European Yearbook of International Economic Law

Marc Bungenberg
Christoph Herrmann
Editors

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Common Commercial Policy after Lisbon

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Foreword

The Common Commercial Policy (CCP) of the European Union (EU) and formerly of the European (Economic) Community has been one of the most dynamic political fields ever since the beginning of the process of European integration. The EU, like its predecessors, the European Economic Community (EEC) and the European Community (EC), has achieved a leading role among the economic superpowers and is regarded in most aspects of economic law as a uniform economic area where the EU speaks also on behalf of its Member States. This volume aims to analyse the implications of the Treaty of Lisbon for the Common Commercial Policy of the EU.

The entry into force of the Treaty of Lisbon[1] on December 1, 2009 amended the existing treaties of the EU and significantly changed the EU competences in the fields of trade, investment and other external commercial relations. The EU now possesses exclusive powers for the conduct of trade relations with third countries covering practically all aspects of trade in goods, services, commercial aspects of intellectual property rights, as well as new competences for setting up an individual European International Investment Policy intended to form part of the Common Commercial Policy.[2] In regard to institutional modifications, the Lisbon Treaty has significantly strengthened the role of the European Parliament and has substantially reformed the role of the 'High Representative of the Union for Foreign Affairs and Security Policy' (HR).[3] He or she is now supported by the European External Action Service (EEAS). This volume examines these developments and their possible impact on the external economic constitution of the EU.

[1] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O. J. (C 306), *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML [hereinafter TEU].

[2] Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1)(e), 206, 207 O.J.2012, C 326147.

[3] *Cf.* Consolidated Version of the Treaty on European Union art. 18(1), 2010 O.J. (C 83) [hereinafter TEU].

In an introductory paper[4] *Professor Thomas Cottier* (World Trade Institute and University of Bern) gives an extended overview of recent developments, starting with a comparative approach, that takes into account the foundations of the EEC's CCP in the GATT as the first field of common European foreign policy, and offers an outlook towards the upcoming difficulties with 'Brazil, China and India operating on par with the US and the EU'. Subsequently, *Cottier* draws attention onto the regional and preferential trade agreements of the EU as well as towards the EU's domestic regulation of external trade. *Cottier* highlights the Lisbon changes in the field of investment as well as the 'fragmentation' in foreign policy provisions in EU law. In his final observations, he notes that the Lisbon reforms do not exclude the Member States entirely. He further stresses that the linkages between economic and non-economic aspects of foreign policy make coherence all the more necessary.

Previously only trade in goods, cross-border trade in services (Mode 1) and border measures against counterfeited or pirated goods were considered within the EC's exclusive competence,[5] whereas the latter now covers all aspects of trade in goods, services and commercial aspects of intellectual property rights. Dealing with this shift in competences and the explicit exclusivity of the CCP—the CCP is listed as an exclusive competence of the Union,[6] barring the Member States from legislating or adopting legally binding acts in the field (including international agreements) without EU approval[7]—*Professor Jörg Philipp Terhechte* (University of Lüneburg) examines German constitutional limits to the further development of the CCP[8] arguing that the Lisbon Judgment of the German Constitutional Court is far from convincing and contains a number of political statements; *Terhechte* questions the Judgment's alleged constitutional basis, namely whether Article 38 of the German *Grundgesetz* may on its own provide a 'sound basis' for it, while Article 23 evidently would play only a marginal role in this issue. But as long as the EU does not develop into a federal construct, it may continue to develop the external trade policy; nevertheless the EU would be best advised to pay heed to this 'warning shot'.

Professor Wolfgang Weiß (Speyer/Oxford Brookes University) discusses the Lisbon decision of the German Constitutional Court,[9] pointing out that areas exist where the EU is bound by internal harmonisation prohibitions, which are thus in the view of the Constitutional Court within the remit of the nation State's primary responsibility; nevertheless the Lisbon Judgment would leave the Court of Justice of the European Union (CJEU) room for manoeuvre as long as there is no

[4] See pages 3 et seq.

[5] Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228 (6) of the EC Treaty [1/94 WTO Case], 1994 E.C.R. I-5267.

[6] TFEU art. 3(1)(e).

[7] TFEU art. 2(1).

[8] Pages 19 et seq.

[9] Pages 29 et seq.

structurally significant shift in the allocation of competences between the EU and its Member States to the latter's detriment. *Weiß* furthermore sees no legal basis for establishing a legal obligation of an EU Member State to leave the WTO. This is also the position of *Professor Michael Hahn* and *Livia Danieli* (University of Lausanne) in their contribution 'You'll never walk alone',[10] who argue from an EU law perspective in favour of a parallel EU-Member States membership in the WTO. They observe that the EU would be violating its fiduciary duties vis-à-vis its Member States if it would undertake any steps that would endanger the present status of EU members in the WTO. Another question addressed by *Hahn*/*Danieli* is if there is still a role for the Member States in the conclusion of the Doha Round. As the CJEU will likely have to settle this matter, if the Doha Round ever produces a Final Act, *Hahn*/*Danieli* contend that all areas currently negotiated in the Doha Round are covered by the competences laid down in Article 207 TFEU, thus a participation of the Member States would be excluded, from the point of view of EU law, unless the Doha Round would extend the areas of WTO law to subject matters beyond the scope of what is covered in Article 207. Nevertheless, in the light of the principle of loyal cooperation enshrined in Article 4 para. 3 TEU it would seem that the Union would be well advised to allow Member States to use their Member State rights in the WTO; a possible way would be to authorise the Member States to do so. The EU Member States currently also point to the remaining shared competence in transport services[11] and criminal sanctions in the field of intellectual property protection to support their call for the continuation of the practice of mixed agreements in the context of the WTO.

The reform of the institutional set-up of EU external relations justifies to discuss especially the role of the High Representative, the External Action Service and the growing influence of the European Parliament on the Common Commercial Policy. The European Parliament has achieved full participation in all matters falling within the CCP; the consent of the Parliament (without the right to ask for amendments, *ergo* 'fast track') is also necessary for the conclusion of international agreements based on the trade competence of the Union; therefore *Professor Markus Krajewski* (University of Erlangen Nuremberg) assesses the 'changes in the Common Commercial Policy from the perspective of democratic legitimacy'.[12] Furthermore, the Treaty of Lisbon has introduced as new actors in the EU external relations the President of the European Council, representing the Union vis-à-vis third States at the level of Heads of State and Government, as far as the Common Foreign and Security Policy (CFSP) is concerned,[13] and the 'High Representative of the Union for Foreign and Security Policy'. Whereas the President has no dealings with the CCP, the HR, supported by the European External Action Service,

[10] Hahn/Danieli, You'll never walk alone: The European Union and its Member States in the WTO, pages 49 et seq.

[11] *Cf.* TFEU art. 207(5).

[12] Pages 67 et seq.

[13] TEU art 15(6)(2).

ensures the coherence of the EU's external actions and coordinates the CFSP and the other external dimensions of the Union's policy, including the CCP.[14] The discussion continues with *Professor Hans-Georg Dederer* (University of Passau) exploring the ways in which the Common Commercial Policy is 'under the influence of Commission, Council, High Representative and European External Action Service' as well as the horizontal allocation of competences between these players.[15] The HR does not preside over the meetings of the Foreign Affairs Council of the Union when the Council deals with CCP matters[16] and the EEAS will also have no say in the field of the CCP. This is why the CCP remains the domain of the Member States-dominated Council, the Commission's Directorate General for Trade and now also the European Parliament. These institutional reforms are commented by *MEP Professor Godelieve Quisthoudt-Rowohl*.

The following section of this volume concentrates on the new normative framework of the CCP after Lisbon. Besides economic policy goals such as market opening,[17] because of the indicative wording of Article 21 TEU the EU is required to embrace newly formulated, broader 'objectives' in its external policies, objectives ranging from democracy and human rights to good global governance and sustainable development.[18] This 'linkage of the Common Commercial Policy to the general objectives for the Union's external action' is discussed by *Professor Christoph Vedder* (University of Augsburg) who draws attention to this new emerging 'value based global governance'. Given the openness and the partially conflictive potential of at least some of the goals, the organs responsible for the conduct of the CCP must enjoy wide discretion in pursuing these objectives, and the Court of Justice is unlikely to strike down particular measures as breaching these objectives. Their normative power must nevertheless not be underestimated, and the European Parliament will most likely closely supervise the Commission and the Council in that regard. Especially, this expansion of parliamentary participation will undoubtedly have a strong impact on EU trade policymaking, given that the Parliament is usually much more responsive to environmental or social policy demands voiced by NGOs and other organisations.

The Common Commercial Policy is highly dependent on secondary legislation; this is examined by *Dr. Till Müller-Ibold* (Cleary Gottlieb Steen & Hamilton). For the regulations (i.e., EU 'laws')[19] defining the framework for the conduct of the CCP, the ordinary legislative procedure applies[20] irrespective of whether the

[14] TEU art. 18(4).

[15] Pages 87 et seq.

[16] *See* Council Decision of 1 December 2009 Adopting the Council's Rules of Procedure, art. 2(5) n.1, 2009 O. J. (L 325), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:325:0035:0061:EN:PDF.

[17] TFEU art. 205, 207(1).

[18] TEU art. 21(2).

[19] *Cf.* TFEU art. 288(2).

[20] TFEU. art. 207(2).

agreement does affect the 'framework' of the CCP.[21] *Müller-Ibold* concludes that the new Article 207 par. 2 TFEU places great emphasis on the Union's need to create strict substantive and procedural standards to regulate the conditions under which the EU can adopt commercial policy measures in advance and underscores its dependence on pre-existing secondary legislation; further harmonisation of the respective administrative and legislative procedures would be required, something that has also already been demonstrated by the new Comitology Regulation.[22] The Lisbon reforms also include a general extension of participatory rights of the European Parliament in the ordinary legislative procedure[23] and a complete change of the requirements for a 'qualified majority' in the Council, the main legislative body of the EU. *Colin Brown* (DG Trade, EU Commission) reflects on the elements of change flowing from the entry into force of the Lisbon Treaty and highlights the topic of the normative framework with regard to the CCP changes from a practitioner's perspective.[24] The new regime for implemented and delegated acts in the field of the CCP should be well under way; many of the major political decisions have been taken; the author points out that it is possible that the introduction of the comitology regime to trade defence measures may be one of the most significant changes to that regime since its inception.

The substantive expansion of EU competence in the field of foreign direct investment[25] and the concomitant integration of investment policy towards third countries into the CCP are completely new, even though the EC had already some legislative powers in the field of establishment and free movement of capital. This entire investment topic has received and continues to attract the greatest deal of academic and political attention in recent times.[26] In this volume some of the most seminal issues deserve particular attention. The contributions concentrate on the possibilities of a investor-state dispute settlement mechanism in future EU agreements and related problems. *Professor Steffen Hindelang*[27] (FU Berlin) highlights the autonomy of the European legal order and deduces from this constitutional limits to investor-state arbitration on the basis of future EU Investment Related Agreements, especially interpreting Opinion 1/09[28] as a warning signal sent from the CJEU, one that should not carelessly be disregarded. One of the main

[21] TFEU art. 218(6)(a)(v). *But see* Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMM. MKT. L. REV. 91, 122 *et seq*. (2005).

[22] Regulation (EU) 182/2011 … laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers, OJ L 55 28.2.2011, p. 13.

[23] TFEU art. 289(1), 294.

[24] Pages 163 et seq.

[25] *Cf.* TFEU art. 206, 207(1).

[26] *See* Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, EUR. Y. B. OF INT'L ECON. L. 1, 123 (2010); Marc Bungenberg, Joern Griebel, & Steffen Hindelang, eds., *International Investment Law and EU Law*, EUR. Y.B. OF INT'L ECON. L. (2010/2011) (spec. issue).

[27] Pages 187 et seq.

[28] CJEU, Opinion 1/09, European and Community Patent Court (2011) ECR.

difficulties is seen by *Hindelang* in the concept of the autonomy of EU law and the CJEU being the ultimate authority to interpret EU law. A similar approach is taken by *Dr. Nikolaos Lavranos* (Dutch Ministry of Economic Affairs, Agriculture & Innovation) also taking Opinion 1/09 as a starting point for his paper on 'designing an international investor-to-state-arbitration system'.[29] He concludes that the jurisprudence of the Court of Justice only leaves very little room to the Member States and the European institutions for establishing a properly functioning independent investor-to-state arbitration system within the European legal order, which would be, however, 'exactly what is needed for the future European investment policy'. Inter alia, it would seem that such a mechanism would have to be fully integrated in the preliminary ruling system; ultimately, a modification of the Treaties would be necessary in order to overcome the resistance of the CJEU. *Davide Rovetta* (Grayston & Company) discusses selected procedural and jurisdictional issues in relation to this topic.[30] The clash between investment arbitration law and practice and EU law principles would create serious, practical problems. A preliminary ruling system might be an option for 'intra-EU BITs', but this would not be possible or desirable for 'extra EU FDI investment arbitrations'. Rovetta—just as *Hindelang* and Lavranos—stresses that the CJEU has made clear that it is the ultimate policymaker of the Union and 'that it is the supreme and sole decision making power insofar as judicial matters are concerned'. Thus, it might have been better to leave FDI competence in the hands of the Member States instead of transferring it to the EU level; the fault for the current suboptimal situation would not lie with the Commission or the other EU institutions, but would with the drafters of the Lisbon Treaty, namely the Member States. Finally *Professor Andreas Ziegler* (University of Lausanne) comments on the ongoing developments in European International Investment Law from 'a third country perspective'[31] and examines the consequences of the competence transfer for third countries, in particular other OECD countries that compete with the EU and its members for FDI inflows and investment opportunities worldwide. He points out that 'if the EU does not manage to quickly convince investors that either the existing BITs of its members or the new EU FTAs do provide a good protection, investors might prefer to use vehicles in countries that do satisfy their needs in a less ambiguous way'.

As organisers of the Conference 'CCP after Lisbon' and editors of this volume we would like to thank *Dr. Brigitte Reschke* from *Springer* for her editorial support and for taking this volume as the second 'Special Issue' of the European Yearbook of International Economic Law. *Sören Räthling* from Passau University took care of the layout of the manuscript of this volume.

Siegen, Germany — Marc Bungenberg
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[29] Pages 199 et seq.
[30] Pages 221 et seq.
[31] Pages 235 et seq.

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Nikolaos Lavranos is currently working as a senior trade policy advisor responsible for all Dutch BITs at the Dutch Ministry of Economic Affairs, Agriculture & Innovation in The Hague. Previously, he was a Max Weber Fellow at the European University Institute (EUI) in Florence, Italy. Before that, he was a senior researcher and assistant professor at the University of Amsterdam, the Netherlands. He received both his Ph.D. in law and LL.M. degree (with distinction) from Maastricht University, the Netherlands and a law degree from J.W. Goethe University Frankfurt, Germany.

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Godelieve Quisthoudt-Rowohl is a member of the European People's Party group in the European Parliament. Her constituency is the Lower Saxony. After obtaining an MS in chemistry, she served as a fellow from 1972 to 1973 at the Max Planck Institute for biophysical chemistry at the University of Leuven (Belgium) and received her Ph.D. in physical chemistry. From 1974 to 1979, she researched for the Medical University of Hannover before working as research fellow (Akademische Rätin) at the University of Hildesheim from 1979 to 1989. Today she teaches pro bono at the University's Institute of Social Sciences and has been an honorary professor at the Department of Education and Social Sciences since 2009. Quisthoudt-Rowohl is a member of the German Christian Democratic Union (CDU) party and serves on its regional board in Lower Saxony as well as on the national party board. She was first elected to the European Parliament in 1989 and has since been continually reelected. She focuses on international trade and international affairs and is an expert on education. Currently she serves on the European Parliament's Committee on International Trade.

Davide Rovetta is admitted to practice as a lawyer in Europe and specializes in international economic law and arbitration matters. He has been working since 2002 at the European Commission as a lawyer in charge of, inter alia, the tariff and customs related aspects of WTO Dispute Settlement as well as with Court cases and litigation in customs and trade matters before the Court of Justice of the EU for Directorate General TAXUD. He has appeared in numerous cases at hearings before Panels, Arbitrator and the Appellate Body of the WTO. He has also acted as a Member of the EU Delegation in the ongoing negotiations on Trade Facilitation before the World Trade Organization. Effective from 1st of July 2012 he is back to private practice working as a Counsel for the Brussels based law firm Grayston & Company. He speaks Italian, English, French and Spanish.

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Contents

Part I
Introduction

Towards a Common External Economic Policy of the European Union

Thomas Cottier

Foundations: The Common Commercial Policy

Throughout modern history, regulation of foreign trade has been a prime driver of federalism next to the removal of internal trade barriers and the creation of larger markets.[1] The need to coordinate trade among the North American provinces and with foreign powers across the Atlantic was a prime topic in the debates after the Boston Tea Party, leading towards the 1776 United States Constitution and the investment of foreign trade powers in the US Congress. Foreign trade was a main driver towards the German Reich of 1871, setting out with the German Zollverein (German Customs Union) in 1834 removing trade barriers among the German Kingdoms of the time. It was an important motivation to create a federal government for the Swiss Confederation under the 1848 Constitution. The advent of the European Economic Community (EEC) in 1957 thus integrates into an extensive historical record of motivating federal and quasi-federal structures by the need to remove hindering trade barriers and creating larger economic entities competing in the world economy. In the case of the EEC, the choice was defined by the 1947 General Agreement on Tariffs and Trade (GATT). Article XXIV leaves two options for regional integration: Free Trade Zones or Customs Unions, the latter requiring a common commercial policy with common external tariffs towards third countries. The European trade policy battles in the 1950s for one or the other were settled with the political choice by France, Germany, the Benelux countries and Italy for a Customs Union. The struggle for a large European Free Trade Zone under the auspices of the then Organisation for European Economic Co-operation (OEEC) failed, and resulted among those countries less willing to cede sovereignty in the

[1] Cf. generally Anderson (ed.), *Internal Markets and Multilevel Governance: The Experience of the European Union, Australia, Canada, Switzerland and the United States,* 2012.

