation: Building on the WTO
Authors: Bernard Hoekman and Petros C. Mavroidis

2015:10epa
Juncker's investment plan: what results can we expect?
Author: Martin Myant

2015:9epa
Russia's economic troubles – a perfect storm of falling oil prices, sanctions and lack of reforms
Author: Torbjörn Becker

2015:8epa
Entering a World of Footloose Tax Bases: Can the EU Generate Its Own Income?
Author: Daniel Tarschys

2015:7epa
Britain and the EU: a negotiator´s handbook
Author: Roderick Parkes

2015:6epa
Europe´s pivotal peace projects: Ethnic separation and European integration
Author: Lynn M. Tesser

2015:5epa
Groundhog Day in Greece
Author: Thorsten Beck

2015:4epa
The Greek elections of 2015 and Greece´s future in the eurozone
Author: Dionyssis G. Dimitrakopoulos

2015:3epa
The diplomatic role of the European Parliament´s parliamentary groups
Author: Daniel Fiott

2015:2epa
Social Policy and Labour Law during Austerity in the European Union
Author: Niklas Bruun

2015:1epa
International Trade Union Solidarity and the Impact of the Crisis
Authors: Rebecca Gumbrell-McCormick and Richard Hyman

"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."

Marise Cremona

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

www.sieps.se • info@sieps.se • +46-8-586 447 00