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field of trade regulation, in the creation of the European Free Trade Association (EFTA) in 1960. It has since receded to the remaining four smaller countries while the customs union of today's European Union (EU) has steadily grown up to its current 27 Member States.

Ever since, the commercial policy of the EU has rested on three pillars: the World Trade Organization (WTO), preferential trade agreements and domestic regulation addressing third country relations. It is essentially based upon Articles 206 and 207 Treaty on the Functioning of the European Union (TFEU), now formally embedded in, and related to, the common external and security policy of the European Union.

GATT and the WTO

The foundations of the common commercial policy of the EEC in the General Agreement on Tariffs and Trade (GATT) 1947 explain why it inherently and necessarily emerged as the first and prime field of a common European foreign policy.[2] Members at the time were willing to cede foreign policy powers only where required to do so by international law. The common customs tariff and shared rules on non-tariff barriers within the realm of GATT 1947 and thus limited to trade in goods laid the foundations for a long history of increasingly shared action and policy of the Member States of today's European Union within the GATT and now the WTO. From the very outset, the Commission, instructed by the Council and the driving *Comité 113*—composed of the ambassadors of Member States in Brussels—assumed responsibilities in negotiating with third parties throughout the Trade Rounds of the GATT. While Members would initially retain their right to speak on policy matters in the bodies of the GATT, it was eventually limited to budgetary matters in the GATT and WTO law. For them, trade policy became a matter of domestic and internal coordination in Brussels and Geneva in negotiations among themselves and with the Commission. From a third party point of view, the role of the Commission was a difficult one, working on two fronts, one external and one internal, both often hard to reconcile without recourse to arm twisting diplomacy and limited transparency. These challenges greatly contributed to the increasing expertise and skills of the Commission, in particular in DG I, in dealing with foreign trade in this triangular constellation. An increasing number of topics and subjects, in particular the emphasis on non-tariff barriers since the 1960s, a renewed focus on agriculture and the extension of the agenda to services and intellectual property in the 1980s, further reinforced the expertise of the Commission. In the Member States, resources allocated to foreign trade were reduced. Even Germany, strongly depending on foreign trade and among the world's largest exporters, has

[2] See generally Elsig, *The EU's Common Commercial Policy*, 2002; Eeckhout, *External Relations of the European Union*, 2004.

been operating with a small staff dedicated to foreign trade in the Ministry of Economics. Powers shifted to the European level in a complex system of checks and balances both horizontally and vertically within the Union.

Overall, the record of the prime and exclusive foreign policy prerogative subsequently of the EEC, the EC and the Union was highly successful. Bundling powers among the Member States allowed Europeans to be on a par with the United States, and to protect and advance European interests successfully. While the EC for many years pursued a defensive agenda within the GATT due to the restraints of the Common Agricultural Policy, often subject to challenges by the US, the EC eventually evolved as leading power, driving negotiations on a par with the United States in the Tokyo and Uruguay Rounds. It is due to the pooling of foreign relations powers in the EU that Europe evolved as one of the pillars in a world of international trade, resting upon the powers and leadership of the United States and the European Communities. The Uruguay Round results were essentially agreed by the US and the EC, and subsequently multilateralized, by extending results, and adjusting them to an enlarged circle of GATT Members. Since the beginning of this century, these powers have been declining in relation to emerging economies. The Doha Development Agenda, introduced in 2001, has been operating in a multi-polar world, in particular with Brazil, China and India operating on a par with the US and the EU. These new constellations lead to complex and flexible alliances and no longer allow for spearheading effective transatlantic leadership. In the WTO, the EU is one of the strongest supporters of multilateralism, but is no longer in a position to prevail despite extensive offers to market access made, in particular in the field of agriculture as early as 2005. The accession of China to the WTO in December 2001 amounts to a landmark in the history of trade relations. It partly explains the continued surge of preferential trade agreements and the failure to conclude the Doha Development Agenda, next to long-term implications of the financial and debt crisis which substantially frustrated the willingness to engage in further trade liberalization. The world is no longer the same. The very achievement of the WTO in the past decade has been to avoid a renaissance of protectionism comparable to the crisis in the 1930s following the Great Depression. The European Union, and its persistent support for the multilateral system, has its share in this achievement thanks to the common commercial policy and the need to speak with a single voice.

Regional and Preferential Trade Agreements

While the common commercial policy is largely based upon the premises of GATT and the WTO, an equally strong and concentric pillar emerged in preferential trade, deviating from the principle of most-favoured nation (MFN). Regional integration, essentially expanding market access and EU law to neighbouring countries marks

the leadership of Europe in regional trade agreements since the 1960s and the Free Trade Agreements with EFTA countries established in 1972.[3] This network substantially expanded after the fall of the Berlin wall with a new generation of Association Agreements towards Eastern European Countries, and the establishment of the European Economic Area (EEA). Both instruments served as an *antichambre* and prelude to massive expansion of the European Union in the 1990s. In the case of Norway, Iceland and the Principality of Liechtenstein, the EEA Agreement continues to offer a foundation of close integration without membership. In the case of Switzerland and due to her direct democracy, a close net of bilateral agreements emerged having effects not identical, but comparable to the EEA as a first layer of external concentric integration. Preferential trade also coins the relationship to former colonies of European Metropolitan powers, starting in 1976 with different generations of the Lomé Convention to the 2000 Cotonou Agreement and subsequent Economic Partnership Agreements (EPAs).[4] It should be recalled that these agreements engage almost two thirds of the total membership of the WTO; some 100 countries are linked by these preferential agreements and thus strongly contribute to the decline of MFN trade. There are substantial differences between these Agreements and WTO law in a domestic context.[5] While the Court has persistently refused to give direct effect to GATT and WTO agreements, subject to limited exceptions, the Court has endorsed a proactive philosophy of granting direct effect to preferential trade agreements. The difference is rooted in the fact that preferential trade agreements offer little or no divergence

[3] After having entered an association agreement with Turkey in 1963, the first generation of regional trade Agreements started in 1969 and 1970. They were concluded with Morocco, Tunisia, Spain and Israel. They were followed in 1972 by Free Trade Agreements with EFTA Members. The next generation of agreements again involved Israel in 1975 followed in 1976–1977 by agreements with the Maghreb (Algeria, Morocco and Tunisia) and Maghreb countries (Egypt, Lebanon, Jordan and Syria), see Bartels, The Trade and Development Policy of the European Union, in Cremona (ed.), *Developments in EU External Relations Law*, 2008, pp. 128–171; for EFTA agreements see Friedrich, Die Freihandelsabkommen der Europäischen Gemeinschaften mit den EFTA – Staaten, NJW 36 (1983) 22, p. 1237; Cottier/Oesch, *International Trade Regulation*, 2005, pp. 313–324.

[4] See Bartels, The Trade and Development Policy of the European Union, in Cremona (ed.), *Developments in EU External Relations Law*, 2008, p. 128 (146–169); Stocchetti, The development dimension or disillusion? The EU's development policy goals and the Economic Partnership Agreements, in Ngangjoh-Hodu/Matambalya (eds.), *Trade Relations Between the EU and Africa*, 2009, pp. 40–58. Panagariya, EU Preferential Trade Arrangements and Developing Countries, The World Economy 25 (2002) 10, p. 1415; Silva, Lessons Learned: The Caribbean Market Access Offer, Trade Negotiating Insights 7 (2008) 1; Scollay, Regional Trade Agreements and Developing Countries: The Case of the Pacific Islands, Proposed Free Trade Agreement, report prepared for the UN Conference on Trade and Development in Geneva, 2001; Bartels, Interim agreements under Article XXIV GATT, World Trade Review 8 (2009) 2, p. 339; an overview of Regional Integration Agreements is provided by Schiff/Winters, *Regional Integration and Development*, 2003, pp. 26–29; Alavi, EPAs, Cotonou and the WTO, in Ngangjoh-Hodu/Matambalya (eds.), *Trade Relations Between the EU and Africa*, 2009, pp. 185–198.

[5] See Cottier, International Trade Law: The Impact of Justiciability and Separations of Powers in EC Law, European Constitutional Law Review 5 (2009) 2, p. 307.

from EU law while WTO law, in particular in the field of agriculture, has a long standing history of challenging domestic EU law. While legal protection in the WTO rests on the international dispute settlement system, state responsibility and legal enforcement in international law, compliance with preferential agreements within the EU essentially relies upon the European Court of Justice. The status of international agreements thus has a significant impact on domestic allocations and balance of powers between the judiciary, lawmakers and the executive branches of the EU.

The success of European integration, both domestically, and in preferential agreements under the auspices of the common commercial policy, offered an important example to the world which has inspired comparable efforts in other parts of the world, in particular Latin America, Africa and Asia alike, offering an alternative model of regional integration shaped along the lines of the North American Free Trade Agreement (NAFTA). Importantly, these efforts are no longer limited to regional integration but cut across continents seeking preferential trade and market access.

Domestic Regulation of External Trade

The third pillar of the common commercial policy is rooted in domestic, EU law. Article 28(2) TFEU extends the privileges of free movement of goods to properly imported goods from third countries. It offers, together with other provisions on the customs union, an important foundation of the external commercial policy. Specific decisions and policies on import[6] and export[7] restrictions and regulation are based upon a multitude of regulations, in particular implementing WTO based trade remedies in the field of safeguards, anti-dumping,[8] subsidies[9] and countervailing duties. A brief look into the Official Journal of the EU recalls that a great—if not the larger—part of decisions and communications relates to commercial policy. Domestic law also entails important procedural instruments, in particular the Trade Barriers Regulation,[10] enabling sectors and companies to seek redress from distress in international economic relations. These instruments, leaving traditional diplomatic protection behind, substantially contribute to the rule of law in the field.

[6] Council Regulation (EC) No. 260/2009 of 26 February 2009.

[7] Council Regulation (EC) No. 1061/2009 of 19 October 2009.

[8] Council Regulation (EC) No. 1225/2009 of 30 November 2009.

[9] Council Regulation (EC) No. 597/2009 of 11 June 2009 and also in particular Regulation (EC) No. 868/2004 of the European Parliament and of the Council of 21 April 2004.

[10] Council Regulation (EC) No. 3286/94 of 22 December 1994; For further information on the TBR see in particular the website of the European Commission at http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/.

Beyond Cross-Border Trade

The extension of GATT and WTO law from trade in goods—the classical domain of the common commercial policy based upon Article XXIV GATT—to services and intellectual property triggered complex battles and adjustments within the Union. Apart from explicit powers vested in the EU on the basis of the commercial policy, the European Court of Justice developed a doctrine of implied powers. To the extent that a matter was settled for the purposes of the internal market, powers in external relations inherently moved to the Union and its treaty-making powers. An exception was made when successful resolution of an internal matter depends upon third country settlement. The philosophy, now essentially codified in Article 3(2) TFEU, seeks to avoid preemption of domestic powers of Members in shaping internal market laws and regulations by means of international agreements concluded by the Union. For example, the EU's authority to conclude agreements in the field of competition policy is based upon the exclusive competence to regulate competition affecting trade between the Member States. The AETR doctrine strongly influenced the response to the extended scope of WTO law.[11] Turning away from a dynamic approach and evolution of trade policy, the Court limited exclusive common commercial policy prerogatives in services and intellectual property to transboundary constellations comparable to trade in physical goods. To the extent that the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement transgressed such constellations—as they largely do—the matter was considered to be of mixed competence, thus requiring explicit consent by all Members. It is important to stress that international trade regulation in its third generation largely moved beyond tariffs and non-tariff border measures into matters pertaining to domestic economic policy, such as intellectual property, investment, domestic subsidies and government procurement.[12] These areas, to a large extent affect domestic regulation on a national and even local level. These levels and powers should not be preempted by means of overriding international agreements short of consent by each of the Member States. The findings in Opinion 1/94[13] largely informed treaty making in Amsterdam and Nice, resulting in complex constructions interfacing exclusive and shared powers.[14] The Lisbon Treaty, based upon work done for the Constitution for Europe, retained the principles of implied powers, but resulted in a welcome expansion of exclusive powers of the Union to services and intellectual property

[11] ECJ, Case 22/70, *Commission v. Council*, [1971] ECR, 263. The Court recognized under this doctrine implied external powers to the extent that the subject matter had been regulated in EC internal market law, or to the extent that effective internal market regulation depended upon prior international agreement. For an analysis see Eeckhout, *External Relations of the European Union*, 2004, pp. 58–100.

[12] For the theory of different generations of trade barriers see Cottier/Oesch, *International Trade Regulation*, 2005, pp. 56–62.

[13] ECJ, Opinion 1/94, *WTO Agreement*, [1994] ECR I-5267.

[14] See e.g. Eeckhout, *External Relations of the European Union*, 2004, pp. 26–35; Leal-Arcas, *Theory and Practice of EC External Trade Law and Policy*, 2008, pp. 163–175.

regulation, safeguarding areas subject to unanimity in internal market regulation. Since most areas—except in particular taxation—are subject to majority ruling, the EU today is exclusively competent to deal with all matters pertaining to the current state of development of WTO law.

In addition, the Treaty of Lisbon expanded powers to regulate foreign direct investment, a matter so far pertaining to the Member States. This addition to EU powers is more dramatic than the somewhat protracted alignment to new areas in WTO law. FDI has been exclusively dealt with by Member States with more than 1300 bilateral investment agreements (BITs) of diverging content in force concluded by Member States with third parties, in particular developing countries.[15] The transition of these powers to the EU is at the heart of current attention and debate. Starting with the question to what extent portfolio investment is included and to what extent this may fall under third country effects of free movement of capital in EU law of Article 63 TFEU which explicitly extends its disciplines to third country relations, amounting to an anomaly among the fundamental freedoms of the internal market.[16] Besides the scope of the new powers, another issue relates to the fate of already existing BITs.[17] Will they have to be approved by the Union, as the Federal Constitutional Court of Germany argues,[18] or

[15] See the UNCTAD World Investment Report 2011, 16, available at http://www.unctad.org/en/PublicationsLibrary/wir2011_en.pdf or the database of BITs provided by the ICSID at http://icsid.worldbank.org/ICSID/FrontServlet.

[16] See Müller-Ibold, Handelsaspekte geistigen Eigentums sowie Investitionen, in Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, pp. 117–133; Ortino/Eeckhout, Towards an EU Policy on Foreign Direct Investment, in Biondi/Eeckhout/Ripley, *EU Law After Lisbon*, 2012, pp. 312–327; Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU-Abkommen, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, pp. 157–184; Benyon, *Direct Investment, National Champions and EU Treaty Freedoms*, 2010, in particular pp. 72–92.

[17] Burgstaller, The Future of Bilateral Investment Treaties of EU Member States, in Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, European Yearbook of International Economic Law*, 2011, pp. 55–77; Terhechte, (National-) Verfassungsrechtliche Grenzen der Weiterentwicklung des europäischen Außenwirtschaftsrechts, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 25 (31–33); Griebel, Der Weg seit Lissabon – Die neue Kommissionsstrategie im Bereich der Direktinvestitionen, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 193 (202–207); Ziegler, Die neugewonnene Kompetenz der EU im Bereich der Direktinvestitionen – ein Kommentar aus Drittlandsperspektive, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 217 (221–222).

[18] BVerfG, NJW 62 (2009) 31, p. 2267 (2291) margin no. 380; see also Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 1 (17–18).

will Member States according to article 351 TFEU have to adjust or even terminate those contracts which may be inconsistent with the Union law?[19] Finally, there remains the problem of dispute settlement. It will be interesting to see whether it will be allocated to the Union or continue to operate as a matter for Member States, in particular relating to private investor-state litigation. The majority of disputes have been carried out at the ICSID (International Centre for Settlement of Investment Disputes). According to the statute of the ICSID, the EU, as an international organization, cannot be a party to a dispute which is carried out at the ICSID since only states can be members and thus be able to carry out a dispute through the dispute settlement mechanism provided by the ICSID.[20] The new powers are likely to lead to a new generation of agreements and a gradual phase out comparable to the alignment of bilateral trade agreements with EEC law in the early days of the common commercial policy.

The Treaty of Lisbon finally, strongly reinforced the role of the European Parliament in common commercial policy.[21] While initially there was no legal obligation to consult Parliament before concluding a Free Trade Agreement, and consultation and consent was limited to association agreements, the European Parliament today is required to consent to all trade agreements before ratification by the Council can take place. These powers also translate into increased efforts to prospectively influence the agenda of negotiations; albeit appropriate tools comparable to US trade legislation remain to be developed. Parliament is not yet in a position to shape, together with the Council, the parameters of future agreements by setting appropriate benchmarks, roadmaps and milestones for the negotiators of the Commission.

[19] Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW 21 (2010) 6, p. 207 (211–212); Johannsen, Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 90, p. 1 (22–27).

[20] Griebel, Der Weg seit Lissabon – Die neue Kommissionsstrategie im Bereich der Direktinvestitionen, in Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 193 (211–215); Johannsen, Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 90, p. 1 (32); Boie, European-Chinese Investment Regulation, PhD, University of Bern 2011 (on file with author); Leal-Arcas, *International Trade and Investment Law*, 2011 and Benyon, *Direct Investment, National Champions and EU Treaty Freedoms*, 2010.

[21] See in particular Krajewski, Die neue handelspolitische Bedeutung des Europäischen Parlaments, in Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, pp. 55–74; for an early account and assessment see Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, CEPS Working Document 346, 2011.

The Legacy of Fragmentation in Foreign Policy

Trade policy prerogatives by Members were grudgingly ceded in commercial policy due to the imposed constraints of GATT and the legal definition of customs unions therein. No such definitions existed in other fields of foreign policy. Partly, alignments were made on the basis of implied powers. The Treaty of Lisbon introduced shared principles in foreign policy enshrined in Articles 21 and 22 Treaty on European Union (TEU). Articles 23–46 of the Treaty set out principles and procedures of cooperation in common foreign and security policy. Article 205 TFEU refers to these principles for the conduct of foreign affairs and creates a common chapeau for the commercial policy in Articles 206 and 207, development cooperation and humanitarian aid in Articles 208–214, economic sanctions in Article 215 and on treaty making powers in Articles 216–219 (basically applicable to all treaties independently of their subject matter) and relations to other international organizations and third countries in Article 220 TFEU. This was an important step in creating better coherence among different policy fields in external relations. Important areas of third country relations of the Union were organized under the single roof of Part V on External Action of the TFEU. Commercial or trade policy no longer stands on its own, but is embedded and deemed to serve broader principles and goals of the Union's foreign policy. It will be interesting to observe to what extent the overall goals of European foreign policy and the context in which other areas of foreign economic policy listed in Part V TFEU will inform trade policy in coming years and the interpretation of Articles 205–207 of the Agreement.

Yet, overall, important pieces are missing and the system remains highly fragmented. It greatly varies from field to field in operational provisions. For example, powers of the EU on border controls of persons, immigration and asylum are based upon enumerated powers in accordance with Article 77–80 TFEU. Development assistance and humanitarian aid is run as a parallel competence and EU action does not preempt national prerogatives according to Article 4(4) and 208–214 TFEU. Staying in the field of economic relations, the treaty remains silent on third country relations in the field of economic policy in Articles 120–126 TFEU. External powers of the European Central Bank system in monetary affairs are limited to currency transactions in Article 127(2) TFEU. The Council, excluding non-members of the monetary Union, and upon proposal of the Commission and upon hearing the European Central Bank, may adopt instructions for negotiations in international monetary fora in accordance with Article 138 TFEU. Other than that, coordination for monetary policies within the International Monetary Fund (IMF) and G-20 essentially remains a matter for Member States within the realm of the Economic and Monetary Union (EMU). The European Central Bank, protected from political influence and obligated to work independently, does not have treaty-making powers and thus participates, next to Members, in international informal consultations with the IMF and BIS, essentially part of a club managing international monetary policy without much transparency. Article 219 TFEU reserves such rights to the Council, adopting exchange rate agreements in unanimity

and upon hearing the European Parliament. Explicit powers to run monetary policy in coordination with other central banks are not expressed in the Treaty. Finally, in Foreign Policy under the EUT, the Union does not have genuine powers except for implementing economic sanctions in trade policy once approved in accordance with Article 215 TFEU.

Foreign Policy, in general, addressed under the auspices of the Common Foreign and Security Policy, the former second pillar—remains subject to the philosophy of international cooperation among Members. Majority decision-making is limited to execution of unanimously agreed policies. It is far from an exclusive competence of the Union and in crisis much more driven by power and leading members than the Union and its bodies itself. The same holds true for military security and operations. There is no equivalent to foreign policy instruments, let alone commercial policy, and action largely depends upon the individual Member States conducting security and warfare within the North Atlantic Treaty Organization (NATO) on their own responsibilities.

History again tells us that the different branches of foreign policy cannot be separated.[22] While trade and investment protection may be very different technically and legally from labour, migration, monetary affairs and from military security and foreign policy, they are all closely interrelated and interdependent. To take a current example: the hopes of the Arab spring, essential to stabilize a neighbouring region of the Union essential for supply of energy, both fossil and renewable in the future, largely depend upon opening the European market for agricultural products. The livelihood of millions in rural areas depends upon it. It further depends upon promotion of education and training. It also depends upon an umbrella of military security without which these policies cannot be implemented in a sustainable manner. It depends upon stable monetary relations, able to combat inflation in the regions concerned. Long term strategic interests of Europe therefore depend on successfully coordinating these different elements of foreign policy. Long term commercial policy interests in return depend upon appropriate flanking policies which, at this stage, are not part of prerogatives of the European Union and remain mainly controlled by individual Member States.[23] Under the legacy of fragmentation and foreign policy, such coordination is extremely difficult, if not impossible, to achieve. Long term European interests in the world, however, mandatorily require enhanced attention in coordinating the different branches of foreign policy.

[22] The linkages of the Common Foreign and Security Policy and the Common Commercial Policy, as well as the role of different actors are addressed by Dederer, Die gemeinsame Handelspolitik im Einflussbereich von Kommission, Rat, Hohem Vertreter und Europäischem Auswärtigem Dienst, in Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, pp. 103–120, as to the different branches in a general overview see Frenz, *Handbuch Europarecht*, Band 6, Institutionen und Politiken, Teil IV, 2011 or Tietje (ed.), *Internationales Wirtschaftsrecht*, 2009.

[23] Krajewski, The Reform of the Common Commercial Policy, in Biondi/Eeckhout/Ripley (eds.), *EU Law after Lisbon*, 2012, p. 292 (310).

Constellations within the European Union do not look more promising and allocations of powers seem to depend much on personalities holding different offices.[24] The European Council is strongly involved in setting out broad lines of foreign policy of the Union. Yet, it remains unclear what role its President plays under Article 15(5) TEU in relation to the High Representative under Article 18 TEU who is both a Vice President of the Commission and the Head of the new found diplomatic service of the EU and is responsible for the foreign policy of the Union. The role of the President of the Commission under Article 17(6) TEU in foreign policy is difficult to define, in addition to the tasks assigned to the individual commissioners, in particular in trade and investment. Finally, the responsibilities of Parliament have remained unclear, and were limited to demonstrating obstructing powers in the process of approving international agreements negotiated by the Commission on the basis of a mandate issued by the Council.

Finally, in a globalized world, strict separation of domestic and foreign policies no longer works. Trade is a good example. Trade policy largely depends upon domestic parameters and need. All politics is local in the end; and this is true for all branches of foreign policy in the long run. Allocations of powers between the EU and Member States need to take this into account. There is a challenge to overcome fragmentation in foreign policy making, and at the same time to enable voice and participation of diverging domestic interests in formulating these policies in a coherent manner. The Treaty of Lisbon has made progress in bundling a number of foreign policy actions, but is hardly in a position to bring this about. It does not sufficiently link external and domestic action. It does not address all relevant areas of foreign affairs and remains short of entailing essential fields in foreign economic affairs, in particular labour migration, immigration, communications, energy, environment and monetary policy in Part V of the TFEU. A more comprehensive approach unifying procedures and powers is called for. The model of a successfully conducted and evolutionary trade policy throughout the history of European integration offers a model to the Union and its Members in aligning other interdependent fields of policy making, both domestic and international.

The Way Forward

L' Europe ne se fait pas dans un jour. The history of allocating powers in foreign trade and investment offers a prime example of an inherently evolutionary process. Integrating foreign policy with all its components from all walks of public life, in light of close interaction between domestic and foreign affairs, does not offer a simple blueprint. The process will be torn and driven by interests on all levels. Yet, these difficulties should not prevent the identification of long-term goals and needs.

[24] See also Dederer, Die gemeinsame Handelspolitik im Einflussbereich von Kommission, Rat, Hohem Vertreter und Europäischem Auswärtigem Dienst, in Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 103 (120).

For this author, Europe will only be able to stand and flourish in a globalized world if united. It needs a structure, tools and powers able to coordinate different policies, both domestic and foreign. A future constitution for the United States of Europe[25] will undoubtedly seek coherent powers by allocating all foreign relations powers to the federal government, even in matters pertaining to the Member States. This is a standard allocation in federal States, such as the US, Germany or Switzerland. The challenge rather is how to get there in meaningful steps in a gradual process of reforming allocation of powers. It is submitted that the process could and should start with realigning matters pertaining to external economic policy, and expanding commercial policy prerogatives accordingly.

The concept of commercial policy, essentially following the breadth and scope of WTO rules, is outdated and should be placed on its own with a proper footing and rationale, independent of existing international organizations in the field. It should bundle all pertinent areas of international economic law: trade, investment, capital movement, monetary affairs, development, human rights policies (including corporate social responsibility), humanitarian aid, labour and immigration, environment, energy and natural resources, and communications. It should develop into a comprehensive foreign economic policy.

Foreign economic policy should thus include all the relevant factors of production and align them accordingly. They should all fall under the same rules on power allocation and procedures. Article 3(2) TFEU, codifying the AETR doctrine of the European Court of Justice,[26] offers a suitable framework for the extension of commercial policy to a comprehensive foreign economic policy:

> The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

The provision allows for a gradual transition into exclusive competence of the Union, commensurate with domestic regulation of the subject matter. While no harmonizing regulation exists within the internal market, the subject matter remains subject to shared powers and mixed agreement, securing full participation and consent of all Member States. Increasing domestic regulation of specific areas,

[25] The current legal qualification of the European Union remains controversial, but is largely semantic in nature in light of a long standing constitutional approach in treaty interpretation and jurisprudence of the European Court of Justice. Not surprisingly, the constitutional approach and qualification is mainly contested by domestic courts following the failure of the Constitutional Treaty and in defence of national sovereignty and domestic prerogatives under national constitutions. For the current discussion in Germany see Terhechte, Europäischer Bundesstaat, supranationale Gemeinschaft oder Vertragsunion souveräner Staaten? – Zum Verhältnis von Staat und Union nach dem Lissabon-Urteil des BVerfG, in Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration*, EuR Beiheft 1, 2010, p. 135. The Federal Constitutional Court of Germany in his opinion of 30 June 2009, BVerfG 123, (267) 3rd. Leitsatz, coins a new term for the EU by depicting the EU as a treaty-based Union of sovereign States ("Vertragsunion souveräner Staaten").

[26] ECJ, Case 22/70, *Commission v. Council*, [1971] ECR, 263.

such as energy or communications, will in parallel transfer powers exclusively to the European Union.

Exclusive competence in foreign economic policy will not imply the exclusion of Member States.[27] Quite the contrary: fact-finding and decision-making processes in a common external economic policy would seek to include not only the European Council, the Council, Commission, the European Parliament and specialized agencies and bodies, such as the Central Bank. It would also engage and consult governments and parliaments provided that decisions at the end of the day are taken by qualified majority on the EU level and operating based upon clearly defined delegated powers. Such delegation may also entail delegation to Member States, for example in the field of development assistance or might leave policy space for autonomous action in well defined areas, such as relations with neighbours. The vertical allocation of powers could take into account the teachings from the doctrine of multilevel governance and a five storey house.[28] It is a matter of asking which layer of governance is best suited to produce an appropriate public good. This can be local, regional, national, continental or European, or global. There should be a presumption that policies addressing global public goods and global common concerns should be coordinated and guided on the level of a future Common External Economic Policy with Europe speaking with one single voice and subject to majority voting. Matters which inherently need attention by global institutions, such as the G-20, the IMF, the World Bank, the United Nations and its specialized agencies, should be dealt with on the level of the European Union. The success of an evolving common commercial policy in GATT and the WTO should be taken into account. Lessons should be learnt and further developed towards structures providing greater coherence in European foreign policy making in coming years.

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[27] See also Weiβ, Handelspolitik im Europäischen Verfassungsverbund: Auβenhandelskompetenz und die Lissabon-Entscheidung des Bundesverfassungsgerichts, in Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, p. 35 (46).

[28] See Joerges and Petersmann (eds.) *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2011 (2nd ed.).

Part II
The CCP as an Exclusive Competence of the EU: An EU Member State's Perspective

(National) Constitutional Law Limitations on the Advancement of the EU's Common Commercial Policy

Jörg Philipp Terhechte

CCP and National Constitutional Law: Two Worlds with Nothing in Common?

The relationship between the Common Commercial Policy (CCP) of the European Union (Art. 207 et seqq. TFEU) and German—or any national—constitutional law has rarely been addressed in the past.[1] This could be the result of a perception that where the more 'technical' trade law and 'political' constitutional law were considered in tandem, what resulted was a collision of two worlds which *prima facie* shared little in common. Considered differently, the relationship between national and European constitutional law is also at play here, in so far as one can consider primary EU law as a form of constitutional law.[2] Despite that the division of competences in the 'European constitutional courts compound' (*Verfassungsgerichtsverbund*) has not been definitively established, this relationship has been explored to the greatest extent in multiple judgments of the German Federal

[1] Certainly examination of the economic constitution of the German Basic Law has focused primarily on the importance of the European Legal Framework, see for example Papier, Grundgesetz und Wirtschaftsverfassung, in: Benda/Maihofer/Vogel (eds.), *Handbuch des Verfassungsrechts*, 1995, 2. ed., § 14 para. 30; see also Badura, *Wirtschaftsverfassung und Wirtschaftsverwaltung*, 2008, 3. ed., p. 60.

[2] See von Bogdandy, Founding Principles of EU Law: A Theoretical and Doctrinal Sketch, European Law Journal 16 (2010) 2, p. 95; von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2009, 2. ed.; Lenaerts/van Nuffel, *Constitutional Law of the European Union*, 2005; Terhechte, Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der Europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?, Europarecht (EuR) 43 (2008) 2, p. 143.

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Constitutional Court (FCC), the *Bundesverfassungsgericht*, and the Court of Justice of the European Union (ECJ).[3] Moreover the national constitutional aspects of the CCP did not normally feature significantly in the foundational judgments of the ECJ and the FCC. In this respect the Maastricht Judgment of the FFC had no impact on the CCP.[4]

This stance changed dramatically with the so-called Lisbon Judgment of the FCC.[5] This judgment discussed extensively the constitutional law limitations on a further conferral of competences in the field of the CCP and considered the constitutional concretion of provisions relating to the CCP which had been changed with the Treaty of Lisbon. The conclusions reached by the court on this occasion have been heavily criticised by some commentators.[6] In particular, the way in which the FFC has approached the new interpretation of Art. 207 TFEU opposes the traditional interpretation basis of Union Law and comprehensively ignores the procedure based on the division of labour amongst the judiciary in the European Constitutional Order. According to Art. 19 TFEU it is still explicitly the task of the ECJ to make final binding declarations on matters of Union law. As regards the CCP, which embodies an exclusive competence of the EU, Courts of final instance in EU Member States cannot be empowered to create their own binding interpretations.

The following remarks attempt to clarify the constitutionally based limitations of deeper European Integration which have been created by the FFC with respect to the CCP. The jurisprudence of the FCC will first be restated so that it can be critically evaluated. An attempt should also be made to consider the reasoning behind the explicit engagement of the FCC with the CCP of the EU.

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[3] Voßkuhle, Der europäische Verfassungsgerichtsverbund, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 29 (2010) 1, p. 1; see also Terhechte, *Konstitutionalisierung und Normativität der europäischen Grundrechte*, 2011, p. 77.

[4] Federal Constitutional Court, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89, 155 (*Maastricht*).

[5] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*).

[6] See Herrmann, Die Gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, *Europarecht (EuR) Special Issue 1/2010*, p. 193; Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für Europäische Studien (ZEuS) 12 (2009) 4, p. 613; Terhechte, Art. 351 TFEU, the Principle of Loyalty and the Future Role of Member States' Bilateral Investment Protection, in: Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, 2 European Yearbook of International Economic Law, Special Issue 1*, 2011, p. 79 (93); Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift (NJW) 62 (2009) 39, p. 2867 (2867).

The Lisbon Judgment and the External Trade Policy of the European Union

A Single Constitutional Limitation to Deeper Integration?

The Lisbon Judgment of the FCC voices an encyclopaedic extent of opposition to the Lisbon Reform Treaty.[7] If one is to consider the sheer length of the judgment and the basic arguments contained therein alone, it is clear that the court intended to give a directed judgment, one which amounted to a general overview of the process of European Integration in light of the German Basic Law. That the FCC was completely opposed to a number of policy fields under Union Law can certainly be cited as a reason behind this judgment. From the beginning, the boundaries which were drawn in the judgment should have indicated a certain permanence or durability. One should not however make the mistake of considering the submissions of the Court as being solely about the CCP. To a much greater extent the comments are connected with further areas in which 'Member States extend the scope of competences and the political possibilities of action of the European association of integration'.[8] In practical terms, what the FCC envisages by this are the fields of Judicial Co-operation in criminal and civil matters, external relations, the Common Defence and Security Policy and ultimately, social policy. The jurisdiction of the EU in these fields, according to the FCC, 'can, and must, be exercised by the institutions of the European Union in such a way that at Member State level, tasks of sufficient weight in extent as well as substance remain which are the legal and practical conditions of a living democracy'.[9] Additionally the court is of the view that as long as the so mentioned competences are expressed in such a manner, amendments or changes will not contain any element of state involvement or causality.[10] This summary of the FCC of the material and legal amendments

[7] For additional analysis see e.g. Grimm, Defending Sovereign Statehood Against Transforming the Union Into a State, European Constitutional Law Review 5 (2009) 3, p. 353; Halberstam/Möllers, The German Constitutional Court says "Ja zu Deuschland!", German Law Journal 10 (2009) 8, p. 1241; Thym, In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgement of the German Constitutional Court, Common Market Law Review 46 (2009) 6, p. 1795; Ziller, The German Constitutional Court's Friendliness towards European Law – On the Judgement of Bundesverfassungsgericht over the Ratification on the Treaty of Lisbon, European Public Law Journal 16 (2010) 1, p. 53; see also Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, *Europarecht (EuR) Special Issue 1/2010*.

[8] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[9] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[10] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

made by the Lisbon Treaty is certainly bold and poses fundamental questions and considerations applying to Criminal Law, the Defence Policy and the future themes of European Law—the 'autonomous' social policies of the Member States. It is however incomprehensible why external trade policy of all areas should be mentioned in this context. Although the findings of the FCC should be quite acceptable to trade law experts, they nevertheless act as confirmation that through their actions they are operating like a surgeon on the 'open heart' of democratic society. Nevertheless the train of argument of the FCC is not coherent: what is particularly interesting is that the FCC has furnished areas dealing with vastly different subject matter with a single constitutionally based caveat, in spite of the fact that the Union in each of these fields is assigned different competences. It is clear that the FCC was less concerned with showcasing the CCP as the outer limit of integration, rather than with exercising a complete overview of the Lisbon Treaty and of the amendments and changes which were introduced in its wake. Ultimately it must be asked whether this mixture of a variety of different subject fields can be considered to be progressive.

As has been mentioned, the CCP incorporates a field of Union *exclusive competence*.[11] According to Art. 2 para. 1 TFEU, this entails that the Union alone may act legislatively and execute legal acts in such a field. Member States may only act in these fields in so far as they have been authorised to do so by the Union or in order to adopt Union acts into their national laws.[12] Therefore, Member States have consciously reduced their role in these policy fields to a minimal level, which could be primarily associated with the affected areas. Alongside the CCP, each of the following areas form part of the exclusive competences of the Union—subject to certain limitations—the customs union, competition policy, monetary policy and the conservation of marine biological resources under the common fisheries policy.[13] Excluding the last field of action mentioned, it is clear that it is areas which are politically and economically sensitive which fall within the exclusive competences of the Union. Conversely the grounds of competence for the other fields about which the FCC speaks are completely different: in social policy and in the area of Freedom, Security and Justice the Union is only afforded a shared competence (Art. 4 para. 2 lit. b and lit. j TFEU); moreover the Common Defence Policy forms part of the intergovernmental regime of Union law.[14] Faced with this range of different competence grounds, it is surprising that the FCC formulated a singular constitutionally-based proviso or caveat. For example, there is

[11] For more on the exclusive competence of the Union in the field of the Common Commercial Policy ECJ, Case 41/76, *Donckerwolcke/Procureur*, [1976] ECR, 1921, paras. 31, 37; see also Osteneck, Art. 207 AEUV, in: Schwarze (ed.), *EU-Kommentar,* 2012, 3. ed., para. 26; Nettesheim, Art. 3 AEUV, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der EU*, loose-leaf, para. 19.

[12] For deeper analysis see Nettesheim, Kompetenzen, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2009, 2. ed., p. 389 (424 et seq.).

[13] See Nettesheim, Art. 3 AEUV, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der EU*, para. 9 et seq.

[14] See Terhechte, Art. 24 EUV, in: Schwarze (ed.), *EU-Kommentar*, 2012, 3. ed., para. 2.

undoubtedly less of a risk that the competences of the Member States will be depleted in the domain of defence than in the area of the CCP. Looked at from a different perspective, the fields of judicial co-operation or defence (politically, at least) take centre stage more than measures in the realm of the CCP.

However, the Member States play an altogether different role than in other fields. It is obvious that because of their heterogeneity, the mixing by the FCC of different policy areas in its judgment is highly problematic. Particularly in the field of the CCP, it can be especially difficult to allow for activities by Member States, which are properly significant in *both their extent and substance*.[15] The demands of the FCC can nowadays no longer be adhered to. What is perhaps a sensible approach for the areas of defence—or social policy provides in the best case scenario only stopping potential for the CCP and goes beyond the actual practice of this field. In so far as the FCC perceived that the CCP needed to be confronted, different sectors should have warranted different approaches.

Common Commercial Policy and (National) Constitutional Law: Three Aspects

In practical terms the judgment deals with three aspects of the post-Lisbon CCP:

1. Firstly, analysis of the practical and legal extension of Union competences as part of the CCP into the arenas of 'foreign direct investment', 'trade in services' and 'trade related aspects of Intellectual Property Rights' is to the forefront.
2. Attached to this is a consideration of the consequences of an expansion of competences, with respect to the role of the Member States in the WTO.
3. Finally, the FCC confronts in detail the broadening of Art. 207 TFEU to incorporate 'foreign direct investment'.

The submissions emerge from the reasoning of the FCC which has been applied in general to policy arenas which have emerged from the Lisbon Treaty. In other words: within the extension of competences and the practical consequences arising there from, the FCC seeks an interpretive approach, which facilitates an interpretation of competences which adheres to the Basic Law or 'enhances national sovereignty'.

Practical-Legal Facets of the CCP

A starting point for the analysis of the FCC is to develop a concept of the newly structured Art. 207 TFEU.[16] FCC summarises the amendments which have been

[15] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 406.

[16] For more, see Bungenberg, Going Global? The EU Common Commercial Policy after Lisbon, in: Herrmann/Terhechte (eds.), *1 European Yearbook of International Economic Law*, 2010, p. 123.

made and even when a strong statement of the Court's WTO opinion[17] is made, this statement is only intended to refer to the division of competences as they existed prior to the Treaty of Nice coming into force.[18] By choosing this starting point for its analysis, it is obvious that the FCC is anxious to show that the ECJ has formulated limits to Union competences and that the concept of an 'all-encompassing' CCP should bear on further submissions. The FCC does however recognise that henceforth with the Lisbon Treaty in force 'the Union acquires the sole power of disposition over international trade agreements'.[19]

Nevertheless the FCC regards such treaties as being capable of enormous consequences, which may result in 'an essential reorganisation of the internal order of the Member States'.[20] In its final analysis, there is a dual perspective in the remarks made by the FCC about the CCP: on the one hand, an overbearing influence of international trade law in the national constitutional sphere should be controlled and hindered, whereas on the other hand, the FCC is concerned with maintaining scope for the Member States, which is ultimately connected with the preservation of the competences held by the FCC.

The Future Role of EU Member States in the WTO

A desire to maintain an outward looking focus is also reflected in the FFC's ideas on the (future) role of the Member States in the WTO.[21] According to the FCC, as a result of the comprehensive competences afforded to the EU in the field of CCP, the Member States risk that their Membership of the WTO will be reduced to mere formal status.[22] The remarks of the FCC state that this affects in particular Member States' voting rights within the WTO, their standing in the Dispute Settlement Understanding as well as their participation in future negotiation rounds for the development of the WTO Regime.[23]

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[17] ECJ, Opinion 1/94, [1994] ECR I, 5267; see also Hilf, The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?, European Journal of International Law 6 (1995) 1, p. 245; further evaluation of this opinion can also be found in Hilpold, *Die EU im GATT/WTO-System*, 2009, 2. ed., p. 193 (esp. p. 206 et seq.).

[18] See also Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für Europäische Studien (ZeuS) 12 (2009) 4, p. 613 (614 et seq.); see in relation to the changes which the Treaty of Nice introduced in the field of the CCP Herrmann, Common Commercial Policy after Nice: Sisyphus would have done a better job, Common Market Law Review 39 (2002) 1, p. 7.

[19] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[20] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[21] See also Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 161.

[22] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418.

[23] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 418 et seq.

Which limits have been drawn by the FCC? Initially it considers the (formal) membership of the Federal Republic of Germany as being unaffected by the Lisbon Treaty. In this sense the EU cannot under any circumstances force Member States to withdraw from the WTO. The Member States, in so far as the above statement is true, will continue to have the opportunity to take part in future WTO negotiation rounds. With respect to this, the Federal Government is obliged to inform both the German Bundestag and the German Bundesrat of any developments which happen on the WTO arena.

In any case there is a limitation already in place for the FCC, in so far as a gradual reduction of Member State legal personality in external relations matters would enable the European Union to act 'more and more clearly in analogy to a state'.[24] These remarks by the FCC refer not only to the CCP, but also to external matters in a general sense, which also includes other fields of EU external relations (in particular the CFSP). This is moreover plausible in the context of the unified orientation as regards foreign relations which accompanied the Lisbon Treaty.[25] It can be deduced therefrom that the limits which German constitutional law has created for the field of Union competences refer to the situation which will arise from the use of such competences, i.e. whereby the Union will communicate in unified manner in external matters. Clear criteria cannot be derived from this. However it is obvious that the FCC is concerned with preserving on a lasting basis the 'double membership' of the Member States and the Union within the WTO and indeed it considers this 'cooperatively mixed' membership as a model for other international organisations and collectives of states.[26]

Foreign Direct Investment Post Lisbon

There was a detailed evaluation of the new competence in the field of foreign direct investments in the FCC's Lisbon judgment.[27] The FCC finds boundaries resulting

[24] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 420.

[25] Art. 205 TFEU contains a cross reference of Art. 21 and 22 TEU, which provide the basis for the CFSP, and which are also of relevance to the CCP for more see Khan, Art. 205 AEUV, in: Geiger/Khan/Kotzur (eds.), *EUV/AEUV Commentary*, 2010, 5. ed., para. 3; Terhechte, Art. 205 AEUV, in: Schwarze (ed.), *EU-Kommentar*, 2012, 3. ed., para. 2 and 7.

[26] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 420; for more detail on the problems posed by 'parallel Membership' see Herrmann, Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationalen Organisationen – Eine Untersuchung am Beispiel der Mitgliedschaft der EG in der WTO, in: Bauschke et al. (eds.), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen*, 2003, p. 139.

[27] See Eilmansberger, Bilateral Investment Treaties and EU Law, Common Market Law Review 46 (2009) 2, p. 383; Bungenberg, Going Global? The EU Common Commercial Policy after Lisbon, in: Herrmann/Terhechte (eds.), *1 European Yearbook of International European Law*, 2010, p. 123 (135 et seq.); Tietje, Außenwirtschaftliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissabonner Reformvertrag – Änderungsimpulse in einzelnen Rechts- und Politikbereichen*, 2009, p. 237; Griebel, Überlegungen zur

from the interpretation of the term 'foreign direct investment', and develops its own proposal for interpreting this term. The remarks of the FCC can be interpreted in a broad fashion. The court assumes that the new competences held by the EU in this domain will primarily effect 'only encompasses investment which serves to obtain a controlling interest in an enterprise [. . .]'. This observation suggests that, exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements'.[28] This proposed interpretation by the FCC has been criticised on numerous occasions.[29] In the context of its subject matter, the FCC has been criticised for leaving open the question as to why it considers such a limited interpretation to be constitutionally required. The motivation for this is however clear when the practical significance of Investment Protection Treaties and the means by which German capital is invested abroad are considered. The Federal Republic of Germany should retain a certain influence in this field; the EU should not be put in a position to appoint itself as the sole actor in this policy arena. Only a judgment of the ECJ can make a final determination on the term 'foreign direct investment', with respect to what is outlined in Art. 19 TEU.

The Future Role of Member States' Bilateral Investment Treaties (BITs)

The judgment also posed the important question as to what the effects of the shifting of competences in relation to currently existing Bilateral Investment Agreements of Member States might be.[30] The FCC assumes in its judgment that the Union must authorise Member State BITs which are already in force; however, the practical consequences of this remain undefined.[31] The foundation of this 'duty to authorise' lies apparently in a practice of the Member States and the justification for this is

Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon, Recht der Internationalen Wirtschaft (RIW) 55 (2009) 7, p. 469; Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon, Europarecht (EuR) Special Issue 1/2009*, p. 195 (202 et seq.); Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2008, 2. ed., p. 126 (127 et seq.); Müller-Ibold, Handelsaspekte geistigen Eigentums sowie Investitionen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 117 (126 et seq.).

[28] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 421.

[29] Pars pro toto Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Europarecht (EuR), Special Issue 1/2010*, p. 193 (204).

[30] For deeper analysis see Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW 21 (2010) 6, p. 207; Terhechte, Art. 351 TFEU, the Principle of Loyalty and the Future Role of Member States' Bilateral Investment Protection, in: Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, 2 European Yearbook of International Economic Law 2011, Special Issue 1*, p. 79.

[31] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267 (*Lissabon*), para. 421 et seq.

shaky. Disregarding the weaknesses in its reasoning, the intention of the FCC is indeed unequivocal. If a change in the structure of competences in the area of the CCP has been observed, then the impact of this should be absorbed. The FCC manifestly seeks means to maintain Member States BITs. It is highly doubtful whether a so-constructed 'duty to authorise', which ultimately prejudices an autonomous decision by the Council of the European Union, can constitute a realistic boundary. Such a move is questionable from the perspective of the autonomy of the Union legal order, not least because neither the Commission nor the Union as a whole is bound by the jurisprudence of the FCC.

Conclusions

How can the relationship between German constitutional law and the future development of European External Trade policy be defined? From the perspective of the FCC the Member States are being essentially kept 'in their place' post the entry into force of the Lisbon Treaty. The criteria which have been developed by the FCC are far from convincing and misrepresent in particular the reality of the day to day co-operation which exists between the EU (the Commission) and Member States in the field of the WTO.

Looking beyond this issue, it is clear from the judgment that the FCC has no desire to await a judgment by the ECJ on a concrete case, which will undoubtedly find in favour of there being a Union competence. The decision of the FCC to define the content of the term 'foreign direct investment' has often been questioned. At any length literature on this subject considers that the ECJ's submissions on the interpretation of this term could have been more broadly worded.[32]

Notwithstanding it is difficult to imagine an actual conflict, given that any hurdles to further development of the European External Trade policy which have been formulated by the FCC have been so general. Most recently the Lisbon Judgment is regarded in a different light in the 'Honeywell' ruling. It is hard to envisage how a ('qualified') legal act which is repugnant to the law and presumes the existence of competence could be possible in the context of an exclusive Union competence.[33]

Ultimately it must be asked what the constitutional benchmark of the FCC actually is. Evidently Art. 23 of the Basic Law only plays a marginal role in this issue. There is good reason to doubt whether Art. 38 of the Basic Law on its own can provide a sound basis for this.[34] Therefore the limits to integration as defined by the FCC had to be extremely abstract.

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[32] Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Europarecht (EuR) Special Issue 1/2010*, p. 193 (204).

[33] Federal Constitutional Court, 2 BvR 2661/06, BVerfGE 126, 286 (*Honeywell*).

[34] Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift (NJW) 62 (2009) 39, p. 2867 (2867); Terhechte, Dynamik, Souveränität und Integration – playing up the rules as we go along? – Anmerkungen zum Lissabon-Urteil des BVerfG, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 20 (2009) 20, p. 724 (725).

Finally the clear boundaries provided for in the judgment affect the general form of the Union: as long as it does not develop into a federal construct, the Union may continue to develop the External Trade policy. Such a move in the direction of becoming a federal state is neither envisaged in the Lisbon Treaty (quite the opposite is the case) nor is it possible in the constitutional order of the Union.[35] The potential to halt further development which has resulted from these limitations—be they of a primarily political or a primarily legal nature—should not be underestimated, as it concerns not only the CCP, but rather the entire field of EU external relations. Once more the problematic construction of the whole Lisbon judgment can be clearly seen. The concentration of the Union's fields of action as determined under national law is neither coherent nor is it possible under Union law. In the context of the CCP many of the FCC's submissions more closely resemble political statements, which are best avoided. The EU is nevertheless best advised to pay heed to this 'warning shot' and to also sufficiently consider areas of exclusive competence and the co-operation structures for European constitutional matters and administration, as are outlined in the Lisbon Treaty. The sharing of tasks and co-operation in the framework of the EU can no longer solely focus on the determination of unilateral limitations. Far more attention should be paid to the form which a commonly executed integration process would take, which would benefit the citizens of the EU.

[35] For more on this see Terhechte, Europäischer Bundesstaat, supranationale Gemeinschaft oder Vertragsunion souveräner Staaten? – Zum Verhältnis von Staat und Union nach dem Lissabon-Urteil des BVerfG, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration, Europarecht (EuR) Special Issue 1/2010*, p. 135.

Common Commercial Policy in the European Constitutional Area: EU External Trade Competence and the Lisbon Decision of the German Federal Constitutional Court

Wolfgang Weiß

Following the Lisbon Treaty coming into force, the further development of an EU Common Commercial Policy is determined—regardless of its further political and regulatory progression—by the increase in powers which the EU has been attributed in the context of commercial policy through the amendment of Art. 207 of the TFEU. But this extension of powers is also related to the repercussions of the EU commercial policy for the Member States. First, the extension of the traditionally exclusive EU competence (now explicitly stated in Art. 3 para. 1 lit. e TFEU) in the field of Common Commercial Policy in a comprehensive manner on trade in services, on commercial aspects of intellectual property and on foreign direct investment (cf. Art. 207, para. 1 TFEU)[1] leads to the question of the role Member States can still assume in the WTO as it seems all the subject matters of WTO law are now covered solely and exclusively by EU competence. Furthermore, the possibility of a further extension of EU competence in the Common Commercial Policy depends on the constitutional limits of the integration process in the Member States, not least in Germany. The German Bundesverfassungsgericht (Federal Constitutional Court) in its Lisbon judgement set these limits in a manner which was quite criticized as the Federal Constitutional Court named specific policy areas for which a further supra-nationalisation could not take place, or only with

[1] EU competence in the area of foreign direct investments was newly added by the Lisbon Treaty, after corresponding attempts of the Commission to expand EU competence failed in Nice. In the Treaty of Nice EU competence had already been extended to trade in services and the commercial aspects of intellectual property (Art. 133(5) TEU), however it had not existed as an exclusive EU competence insofar, cf. ECJ, Opinion 1/08 – GATS, ECR [2009] I-11129, paras. 144 et seq.; Hahn, in: Calliess/Ruffert (eds.), *EUV/EGV*, (3rd ed.) 2007, Art. 133 EGV, paras. 72, 130.

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significant sensitivity for remaining domestic competences,[2] and which have been termed "Integration proof reserved areas".[3] Without having the slightest criteria for this in the Constitution, the Federal Constitutional Court deduced them ostensibly from the principle of democracy and subsidiarity,[4] and thus as if providing instruction of the tasks of the state.[5] The Court opined: "Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on ... criminal law..., on the disposition of the monopoly on the use of force ..., fundamental fiscal decisions ... decisions on the shaping of living conditions in a social state ... decisions of particular cultural importance" (The German Federal Constitutional Court lists here "family law, the school and education system and the dealing with religious communities").[6] One of the reserved areas was subsequently stressed particularly by the Federal Constitutional Court's order on the rescue package, i.e. national autonomy over budgetary matters,[7] which in our context here is irrelevant as the obligations flowing from WTO law have no fundamental budgetary significance.

Second, the subsequent question is the issue of constitutional restraints to further supra-nationalisation of the Common Commercial Policy resulting from this perception of the Federal Constitutional Court as this Court steers the reality of German constitutional law.

On these two issues in the interplay of supra-national and national competences in the context of the Common Commercial Policy a stance should be taken pointedly in the following:

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[2] Terhechte, Souveränität, Dynamik und Integration – making up the rules as we go along? Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts, Europäische Zeitschrift für Wirtschaftsrecht 20 (2009) 20, p. 724 (731) speaks of "areas of decelerated integration".

[3] By Ruffert, An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1202): "integrationsfeste Vorbehaltsbereiche". For more detail on these areas see, pp. 1202 et seq.

[4] See the Lisbon decision of the Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 251: "The principle of democracy as well as the principle of subsidiarity, which is also structurally required by Article 23.1 first sentence of the Basic Law, therefore require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required". (This and all other quotes from the Federal Constitutional Courts are taken from the official English translation of the decisions, available at the Court's website: www.bverfg.de).

[5] S. Calliess, *Die neue EU nach dem Vertrag von Lissabon*, 2010, p. 258; Terhechte, Souveränität, Dynamik und Integration – making up the rules as we go along? Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts, Europäische Zeitschrift für Wirtschaftsrecht 20 (2009) 20, p. 724 (730).

[6] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 252 et seq.

[7] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package*, NJW 64 (2011) 40, 2946 (paras. 124 et seq. and esp. paras. 133 et seq. The limit to the conferral of powers is reached when the autonomy of the national budget is no longer guaranteed resulting in the liability for other Member States' debts, even in the form of the communitisation of national debt.

The Future Role of the EU Member States in the WTO in View of the Exclusivity of EU Competence

The comprehensive exclusive EU competence in the Common Commercial Policy has led to the consideration that the Member States could not participate in ratification of the (possible) outcomes of the current Doha Round negotiations (in the form of a mixed agreement) due to lack of national competences being affected; the changes to the WTO agreements which to date have been discussed or are expected to fall completely within the exclusive competences of the EU in accordance with Art. 207 TFEU.[8] In addition, there are considerations whether or not the EU Member States must leave the WTO for EU legislative reasons as this could be required with reference to the analogous application of Article 307 read in conjunction with Article 10 ECT, which is now Article 351 read in conjunction with Article 4 TFEU.[9]

However, in this issue an initial differentiation must be made between the legal situation under WTO law and that under EU law.

WTO Law

The EU Member States are and remain, in any case, formal members of the WTO and thus participate in the ratification processes of changes to the WTO Agreements in accordance with Article X of the Agreement Establishing the WTO. They do not lose membership status on account of a total transition of competence to a supranational organisation; this is not changed by Art. XII of the Agreement Establishing the WTO which requires as a condition of membership that a State or separate customs territory possesses full autonomy in the conduct of its external commercial relations and of the other matters covered by WTO law. For, on the one hand, the EU Member States are original members of the WTO according to Art. XI of the Agreement Establishing the WTO with the result that Article XI is not applicable; on the other hand, the discontinuation of membership requirements does not result in loss of membership. A loss of membership in an international organisation under international law only happens in the event of the dissolution of a State. Thus, EU

[8] Haratsch/Koenig/Pechstein, *Europarecht*, (7th ed.) 2010, para. 1277.

[9] Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (172); Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, Europarecht Supplement 1/2009, 2009, p. 195 (206); see also Berrisch, *Der völkerrechtliche Status der EWG im GATT*, 1992, pp. 99 et seq. The Federal Constitutional Court (2 BvE 2/08 et al., BVerfGE 123, 267, para. 380) interprets Art. 351 TFEU to the effect that at first earlier Treaties of the EU Member States remain in force. This is very correct but Art. 351(2) TFEU envisages an obligation on the part of the Member States in the event of a collision with EU legislation to dissolve the latter which actually could happen by a national exit from the WTO.

Member States maintain their WTO membership which—and this rightly has been pointed out—is on this account more than just a formal membership, because it is the EU Member States that pay membership contributions to the WTO budget, and not the EU.

EU Law

As regards the situation under EU law, the need for a mixed agreement to conclude the Doha Round and other changes to treaties may cease with the expansion of the EU exclusive competences in the area of external trade. Such a situation already arose in 2007 when only the European Community ratified the agreed amendments to the TRIPS Agreement of December 2005 on access to essential medication (Protocol amending the TRIPS Agreement)[10]: When depositing the instruments of acceptance the Presidency of the Council of the EU had confirmed the binding nature of the legislation also on Member States pursuant to Article 300 para. 7 ECT (now Article 216 para. 2 TFEU).[11] In terms of competence this resulted from the exclusive competence of the EU extended to TRIPS by the Treaty of Nice.[12] However, for future amendments or factual amendments to the WTO agreements by dynamic interpretation of WTO law by the WTO dispute settlement institutions the situation may become more complex as it cannot be excluded that the WTO may one day cover issues which go beyond the exclusive competence of the EU because, for example, the WTO disciplines could also comprise portfolio investments which may not be covered necessarily and in every context by the new Article 207 para. 1 TFEU[13]; in part the definition of direct investment is narrowed to such an extent in Art. 207 para. 1 TFEU that it covers

[10] WT/L/641. See Herrmann/Weiß/Ohler, *Welthandelsrecht*, (2nd ed.) 2007, para. 967.

[11] The document can be found at http://www.wto.org/english/tratop_e/trips_e/popup_amendment_ec_e.htm.

[12] On the significance of Art. 133(5) TEC cf. Osteneck, in: Schwarze (ed.), *EU-Kommentar*, (2nd ed.) 2009, Art. 133 para. 11.

[13] See also Hahn, in: Calliess/Ruffert (eds.), *EUV/AEUV*, (4th ed.) 2011, Art. 207 para. 62. For the notion of investment in the sense of Art. 207(1) TFEU see Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 379, which uses the acquirement of control as the relevant criterion, and refers to Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrechts (2009) 83, p. 16, (also Tietje, Außenwirtschaftliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissaboner Reformvertrag*, 2009, p. 237 (249)) who states that according to OECD principles the term direct investment subsumes an equity interest exceeding 10%. This can open up a tension in the interpretation of the term investment to the rules on movement of capital which usually are more broadly interpreted because they not only imply gaining control but also refer to effective participation in management, cf. ECJ, Case C-326/07, *Commission vs. Italy*, ECR [2009] I-2291, para. 35.

only specific trade-related aspects of investment agreements.[14] In such cases, the competence of the Member States becomes relevant again for the activities of the EU in the WTO under EU law. Against this backdrop it seems absolutely improper to intend to compel EU Member States to leave the WTO, and then having to renew their accession at a later date. Also for the conclusion of the Doha Round the extension of EU competence does not necessarily mean that in regard to EU law a ratification of amendments to the WTO agreements also by the EU Member States would be prohibited. For in assessing this question it must be taken into consideration that in international law, on account of a lack of clear distribution of competences between EU Member States and the EU,[15] the EU Member States on account of them being signatories to the Treaty bear full liability for adhering to WTO obligations and newly emerging obligations resulting from the Doha Round. In the same way, in WTO dispute settlement practice the recurring total liability of the EU for compliance with WTO law and for measures of the EU Member States which damage the WTO is stressed.[16] The internal delimitation of competences between the EU and its Member States is of no interest insofar. Additionally, the fact remains that the Member States, and not the EU, are parties to international agreements in the context of which principles and standards are drafted which are relevant for WTO law. In order to uphold these standards and principles also towards the EU the panels refer to the respective membership of at least the EU Member States.[17]

For these reasons construing under EU law an obligation for EU Member States to exit the WTO does not seem convincing, all the more so as the EU competences (irrespective of the problems of interpreting the term investment in Article 207 para. 1 TFEU) do not cover all fields already currently covered by the WTO, for example, national security policy (this remains the competence of the Member

[14] So Krajewski, External Trade and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (114–115); equally Osteneck, in: Schwarze (ed.), *EU-Kommentar*, (2nd ed.) 2009, Art. 133 para. 42; contrary to Terhechte, Art. 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, Europarecht 45 (2010) 4, p. 517 (521).

[15] The Lisbon Treaty made no far-reaching changes to this as the competence provisions of Art. 2 et seq. TFEU incorporate the well-known, even though not explicitly stated rules under the Nice EU/EC law. Art. 2 et seq. TFEU largely do not more than reflect the traditional ECJ case law on the categories and scope of EU competences, cf. Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, (3rd ed.) 2010, p. 104, 107–108.

[16] Cf. the case studies mentioned by Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (165 et seq.).

[17] Cf. Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (167).

States alone, Article 4 para. 3, sentence 3 TEU), balance of payment issues of non-Eurozone members and budget law (relevant for Articles XXI, XII GATT and members' contributions).[18]

In Particular: Harmonisation in Services Trade and the Meaning of Article 207 Para. 6 TFEU

Not every facet of trade in services falls under exclusive EU competence. Even though cultural services, services in the social, education and health sectors are under the exclusive competence of the EU (see their explicit naming in Art. 207 para. 4 TFEU) yet in accordance with Art. 207 para. 6 TFEU this competence has its limits where, as a result of WTO provisions, obligations for harmonisation in these areas may arise. For in relation to culture, health protection, education or vocational training, according to Article 2 para. 5 in conjunction with Article 6 TFEU, the EU may only support and coordinate but not harmonise (Art. 2 para. 5, subpar. 2 TFEU; see also the prohibition against EU harmonization provided for in Article 166 para. 4 TFEU regarding education and vocational training, Article 167 para. 5 regarding culture and Art. 168 para. 5 regarding health services). The GATS envisages in Article VI:4, however, the setting of uniform criteria in the form of disciplines necessary for ensuring the quality of services and the objectivity and transparency of criteria for the supply of services; in other words, this provision prescribes the adoption of (minimum) harmonisations.[19] Thus the WTO possesses an albeit currently almost unused competence to adopt disciplines leading to certain standardisations of domestic provisions in the service sector whereby the area of application has not been conclusively clarified.[20] In regard to Article 207 para. 6 TFEU the external competence of the EU should not suffice to adopt such harmonisations within the WTO, but require further supplementing by the Member States.[21] Insofar, Article 207 para. 6 TFEU is similar to the former Article 133 para.

[18] This is also noted by Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 161 (172).

[19] Cf. Hummer, in: Vedder/Heintschell von Heinegg (eds.), *Europäischer Verfassungsvertrag*, 2007, Art. III-315, para. 36–37; Pitschas, Der Handel mit Dienstleistungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 99 (105–107).

[20] It has not yet been clarified whether disciplines pursuant to Art. VI(4) GATS only include sectors for which specific commitments were made or whether they are relevant to all services.

[21] Cf. Fischer, *Der Vertrag von Lissabon*, 2008, p. 334 who regards Art. 207(6) as limitation clause to the exclusive EU competence; similar Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag*, 2007, Art. III-315, para. 32–33, who once speaks of a limit to exclusive competence, but then of a limitation to the exercise of competence. In favour of a need for a mixed agreement also Pitschas, Der Handel mit Dienstleistungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der EU nach dem Verfassungsvertrag*, 2006, p. 99 (106–107).

6 subpar. 2 ECT, which explicitly envisaged a joint responsibility and thus a mixed agreement of the EU and its Member States in certain areas (trade in cultural services, in educational services, or in social and human health services) which were very broadly interpreted.[22] The exclusion of these areas from the exclusive competence of the EU through Art. 133 para. 6 subpar. 2 ECT went much further in actual application than Art. 207 para. 6, as Art. 133 ECT excluded these areas completely while Art. 207 para. 6 only does this in relation to harmonisation obligations. Functionally, through Art. 207 para. 6 TFEU however a limitation on the exclusive competence of the EU has been enshrined in the TFEU with the result that trade agreements entered into by the EU, which could lead to harmonisation obligations for the Member States in areas where harmonisation is prohibited to the EU, cannot be based on the exclusive EU competence.

In any case the meaning of Art. 207 para. 6 TFEU is controversial. Usually this norm is not regarded as a limitation of the exclusive external competence of the EU in the Common Commercial Policy but is regarded as emphasising the Member States' internal implementation competence which still should remain their unchanged responsibility.[23] Such reading fails to recognise that Art. 207 para. 6 is not limited only to the *internal* allocation of competences. It is of course correct that Art. 207 has no significance for the allocation of implementation competences between the EU and the Member States; the issue of implementing EU law is governed as always by other EU provisions. However, the question stands as to the remaining significance of Art. 207 para. 6, should the contrary view be correct. For this norm would only maintain something which is in itself self-evident because no one ever claimed that if the EU had a competence to conclude an international agreement then it should also have the internal implementation competence; such a conclusion has never been drawn and would collide with the principle of conferred powers.[24] If Art. 207 para. 6 TFEU should ensure that exclusively *national* harmonisation competences should not be displaced through the Common Commercial Policy treaty competences of the EU, this can only mean that the EU cannot

[22] Cf. ECJ, Opinion 1/08 – *GATS*, ECR [2009] I-11129, paras. 138–139; Advocate General Kokott, Opinion in ECJ, Case C-13/07, paras. 167–168.

[23] Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (115–116); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrecht (2009) 83, pp. 12–13 (also Tietje, Außenwirtschaftsrechtliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds.), *Der Lissabonner Reformvertrag*, 2009, p. 237 (244-245); Müller-Ibold, in: Lenz/Borchardt (eds), *EU-Verträge*, (5th ed.) 2010, Vor Art. 206-207, para. 21.

[24] Contra Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (116–117), who opines that without Art. 207(6) TFEU the EU would have gained comprehensive implementation competence with conclusion of an international trade agreement. There seems, however, to be no legal basis for such bold allocation of competence to the EU; Krajewski does not offer one. The case law of the ECJ deals with the emergence of external EU competences as a result of exercise of internal EU competences, but not the other way round.

justify harmonisation obligations through trade agreements by means of Art. 207 TFEU. Instead it may do so only together with the Member States by means of a mixed agreement.[25] Otherwise the harmonisation prohibitions stated earlier would be meaningless and could easily be circumvented.[26] The interpretation of Art. 207 para. 6 TFEU put forward here, to the contrary, results in respect for the remaining national competences as the Member States' competences are still required for conclusion of the GATS in as much as it requires a joint agreement in spite of the extension of the EU competence in Art. 207 para. 1 TFEU. Here Art. 207 para. 6 draws a border for EU competence just as the ECJ in his Opinion 1/94 on the WTO Agreement refuted an interpretation of Art. 113 ECT (now Art. 207 TFEU) which would have permitted the European Community to conclude agreements in the area of intellectual property. In doing so the ECJ pointed out that this would thus undermine the differing procedural provisions regarding the internal EU competences for these areas (the ECJ referred to Art. 100, 100a and 235 ECT, now Art. 114 f. 352 TFEU).[27] The same rationale must reign all the more so for the risk of curbing internal harmonisation prohibitions against the backdrop of the contents of Art. 207 para. 6 TFEU.

Against the view stated here concerning Art. 207 para. 6 TFEU apparently *four objections* can be raised: Firstly, it is said that there is nothing unusual in the fact that the competence for concluding an agreement and competence for its implementation are separated. Secondly, the wording allegedly indicates otherwise as it only limits the *exercise* of competence. Thirdly, the drafting history is said to prove that Art. 207 para. 6 TFEU does not intend to limit the exclusive EU competence, thus it does not build a basis for advocating EU Member State's competence to be involved in contractual agreements. And finally, the view presented here is blamed for cancelling the competence extension desired by the Convention. The latter objection is a *petitio principii*, for the debate exactly is about the degree of this extension.

Concerning the first objection: The fundamental statement that in EU legislation external and internal competences can be separated doubtless is correct. However, the situation described here is not comparable with the rather frequent situation that the EU enters into obligations in international law for which it has no responsibility for internal implementation; in regard to the above-named harmonisation areas the EU does not only lack the competence, but harmonisation attempts originating in EU legislation are explicitly excluded.[28] The existence of Art. 207 para. 6 proves

[25] Cf. also Hahn, in: Calliess/Ruffert (eds.), *EUV/AEUV*, (4th ed.) 2011, Article 207, para. 121.

[26] Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (118) describes the substantial legal and factual pressure on the Member States in case the EU takes on obligations under international law.

[27] ECJ, Opinion 1/94, ECR [1994] I-5267, paras. 59–60.

[28] This is ignored by Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, Common Market Law Review 42 (2005) 1, p. 91 (117).

that this exclusion should not be invalidated through EU agreements in the context of the Common Commercial Policy.

Concerning the second objection: The interpretation presented here whereby Art. 207 para. 6 limits the exclusive EU competence, cannot be deduced so simply from the wording indeed. The wording of Art. 207 para. 6 is ambivalent, however, and does not exclude the interpretation presented here. The wording does not explicitly limit the EU competences according to Art. 207 para. 1 but refers to the "exercise" of competences and not to the competences themselves. On the other hand, it prohibits, unequivocally, an impact on the allocation of competences between the EU and the Member States and forbids that the exercise of EU competences leads to an EU harmonisation in excluded areas. The latter appears to be decisive in nature: The exercise of EU competence should not lead to a EU harmonisation excluded by the TFEU; this would be precisely the case if the EU alone had the remit to enter into harmonisation obligations under international law in such policy fields. As a result the Members States would be obliged to implement these, and this would render the prohibition against EU harmonisation in the areas listed in the TFEU worthless. Under the Nice Treaty Art. 133 para. 6 subpar. 1 ECT was a more precisely formulated, albeit a norm no easier to interpret, which made clear that the Council could not conclude agreements with consequences for harmonisations of national legal and administrative provisions excluded in the ECT. Thus the exclusive EU competence was limited,[29] according to the Finnish proposal on which the new formulation of Art. 133 ECT introduced by the Nice Treaty was largely based.[30] That Article 207 para. 6 TFEU is less stringently formulated in comparison to Article 133 para. 6 ECT does not mean that the interpretation advocated here would be inadmissible.

Concerning the third objection: A glance at the Convention documents confirms that the current Art. 207 para. 6 TFEU was incorporated very early in an almost verbatim provision[31] and that thus the recommendation of the responsible Convention working group was to be taken into account (to the effect that the decision on trade agreements should require a qualified majority in the Council without prejudice to current restrictions on harmonisation) and that the EU competence for the Common Commercial Policy should in no way modify the delimitation of competences between the EU and the Member States.[32] However, the Presidium postponed the decision on the explicit continuation of the exceptions to the

[29] Cf. Hahn, in: Calliess/Ruffert (eds.), *EUV/EGV*, (3rd ed.) 2007, Art. 133, paras. 110–112.

[30] Cf. Fischer, *Der Vertrag von Nizza*, 2001, pp. 116–117.

[31] In the convention draft this finally became Article III-217(5) ("The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States in so far as the Constitution excludes such harmonisation".) After the intergovernmental conference of 2004 the only change in the English version of the text was the omission of the word "internal" in the then Art. III-315(6) of the Draft Constitutional Treaty, see OJ [2004] C 310/1.

[32] See CONV 685/03, p. 55, para. 7 (at the end).

exclusive competence of the EU as contained in Art. 133 para. 6 subpar. 2 ECT.[33] In addition, the first version of this paragraph contained an important clarification which, however, was not maintained in the final text of Art. III-217 para. 5: the draft of the Presidium (CONV 685/03) reads "The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of *internal* competences between the Union and the Member States" (Italics from the author). This clarification that the extension of EU competences would not impinge upon the *internal* division of competences only is later missing. Working Group VII had considered in their discussions, to which the Presidium refers, the issue of the voting quorum in the Council (qualified majority or unanimity)[34] and issues concerning EU competence.[35] The subsequent proposals for amendment in the Convention in relation to para. 5 of Art. III-217 (the precursor of Art. 207 para. 6 TFEU in the Convention draft) focused on changing this to the wording of Art. 133 para. 6 ECT,[36] which, however, was not fully implemented. The same happened to the proposal to add as a new paragraph 6 a provision which explicitly states a competence of the Member States to conclude agreements as in Art. 133 para. 5 last sentence ECT. From this drafting history it is deduced that amendment proposals to limit the exclusive EC competence did not prevail.[37] An extensive discussion ensued in the Convention on the formulation of Art. III-217 para. 4 (requirement for unanimity) and para. 5. Proposals digressing from the Presidium draft wanted either no single exception to the qualified majority decision or even more strongly to revert to Article 133 para. 6 ECT and provide that agreements in the areas of trade in cultural and audiovisual services, educational or social and human health services should come under the joint responsibility of the Community and its Member States.[38] The Presidium, however, retained its initial formulations and promised a more explicit and comprehensible formulation of the policy areas subject to the requirement for unanimity.[39] The course of the discussions shows that the discussion focused primarily on the scope of the voting quora in the

[33] CONV 685/03, p. 55, para. 8.

[34] The majority of the working group advocated qualified majority, but regardless of harmonisation limitations: The Presidium did not take this up and referred to a simplified continuation of Art. 133(5) TEU in the precursor rule of Art. 207(4) TFEU requiring unanimity in certain areas, CONV 685/03, p. 53, para. 1.

[35] CONV 459/02, pp. 7, 18.

[36] Cf. CONV 707/03, pp. 7, 108.

[37] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum transnationalen Wirtschaftsrecht (2009) 83, pp. 12–13 (also Tietje, Außenwirtschaftsrechtliche Dimensionen der europäischen Wirtschaftsverfassung, in: Fastenrath/Nowak (eds), *Der Lissabonner Reformvertrag*, 2009, p. 237 (244–245).

[38] CONV 727/03, pp. 53–54.

[39] CONV 727/03, pp. 53–54. The final convention draft, CONV 850/03, p. 166, Art. III-217 para. 4, included trade in cultural and audiovisual services as further cases for unanimity.

Council.[40] The fact that a closer alignment of Art. III-217 para. 5 to Art. 133 para. 6 TEU did not occur, shows only that there were no corresponding formulations in this direction. Nevertheless, however there was a definite change to the formulation and reference to internal competences was deleted. The consequences resulting from the harmonisation prohibition of Art. III-217 para. 5 for the scope of exclusive EU competence never was an explicit issue in the Convention. As a result it is evident that the genesis of this norm does not concede a clear significance in either direction. In the light of these facts it is by no means compulsory that Art. 207 para. 6 TFEU cannot be interpreted as a limitation to the exclusive EU competence. Indeed the change to the text, which dispenses with the little word "internal", rather is evidence of the interpretation presented here.

Concerning the fourth objection: As the areas in the TFEU which are subject to a harmonisation prohibition for the EU are strictly delimited, the interpretation made here will not significantly undermine the extension of competences in favour of the EU. The present interpretation of Article 207 para. 6 TFEU changes nothing regarding the fact that the EU may conclude trade agreements also in areas for which it has no competence for internal implementation. The exceptions to the EU treaty making competences comprise only those areas for which EU harmonisation is (expressly) excluded (thus the wording of Art. 207 para. 6 TFEU).

The interpretation presented here of Art. 207 para. 6 TFEU is strengthened, in addition to the wording which clearly proscribes that the EU Common Commercial Policy competence should not lead to a harmonisation which the Treaty excludes, also by the motivation for introducing a norm which should ensure that the delimitation of competence should not be at the cost of the Member States. Only if one interprets Article 207 para. 6 TFEU as a limitation to the exclusive EU competence the wording and purpose of Art. 207 para. 6 TFEU retain significance while the contrary view of Art. 207 para. 6 TFEU robs it of any effective significance and regards it as an "unnecessary clarification".[41]

On the Possibility of the Member States to Exit the WTO

However, it is a completely different question if the EU Member States on their own instigation can leave the WTO on account of the comprehensive exclusive EU competence. In terms of power politics and negotiation tactics it is not expedient because of the loss of direct influence and the resulting reduced voting weight for the EU in the WTO (even though formal voting where the number of votes is of importance has to date scarcely, if ever, taken place). Hence, for this reason there

[40] The setting of unanimity in the Council and the issue of exclusive or shared EU competence are two different matters, see also ECJ, Opinion 1/08 – *GATS*, ECR [2009] I-11129, para. 142.

[41] Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, Europäische Zeitschrift für Wirtschaftsrecht 21 (2010) 6, p. 207 (210).

have been really no relevant considerations to this end in any EU Member State. Concerning deliberations about an exit of EU Member States from the WTO as a consequence of the far-reaching EU competences, the Federal Constitutional Court in its Lisbon decision has attempted to determine a constitutional limit and even to justify a constitutional prohibition against exiting the WTO. The Court did so by refering to the competence limitations of the EU (convincingly insofar) and further by refering to the democratic necessity for the Member States' participation in the WTO negotiation processes. The latter argument fails as under the Nice Treaty Member States were already mediated through the EU Commission in the WTO institutions: In practice, it is only the EU Commission which represents the EU and its Member States in the WTO bodies.[42] The marginalisation of Member States' influence in the WTO feared by the German Federal Constitutional Court as a consequence of the competence extension through the Lisbon Treaty and the accompanying loss of participation "in the discourse on fundamental socio-political and economic policy issues"[43] would have already existed prior to the changes introduced by the Lisbon Treaty if the assumption had been correct. The fear of marginalisation of the Member States as a consequence of the enlarged EU competences ignores, however, that also in future the Commission must come to agreement in close collaboration with the Member States through the Special Committee pursuant to Art 207 para. 3 TFEU (it already pre-existed in accordance with Article 133 para. 3 ECT). As a result the exit of EU Member States from the WTO would also raise problems under EU law (here reference is made again to the areas listed earlier for which the Member States remain responsible): An obligation to exit does not exist in EU law, nor does a national constitutional prohibition against leaving the WTO. The converse argumentation of the Federal Constitutional Court can indeed only be termed breath-taking.[44] In any case it seems politically undesirable.

Result

It should be kept in mind that also the new EU law contains no obligation on the part of EU Member States to exit the WTO; there hardly is any legal basis for such obligation. The extension of exclusive EU competence in the area of Common Commercial Policy by the Lisbon Treaty does not completely remove the basis for the EU Member States' further participation in the WTO. On closer inspection,

[42] Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für europarechtliche Studien 12 (2009) 4, p. 613 (615, 617, 618 et seq.).

[43] Cf. Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 374–375.

[44] Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, Neue Juristische Wochenschrift 62 (2009) 39, p. 2867 (2868).

their participation in the WTO remains necessary even if single amendments to the WTO Agreements seen in themselves may be completely covered by EU competences. The Common Commercial Policy will continue—as is currently the case—to be driven by the Commission in close agreement with the Member States; the pivotal 133 Committee is maintained as a Special Committee under Article 207 para. 3 TFEU. Thus, the new Article 207 TFEU can be understood even in such a way that it (to a large extent) only reflects what has in any case been the WTO reality since Nice at the latest[45]: i.e. that the Commission represents the EU and the Member States. The Lisbon Treaty only added the primary law basis, as we have seen in other areas of EU law as well.

Limitations to Further Supra-Nationalisation of the External Economic Policy?

The Federal Constitutional Court did not include legislation on external trade in the list of reserved areas in which further supranationalisation can only occur if due regard is taken to the remaining domestic competences (cf. the above quote of the Lisbon decision). This could lead to the view that no limits have been set for a further extension of EU competences in this policy field either through further amendments to the EU Treaties or through an extensive interpretation of Article 207 TFEU by the ECJ. Thus the ECJ could be tempted to continue interpreting the area of investment protection beyond the frame which the Federal Constitutional Court set and, for example, to include portfolio investment in EU competence under Art. 207 para. 1 TFEU, or to take a different stance than that of the Federal Constitutional Court on the fate of the bilateral investment protection agreements already concluded by the EU Member States. The Federal Constitutional Court did not regard the continued legal existence of these national agreements as jeopardised but ruled that the EU Council would have to approve their retention on account of the "legal concept that a legally existing factual situation in the Member States will in principle not be adversely affected by a later step of integration".[46]

An additional area of conflict could arise if the ECJ, as a consequence of the far-reaching transition of exclusive competence to the EU, would question the membership role of EU States in the WTO as this would contradict the Federal Constitutional Court's emphasis on the significance of WTO membership for EU Member States.[47]

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[45] Cf. Raith, The Common Commercial Policy and the Lisbon Judgement of the German Constitutional Court of 30 June 2009, Zeitschrift für europarechtliche Studien 12 (2009) 4, p. 613 (617).

[46] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 380. This is rightfully criticized by Terhechte, Art. 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, Europarecht 45 (2010) 4, p. 517 (530–531).

[47] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 375–376.

Even though external trade is not part of the reserved areas, the Federal Constitutional Court has also determined that for external trade law the exercise of the new EU competence must be carried out in such a way that at the Member State level both in scope and in substance tasks of sufficient importance must exist in order to ensure that the prerequisites for a living democracy at the national level remain and that "the Federal Republic of Germany retains substantial national scope of action for central areas of statutory regulation and areas of life".[48] It is interesting that—apart from the above-mentioned reserved areas of sovereign Statehood—it is only the area of external trade which became subject to closer analysis by the Court regarding the question whether the changes by the Treaty of Lisbon still provides enough national scope meeting the requirements stated by the Court.[49] Regarding the statements of the Federal Constitutional Court about the new EU competence in the area of investment agreements and the future fate of the national Bilateral Investment Treaties,[50] *Matthias Ruffert* has ascertained that finally it remains unclear what the consequences would be of an even further extension of EU competences, beyond what the Federal Constitutional Court did for Art. 207 TFEU, in particular for the interpretation of the notion of investment. It was left open, in particular, if the violation of statehood and sovereignty negated by the Federal Constitutional Court in its Lisbon decision at some point (and from when?) must be viewed in a different light.[51]

Further Supra-Nationalisation in the Context of the Current Transferred Competences: About Dynamic Interpretation of Competences by the ECJ as an Action Ultra Vires in the Light of the Honeywell Order and the Rescue Package Judgement of the Federal Constitutional Court

As far as the possibility of an extension of EU competence through a broad interpretation and dynamic legal development resulting from judicial development of the law by the ECJ is concerned, the Federal Constitutional Court acknowledges—as last confirmed in the so-called *Honeywell* Order[52]—that the

[48] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 351, 370 et seq.

[49] Ruffert points to this in his contribution: An den Grenzen des Integrationsverfassungsrechts: Das Urteil des BVerfG zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1204).

[50] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 377 et seq.

[51] Cf. Ruffert, An den Grenzen des Integrationsverfassungsrechts: Das Urteil des BVerfG zum Vertrag von Lissabon, Deutsches Verwaltungsblatt 124 (2009) 19, p. 1197 (1204).

[52] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 62. See also Federal Constitutional Court, 2 BvR 687/85, BVerfGE 75, 223 (242 f); Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 351–352.

"Court of Justice is . . . not precluded from refining the law by means of methodically bound case-law. The Federal Constitutional Court always explicitly recognised this power . . . It is in particular not opposed by the principle of conferral and the structure of the association of sovereign states (*Staatenverbund*) constituted by the Union. Rather, the further development of the law – carried out within the boundaries imposed on it – can particularly also contribute in the supranational association to a delimitation of competences which does justice to the fundamental responsibility of the Member States with regard to the Treaties as against the regulatory powers of the Union legislature".

Hence, broad boundaries should be set to a dynamic competence interpretation. According to the latest statements of the Federal Constitutional Court these boundaries would be transgressed if "[f]urther development of the law . . . changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence".[53] The Member States' "constitutional law responsibility for integration" would be seriously undermined if independent expansions of competence were carried out by the ECJ to "cover areas which are counted among the constitutional identity of the Member States or depend particularly on the process of democratic discourse in the Member States".[54] On the other hand, the Federal Constitutional Court allows the ECJ methodic scope and also fallibility:

The "Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the 'uniqueness' of the Treaties and goals that are inherent to them (see ECJ Opinion 1/91 *EEA Treaty* [1991] ECR I-6079 para. 51)" are to be respected. "Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens".[55] These deliberations of the Court may be regarded as a softening of the Lisbon Judgement of the Federal Constitutional Court; at least Justice Landau, in delivering a dissenting opinion expressed this because "[t]he

[53] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 64.

[54] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 65, with reference to Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 357–358.

[55] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 66.

Senate majority goes beyond the requirement of a manifest – that is unambiguous and evident – transgression of competences and departs from the consensus on which the Lisbon judgment was based by requiring a 'sufficiently qualified' violation of competences which is not only manifest, but which also leads to a structurally significant shift in the structure of competences between Member States and a supranational organisation. Hence, the Senate majority goes beyond the goal of a structure of *ultra vires* review which is open towards European law. It ignores the major prerequisite of binding democratic legitimation on exercising sovereign power that is emphasised in the Lisbon judgment which is breached on any transgression of competences; if the exercise of sovereign power is permitted without sufficient democratic legitimation, this contradicts the core statement of the Senate's judgment of 30 June 2009".[56]

In the application of these principles the Federal Constitutional Court saw no grounds to intervene against the postulated general legal principle of the prohibition of discrimination on grounds of age as postulated by the ECJ in the *Mangold* Judgement[57]: "It is irrelevant whether the outcome found in the *Mangold* ruling can still be gained by recognised legal interpretation methods and whether any existing shortcomings would be evident. At any rate, it does not constitute a transgression of the sovereign powers assigned to the European Union by an Approving Act (*Zustimmungsgesetz*), thus violating the principle of conferral in a manifest and structurally effective manner".[58]

Hence, the Federal Constitutionl Court has lowered the standards for its review for ultra vires acts also with regard to ECJ judgements to a control of manifest transgressions of competences implying a structurally significant shift in the competence structure. This would seem to suggest that, as a result of being anchored in competence norms of the EU Treaties, a dynamic, broad interpretation of the term investment in Article 207 TFEU and different assessment of the future of the national BITs by the ECJ would not be acts ultra vires, in spite of the limitations set by the Federal Constitutional Court to the competence effects of inadmissible development of the law which do not allow to expand "existing competences ... with the weight of a new establishment".[59] With regard to its structural effects an interpretation must be seen much more critically under which the exclusive EU competences no longer would leave scope for the participation of EU Member States in the WTO. Taking a realistic view of this and in view of the political significance of an exit of the EU Member States from the WTO it is not to be expected that the ECJ will adopt such a legal interpretation.

[56] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, Dissenting opinion of Judge Landau, para. 102.

[57] ECJ, Case C-144/04, *Mangold*, ECR [2005] I-9981.

[58] Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286 para. 68.

[59] Regarding the latter Federal Constitutional Court, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286, para. 78.

The recent judgement of the Federal Constitutional Court on the rescue package is proof of retraction of the standard of review for acts ultra vires, at least in its outcome.[60] The Euro rescue package consists of three components, namely the Regulation 407/2010 based on Art. 122 para. 2 TFEU, by means of which the European Financial Stabilisation Mechanism (EFSM) was introduced, The European Financial Stability Facility (EFSF),[61] which is not based on European secondary legislation, but represents an intergovernmental agreement of the Euro States (implemented in Germany through the Euro Stabilisation Mechanism Act—StabMechG), and participation of the IMF.[62] This raises the question of an act ultra vires in regard to VO 407/2010 as it is very questionable if the legal basis of Art. 122 para. 2 TFEU is sufficient, all the more so as it is doubtful if the underlying events are really exceptional occurrences beyond the control of a Member State.[63] The Federal Constitutional Court, however, has not touched upon this problem. Instead it regarded the participation of the Federal Government in intergovernmental decisions and the participatory activities of German organs in agreements under international law also as an unsuitable object of a constitutional complaint as is the case with the intergovernmental and supra-national decisions themselves.[64] Indeed, legal acts of the EU are not acts of the—German—public administration. But in the case of lack of EU competence they could very well be legal acts ultra vires. In the Maastricht Judgement[65] and in the Lisbon Judgement[66] the Federal Constitutional Court explicitly reserved the competence to examine this. A further object for the Federal Constitutional Court's ultra vires review (which the Court, however, did not pursue) could be the purchase of government bonds by the ECB in the context of a programme for the securities market (admittedly the secondary market) which

[60] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package, NJW 64 (2011) 40, 2946*.

[61] It is a special purpose vehicle of the Euro States under Luxembourg law.

[62] For details on the content and essence of the Euro rescue package see Thym, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle, Europäische Zeitschrift für Wirtschaftsrecht 22 (2011) 5, p. 167 (168); Baumgart, Die Zurückweisung der Verfassungsbeschwerden gegen Maßnahmen zur Griechenlandhilfe und zum Euro-Rettungsschirm, Neue Justiz 65 (2011) 11, p. 450 (450–451).

[63] Sceptical Thym, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle, Europäische Zeitschrift für Wirtschaftsrecht 22 (2011) 5, p. 167 (169).

[64] Federal Constitutional Court, 2 BvR 987/10, *Euro Rescue Package*, NJW 64 (2011) 40, 2946, paras. 113 et seq.

[65] Federal Constitutional Court, 2 BvR 2134/92; 2 BvR 2159/92, BVerfGE 89, 155, para. 188.

[66] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, paras. 353–354.

could contravene Article 123 para. 1 TFEU.[67] Instead of denying the admissibility of the complaint, an ultra vires review in accordance with the *Honeywell* criteria would have been appropriate at the level of substance.[68] The Federal Constitutional Court, however, created a high admissibility hurdle in a way which is methodically questionable.

Further Supra-Nationalisation Through Treaty Changes: Identity Review

A second possibility for extending the EU competence in the area of Common Commercial Policy is through Treaty amendments. Here the above-mentioned reserved areas could be relevant if the EU was granted exclusive competence to conclude far-reaching agreements on educational or human health services which involve harmonization obligations. In the Lisbon Treaty, according to the interpretation presented here, as a consequence of Article 207 para. 6 TFEU the conclusion of agreements for example in the educational services sector a joint agreement is required if the agreement contains obligations causing the need for regulatory harmonization because such trade agreements insofar are not covered by the exclusive EU competence under Article 207 para. 1 TFEU (cf. I., *supra*). Harmonisations in the area of education collide with the commitment of the Federal Constitutional Court in the Lisbon Decision whereby the principle of democracy guarantees democratic self-determination, i.e. the nation State's primary responsibility "to assert oneself in one's own cultural area, especially relevant in decisions made concerning the school and education system, family law, language, certain areas of media regulation, and the status of churches and religious and ideological communities".[69] Obligations in international law to harmonise educational diplomas and educational content in the interest of establishing a global educational market could clearly collide with this. Such harmonisation competences thus cannot, at least not to any large degree, be transferred to the EU as part of its exclusive Common Commercial Policy.

[67] Critical remarks by Ruffert, Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011, Europarecht 46 (2011) 6, p. 842 (847) and Pagenkopf, Schirmt das BVerfG vor Rettungsschirmen?, Neue Zeitschrift für Verwaltungsrecht 30 (2011) 24, p. 1473 (1479). Also Nettesheim, "Euro-Rettung" und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion, Europarecht 46 (2011) 6, p. 765 (769–770) stressed that a constitutional court review is also necessary where there is no national legislation or national implementation measure. Explicitly he names the activities of the EFSM and the role change of the ECB as starting points for ultra vires review.

[68] Accord Ruffert, Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011, Europarecht 46 (2011) 6, p. 842 (846–847).

[69] Federal Constitutional Court, 2 BvE 2/08 et al., BVerfGE 123, 267, para. 260.

Conclusion

The new EU law hardly offers a legal basis for establishing a legal obligation of an EU Member State to leave the WTO. The extension of EU competences in the Common Commercial Policy does not touch the foundations of the Member States' further participation in the WTO. It even continues, in certain areas, to be indispensable. The Common Commercial Policy will also in future be led by the Commission in close agreement with the Member States present in the Special Committee under Article 207 para. 3 TFEU.

The limits to further supra-nationalisation of commercial policy as exclusive EU competence are above all existent in areas where the EU is bound by internal harmonisation prohibitions which are of cultural significance and thus, in the view of the Federal Constitutional Court in the Lisbon Judgement, are within the remit of the nation State's primary responsibility. The statements of the Federal Constitutional Court in the *Honeywell* judgement prompt the assumption that the interpretative guidelines developed by the Federal Constitutional Court in the Lisbon Judgement regarding Article 207 TFEU should not be regarded as absolute but leaves the ECJ room for manoeuvre as long as there is no structurally significant shift in the structure of competence allocation between the EU and its Member States to the latter's detriment. Such significant shift would occur in the case of an exclusion of EU Member States from WTO membership. Such an interpretation of EU law seems very improbable.

You'll Never Walk Alone: The European Union and Its Member States in the WTO

Michael Hahn and Livia Danieli

Introduction

Churchill is supposed to have said that on all truly important questions, the United States will come out on the right side—after having explored all other options exhaustively. That quote comes to mind when one considers the somewhat twisted history of how the Union and its Member states project their positions into the multilateral trading system, i.e. the former GATT and today's World Trading Organization (WTO): Since the mid-sixties, it was well-established that it was the Union (then the Community[1]) which was exclusively competent to represent its Member states within the GATT: As the Common Commercial Policy (CCP, today regulated in Art. 206 and 207 TFEU) covered all subject matter areas that were within the realm of the multilateral trading system, and as the exclusive character of that competence was well-established in the case law of the Court of Justice,[2] it was inconceivable that the (six, then nine, then fifteen) Member states would speak for themselves. Rather, the Union, through its competent organs, exercised the bundled rights of its Member states within the multilateral trading system. In practice, that meant that it was the Commission which spoke in the GATT Council, despite the EC not being formally a member – of course under the guidance and supervision of

[1] In the following we will use the term Union for both today's European Union and the pre-Lisbon Community.

[2] ECJ, Case 8-73, *Hauptzollamt Bremerhaven*, [1973] ECR, 897, para. 3; ECJ, Case 41-76, *Donkerwolcke*, [1976] ECR, 1921, para. 31 and 37; as well as ECJ, Opinion 1/94, [1994] ECR I, 5267 para. 22 et seq.; and EJC, Opinion 1/75, [1975] ECR 1359 (1363 et seq.).

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what is today the "Article 207 committee".[3] All contracting parties knew that state of play, which was not codified but was Court-approved state practice: when, during the presidency of the *General de Gaulle*, France requested to speak to a substantive matter in the GATT Council, the non-European chairperson adjourned, and after the meeting was reconvened, the Commission representative explained what her French colleague had wanted to say.

All of that came to a grinding halt with Opinion 1/94. There, the Court of Justice deviated from its prior view that the treaty provision regarding the Union's Common commercial policy provision was a flexible interface between the Multilateral trading system and the Union, and decided that an interpretation of the Common commercial policy that would deviate too much from the wording of what was then Art. 113 TEC would endanger the principle of conferral. Thus it held that the CCP was neither covering TRIPS[4] nor trade in services other than mode 1, which was seen to be so similar to trade in goods that it was seen as a natural extension of Art. 113 TEC. Subsequent efforts by the Commission to change the status quo after opinion 1/94 and recreate a full and quasi-automatic parallelism between the subject matters dealt with in Geneva and the exclusive competence of the Union were rejected by the Members states who liked that their role was not limited to their (very influential) membership in the Council and the special committee administering the foreign economic policy of the Union. Rather, as sovereign states, they had regained the absolute veto power that some of them are so fond of. Despite several treaty modifications since the entry into force of the WTO Agreement, the provisions of the common commercial policy were not changed according to the wishes of the Commission. While, little by little, the role of the Union was strengthened,[5] all these modifications fell short of the full parallelism between GATT affairs and CCP competence that had characterized the *status quo ante* before opinion 1/94.

But the weakening of the European Union had a price; that price is—by definition—never to be paid by the Union which remains after all a legal abstraction, but rather by its Members and their people, initially by their economic operators. These disadvantages, some obvious, some subtle but not less dangerous, were important enough for the Lords of the Treaties (Herren der Verträge), as the German Constitutional Court likes to call the Member states, to restore, for the time being, in the Lisbon Treaty the coherence between Union competence and the subject matters that are covered by the present WTO Agreement and the mandate of the Doha round. It is noteworthy, that in one of the least convincing parts of its "Lisbon

[3] Art. 207 para. 3 TFEU, in fine: "The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations".

[4] With the exception of border enforcement measures.

[5] Cf. Van Nuffel, Le Traité de Nice : Un Commentaire, Revue du Droit de l'Union Européenne, (2001) 2, p. 329.

decision",[6] the German Constitutional Court, characterizes the cooperation-based, mixed and jointly exercised membership of the Union and the Member States as exemplary.[7]

With regard to the characterization as jointly exercised membership, this statement contradicts state practice: Member states exercise enormous influence over the conduct of the Union's policy within the WTO, but this influence is not exercised in parallel to the Union's positioning, but rather within the Union structure of governance, i.e. through the Council, the "Art. 207 committee" and other Union-specific fora. However, the very fact that the powerful *Bundesverfassungsgericht* expresses that opinion, highlights that the relationship between the Union and its members within the WTO arena is less crystal-clear than students of EU law would like to think. If the Doha-Round comes to a conclusion in our lifetime, some important trading partners may also raise the question whether the very special joint membership of Union and its Members (including their, at present, 27 votes) fits into a system where even China has only three votes (the People's Republic, Hong-Kong and Macao), and the mighty US only one. As of now, that is a rather esoteric issue as the consensus principle is truly fundamental to the workings of the WTO; but in the line with the treaty text (see *infra*) some form of weighted voting may at some point, if only in very limited areas become a possibility and then, 27 voting rights as opposed to the US' lone single voting right may seem somewhat inappropriate.[8]

Both the European Union (EU) and its Member states are Members of the WTO (cf. Art. IX:1, XII:2 WTO Agreement[9]); in fact, the Union and many of its Member states are original Members. For those dealing—even sporadically—with WTO law or with the external commercial relations of the Union this is so obvious that the rather complex legal basis for the well-known fact may be forgotten.[10] It should also be highlighted that this situation is far from exemplary: in most international organizations, the Union is something of a ghost: it is rarely a full Member, and it almost never has the *de iure* exclusive internal competence[11] for the issues discussed and the solution negotiated in these fora: in fact, most international organizations reserve the right of membership to states or territories only, thus excluding *a priori* the Union from sitting on the table in its own right. Almost all international organizations were established before the Union was either established or obtained,

[6] An English summary of the decision can be found on the Court's website, http://www.bverfg.de/en/press/bvg09-072en.html.

[7] BVerGE, 2 BvE 2/08 et al., *Lisbon,* BVerGE 123, 267, para. 376.

[8] Bungenberg, Going global? The EU Common commercial policy after Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law 1*, 2010, p. 123.

[9] Agreement establishing the World Trade Organization.

[10] Herrmann, Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationale Organisation: Eine Untersuchung am Beispiel der EG und ihrer Mitgliedstaaten in der WTO, in: Bauschke (ed.), *Pluralität des Rechts*, 2003, p. 139.

[11] Whether it has that competence *de facto* on the base of Article 3, para. 2 TFEU is almost always disputed by at least one Member state, which would normally be the United Kingdom.

explicitly or implicitly, the competence to deal with the matters dealt with by the Organization. However, it seems that sometimes not too much love nor energy was lost by third countries and EU members alike to change that status quo. Thus, in 2010, the Union made the painful experience that in the UN[12] the empathy for the "exceptionalism" of the EU was in short supply: efforts to get an extraordinary observer status in the UN, corresponding to the reinforced external at least at the first attempt representation competences granted by the Lisbon treaty proved less successful than had been anticipated.[13] What this event illustrates is that the parallel membership of the Union and its Member states has indeed remained the exception rather than the norm, something one tends to forget, if one's perception of the EU as international actor is shaped by how things are done in Geneva.

The Union and Its Member States as WTO Members: The Provisions of the WTO-Agreement

Since the second part of the seventies, the EU was treated, within the sphere of GATT, in line with its internal legal status quo: the Union became the entity that used the rights that the GATT granted to its constitutive parts, its contracting parties. Hence, the Union, not its Member states, was engaged in multilateral trade negotiations, waiver negotiations, treaty modifications and in the GATT dispute settlement mechanism, were it acted both as complainant and as defender of its interests.[14]

Since the conclusion of the Uruguay round in 1993, the WTO Agreement—in contrast to the IMF or other financial or economic international organizations—recognizes explicitly the role of the Union and the peculiar parallelism between a strengthened Union and its member states which do not want to vanish as WTO Members in their own right.[15] The Uruguay Round negotiators, most notably the

[12] Draft Resolution A/64/L67 of the UN General Assembly –Participation of the European Union in the Work of the United Nations; for voting results see GA-Doc. GA/10983,14 September 2010. Finally, after months of negociations the UN General Assembly achieved to adopt on 3 May 2011 the resolution 65/276 enhancing the modalities of the EU participation in the work of the UN.

[13] Emerson/Wouters, The EU's Diplomatic Debacle at the UN- What else and what next?, CEPS Commentary, 1 October 2010, at http:/www.ceps.eu.

[14] See the extensive compilation regarding the proceedings of the E(E)C as claimant as well as opposing party until the beginning of the Uruguay Round, Petersmann, Die EWG als GATT-Mitglied: Rechtskonflikte zwischen GATT-Recht und Europäischem Gemeinschaftsrecht, in: Hilf/Petersmann (eds.), *GATT und Europäische Gemeinschaft*, 1986, p. 119 (168 et seq.); and for the whole issue also Petersmann, Participation of the European Communities in GATT: International Law and Community Law Aspects, in: O'Keefe/Schermers (eds.), *Mixed Agreements*, 1983, p. 167.

[15] Cf. Müller-Ibold, Art. 207, in: Lenz/Borchardt (eds.), *EUV/AEUV*, 2010, para. 4 et seq.; Hahn, Art. 207, in: Calliess/Ruffert (eds.), *[Commentary on] EUV/AEUV*, 2011, para. 1 et seq.; Krenzler/Pitschas, Die gemeinsame Handelspolitik im Verfassungsvertrag – ein Schritt in die richtige Richtung, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 11; Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83.

important trading powers such as Australia, Canada, Japan, the United States and emerging powers like Brazil and India, accepted to attribute to both Union and its constituent parts full membership rights, with the only caveat that the Union may at most command as many votes as it has Member states. This arrangement was certainly a proper reflection of the state of play according to opinion 1/94, which lay down a shared competence of Union and its Member states for the WTO. The idea to allocate only *one* vote to the Union would not have been completely out of question from the EU's trading partners point of view, but was not pursued. A push for such a solution would have tested how far the EU Member states would have gone to ratify vis-à-vis the quasi-universal membership of the WTO that their sovereign competences are by now, pursuant to Art. 207 TFEU, exercised by the Union and its organs.

In fairness, the "greater voting power" of the Union is, for all practical purposes, a non-issue: the practice of consensus-based decision-making, developed within the GATT contrary to the wording of the treaty, was supposed to be continued in the framework of WTO.[16] Hence, in today's WTO, no practical significance is attached to the fact that one of the trade superpowers has 27 and the other only one vote. In contrast to the *Bretton Woods* institutions and the UN, the WTO does not *practice* a weighed voting. Also, contrary to the assumption of the German Constitutional Court, the Commission casts the votes of its Members.[17]

On the other hand, the contracting parties of the WTO Agreement explicitly confirmed that the pre-existing but unused provisions on qualified majority voting should not be abolished but continue their existence as sleeping beauty (or: monster, depending on one's point of view) in the new *World Trade Organisation*:

> Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.[18]

Thereby a potential advantage is *de iure* conceded to the EU, in case the fifty-year practice of consensus would be given up. However, this change would be revolutionary and highly unlikely. However, if it was indeed about to happen, it would be almost inconceivable that the Brazil, China, India and the United States would accept to be out-voted by the EU[19]; it should be recalled that, under Art. XV WTO-Agreement, the treaty can be terminated within 6 months.

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[16] Article IX paragraph 1, WTO Agreement: "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947".

[17] Cf. Bungenberg, Going global? The EU Common commercial policy after Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law 1*, 2010, p. 123 on Art. IX WTO-Agreement: "The number of votes of the European Communities and their Member States shall in no case exceed the number of the Member States of the European Communities". Voting is a most exceptional in the WTO; normally, decisions are being taken by consensus, with the Union representatives, i.e. a representative of the Commission indicting the acceptance by the Union.

[18] Article IX para. 1, second sentence WTO-Agreement.

[19] See from practical experience Raith, The Common Commercial Policy and the Lisbon Judgment of the German Constitutional Court, ZEuS 12 (2009) 4, p. 613 (618).

Things have changed since opinion 1/94. Arguably, it has, as of today, again the full competence for all subjects matters covered by the WTO Agreements. Does this lead to an obligation of the EU member states to withdraw from WTO membership? It will be recalled that Art. XII para. 1 WTO-Agreement provides that (only) "any State or separate customs territory possessing *full autonomy in the conduct of its external commercial relations* and of the other matters provided for this Agreement (. . .) may accede to" the WTO.[20] Again, this is—in the light of the prominent role the Union plays since over 40 years within the multilateral trading system and the well-known state of affairs within the Union a non issue: Whereas "full autonomy" may certainly be interpreted in many ways, there is no doubt that the EU Member states were, at the end of the Uruguay-Round, not *fully autonomous in conducting their external commercial policy*,[21] and this would even be less true today. Thus, Art. XII WTO Agreement may only be interpreted as a condition for applicant *territories* (such as Hong-Kong), not for states, and certainly not for the original Members of the WTO. It is not an oversight that the treaty does not attach consequences to a Member losing its full autonomy in WTO affairs. Rather, the provision of Art. IX para. 1[22] WTO Agreement renders clear that its contracting parties understood that the relationship between the Union and its Member states had the potential to be fluid.

The Union Within the WTO: Status Quo from an EU Perspective

Pursuant to Article 3 para. 1 lit. e and Article 207 para. 1 TFEU, the Union has the exclusive competence to conclude 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 liberalization, export policy and measures to protect trade such as those to be taken in the event

[20] Emphasis added.

[21] Except some specific aspects: cf. Wouters/Coppen/De Meester, External Relations after the Lisbon Treaty, in: Griller/Ziller (eds.), *The Lisbon Treaty*, 2009, p. 143 (180).

[22] "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States, which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement".

of dumping or subsidies. Thus, the quasi-totality[23] of subject-matters covered and addressed by the WTO Agreement (notably in its Annex 1–3) fall in the Union's *exclusive* competence, despite the parallel membership of the Union and the Member states recognized by the WTO Agreement.

From a Union perspective, the WTO Agreement was concluded, on the orders of the Court of Justice,[24] as a mixed agreement.[25] This is so, because in 1993 Art. 113 TEC did not contain any provision on intellectual property and trade in services, and thus certain parts of the treaties covering these areas (notably TRIPS and GATS) were seen as being outside the realm of Community competence. While, therefore, EU Member states became WTO Members in their own right without intruding into the Union's sphere, both Union and Member states were reminded by the Court of Justice to practice "close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community[26]". While the Court had assumed that both the Community *and* the EU Member states would express their opinions, the Member states, maybe surprising for some, granted the Commission the authority to speak not only for the Community but also for them. Therefore the Member states expressed their positions within the framework set up by what is today Art. 207 TFEU, notably the "Art. 207 Committee".

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[23] According to Art. 207 para. 6 TFEU the exercise of the competences in the field of common commercial policy should not lead to harmonisation of legislative or regulatory provisions of the member States in so far as the Treaties exclude such harmonisation. This prohibition of harmonization could be relevant to the area of competence laid down in Article 6 TFEU which accords only the competence to carry out actions to support, coordinate or supplement the actions of the Member states. This could become relevant for certain services negotiations: if qualifications in the areas of health, culture, education and tourism would be affected (for example, with a view to create systems of equivalence) this could require Member states' involvement; cf. on Art. VI: 4 GATS cf. Pitschas, Allgemeines Übereinkommen über den Handel mit Dienstleistungen, in: Priess/Berrisch (eds.), *WTO Handbuch*, 2003, para. 127; Krajewski, *National Regulation and Trade Liberalization in Services*, 2003, p. 124 et seq. and 129. Article 207, para. 6 TFEU is seen by some authors as implying that in areas mentioned in Article 6 TFUE the Union should not negotiate nor conclude any agreement without the participation of the Member States (cf. Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO?, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 161). The possibility provided by Article VII GATS to base the mutual recognition of education or experience obtained, requirements met, licences or certifications granted in particular country upon an agreement (see Pitschas, Der Handel mit Dienstleistungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 99) would meet similar restrictions.

[24] ECJ, Opinion 1/94, [1994] ECR I, 5267.

[25] Specifically with regard to the WTO-Agreement, Kuijper, International Responsibility for EU Mixed Agreements, in: Hillion/Koutrakos (eds.), *Mixed Agreements Revisited*, 2010, p. 208 (213 et seq.) and more generally see O'Keeffe/Schermers (eds.), *Mixed Agreements*, 1983.

[26] ECJ, Opinion 1/94, [1994] ECR I, 5267. para. 108.

Despite the Commission being in practice the sole official spokesperson for the "EU side", all EU Member states are Members of WTO and hence represented in all organs of the organisation, as all of them are plenary organs open to each and every member and not limited to a select group.[27] Of course, the duty to cooperate to ensure the unity of the international representation of the Union would limit the "*marge de manoeuvre*" of Member states to take up autonomously determined positions contradicting those of the Union.

Maintaining Parallel Membership from the Union's Point of View?

Can the Union request its Member states to end or suspend their WTO membership? And—should it do so? Putting aside certain limitations of the EU competence pursuant to Art. 207 para. 6 TFEU in the field of trade in services (because of the reciprocal recognition of professional qualifications reserved, arguably to Member states) and assuming for the moment that the Union has been conferred with the exclusive competence for *all* subject-matter areas dealt with in the WTO, Art. 351 TFEU seems to be the pertinent provision for answering those questions.[28] While this provision explicitly only applies to treaties concluded by Member states *before* joining the Union, it has been used for situations, in which the Member states entered into international obligations at a time when they had not yet conferred the pertinent competence on the Union, and were thus still entitled to act on their own. Opinion 1/94 is a Court of Justice issued certification that the Member states had, as matter of law, to participate in order for the EU and its Member states to remain relevant actors on the multilateral trade arena, as the Union would not have had the competence to do it alone, due to the then lacking competences in the fields of services and intellectual property.[29]

[27] With regard to informal fora (such as several Mini-Ministerials convened in order to jump-start the Doha-Round), only the EU takes part.

[28] Art. 351 TFEU reads: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States".

[29] Council Decision 94/800/EC of 22 December 1994, OJ L 336 of 23 December 1994, p. 1.

According to Art. 351 para. 2 TFEU, Member states "shall take all appropriate steps to eliminate the incompatibilities established" between the agreements they concluded and the new status quo; this may include, as *ultima ratio,* the duty to terminate an international treaty.[30] However, it is important to realize that a Member state's *lack of competence* (which would render every *new* treaty concluded by such Member states a violation of EU law) would *not* appear to be an incompatibility in the sense of Art. 351 TFEU. If that was the case, *each* and every older agreement would have to be terminated—in line, of course, with applicable treaty provisions. This is the opposite of what Art. 351 TFEU is about: this provision aims at *grandfathering* the agreements concluded prior to the Union's obtaining the competence, provided they do not clash with the requirement of unity of the Union's external representation. The test is thus not whether the "inherited" treaty could be concluded today, and not even whether it is, from a policy perspective, optimal that it exists. Rather, the only reason for being *obliged* to terminate such grandfathered agreements is, pursuant to Art. 351 TFEU, a specific and concrete disadvantage for the Union position. In other words: there is no legal imperative to end previously concluded agreements of EU Member states with their WTO partners, unless the joint membership represents real and present danger of the exercise of the European Union's competence

Luckily, there is considerable practice post-Nice and pre-opinion 1/94 (i.e. constellations where arguably the situation was exactly as it is today: exclusive competence for everything dealt with under GATT/WTO, but joint membership of both Member states and EU) that would allow to evaluate whether such a conflict exists.[31]

The Practice of Parallelism in a Mixed Multilateral Agreement

The representation of the Union and of the Member states in the framework of a mixed agreement is a topic that has attracted considerable interest in practice and doctrinal writing during the last thirty years.[32] It would go beyond of the scope of

[30] Cf. Terhechte, Artikel 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, EuR 45 (2010) 4, p. 517 (524) with further references.

[31] Cf. the Joint Conclusions of the Advocate General Tizzano delivered on 31 January 2002, Case C-466/98, *Commission vs. United Kingdom*; Case C-467/98, *Commission vs. Denmark*; Case C-468/98, *Commission vs. Sweden*; Case C-471/98, *Commission vs. Belgium*; Case C-472/98, *Commission vs. Luxembourg*; Case C-475/98, *Commission vs. Austria*; Case C-476/98, *Commission vs. Germany*, [2002] ECR I, 9427, para. 113.

[32] Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft*, 1986; Arnold, Der Abschluss gemischter Verträge durch die Europäischen Gemeinschaften, AVR 19 (1981) 4, p. 419*;* Ehlermann, Mixed Agreements – A List of Problems, in: O'Keefe/Schermers (eds.), *Mixed Agreements*, 1983, p. 1; Sattler, *Gemischte Abkommen und gemischte Mitgliedschaften der EG und ihrer Mitgliedstaaten. Unter besonderer Berücksichtigung der WTO*, 2007; Hoffmeister, Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States, in Hillion/Koutrakos (eds.), *Mixed Agreements Revisited*, 2010, p. 249.

this essay to analyse in detail case law and state practice concerning the conclusion and implementation of what has so ably been named "mixed agreements". For present purposes, it is worth indicating that regardless of some practical difficulties due to the case law[33] the parameters of the collaboration between the Union and the Member states are well established.[34] In order to make the status quo completely transparent to third states, the Union has developed the habit to occasionally notify to fellow contracting parties of multilateral agreements documents containing the pertinent demarcation lines between the competences of the Union and the Member states.[35] Despite the recognition that mixed agreements are a function of the fact that Union and Member states are responsible for different segments of an international agreement, the 28 parties involved on the European side are under the obligation to coordinate to ensure that the European side is speaking with one voice.[36] Internally, this is sometimes reflected in inter-institutional agreements.[37] In a nutshell: while the management of mixed agreements is still diplomatically and legally a very complex undertaking, the practice works, by and large, well. It would seem a weak proposition to claim this phenomenon to be an "incompatibility" in the sense of Art. 351 para. 2 TFEU.

[33] Cf. the excellent German commentary literature and more recently the above mentioned opinions: ECJ, Opinion 1/94, [1994] ECR I, 5267; ECJ, Opinion 1/03, [2006] ECR I, 1045 – Lugano-Convention; and the decision ECJ, Case C-25/94, [1996] ECR I, 1469 – *Commission vs. Council (FAO)*.

[34] Cf. WTO-Doc. WLI/100 of 10 December 2007, to be found, inter alia, at http://www.wtocenter.org.tw/SmartKMS/do/www/readDoc?document_id=89441: "THE PRESIDENT OF THE COUNCIL OF THE EUROPEAN UNION,

HAVING regard to the Treaty establishing the European Community, and in particular Article 133(5) in conjunction with the first sentence of the first subparagraph of Article 300(2) and the second subparagraph of Article 300(3) thereof,

NOTIFIES by these presents the acceptance, by the European Community, of the Protocol amending the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), done at Geneva on 6 December 2005,

CONFIRMS, in accordance with Article 300(7) of the Treaty establishing the European Community, that the Protocol will be binding on the Member States of the European Union".

[35] Cf. the declaration related to the World Customs Organization in OJ 2007 L 274/13; on the UN Convention Against Transnational Organized Crime, OJ 2004 L 261/115; to the Codex Alimentarius OJ 2003 L 309/17; to UNCLOS OJ 1998 L 179/1.

[36] ECJ, Case 1/78, [1978] ECR 2151, para. 34–36; ECJ, Opinion 2/91, [1993] ECR I-1061, para. 36.

[37] See the very instructive Code of Conduct between the Council, the Member States and the Commission for the participation of the Community and its Member States in meetings regarding the implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://register.consilium.europa.eu/pdf/en/07/st05/st05914.en07.pdf.

The Practice of Parallelism with Regard to the WTO Dispute of Settlement Procedure

However, a final determination of that issue may require an analysis of how the Union fares with parallel membership in the context of the Dispute Settlement mechanism. After all, this is today, more than ever, the part of the WTO that has remained its biggest success. If the parallel membership of the Union and the Member states in the WTO dispute of settlement system would lead to an interference with the effective exercise of the Union's exclusive competence conferred by Article 207 TFEU, one would possibly have to reconsider the issue.

It should be highlighted that there is not a single case in which only a Member was on its own party to a dispute settlement procedure. There are cases, in which the Union and all or some of the Member states participated, notably in the field of TRIPS, before the Treaty of Nice added IP to the CCP. In other cases, claimants undertook[38] to divide (and conquer) the Union camp by nominating both the Union and some of its Member states collectively and individually as opposing parties. In the proceedings *European Communities—Customs Classification of Certain Computer Equipment*[39] the United States claimed that tariff bindings under Art. II GATT had been violated[40] and attacked, together with the Union, the United Kingdom and the Republic of Ireland: the issue was whether *Local Area Network (LAN)* equipment would fall into the tariff headings for phone equipment or rather into the categories for personal computers equipment. Of particular importance was the fact that customs laws are—like the CCP proper—an exclusive competence of the Union, however, without any implementation competences attached: it is the Member states and their specialised agencies (such as the notorious Hauptzollämter) which execute the law. This separation of competencies is difficult to understand for most third countries; even in a federal state like the US, law creation and implementation tend to be not to be separated. In the *LAN* case, the US named in its complaint the Union, the Republic of Ireland, and the U.K. as Members complained against, despite the fact that the tariff binding in question (Art. II: 7 GATT) had been entered into by the Union,[41] and the Union alone, as GATT issues are an exclusive competence of

[38] Tietje, Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO ?, in : Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, 161 (165 et seq.) indicates other proceedings: Report of the Panel, *European Communities – Trade Description of Sardines*, WT/DS231 (Panel Report on 7.78, Appellate Body Report at para. 199) and Report of the Panel, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301 (Panel Report on 7.32); see also pp. 170-172.

[39] Report of the Panel, WT/DS/62, 67, 68/R, *European Communities – Customs Classification of Certain Computer Equipment ("LAN"-case)*, adopted on 22 June 1998.

[40] Report of the Panel, *European Communities – Customs Classification of Certain Computer Equipment ("LAN"-case),* WT/DS/62, 67, 68/R, on 4.12 et seq.

[41] The EU being a Customs Union, tariffs of the Member states are excluded.

the Union since 1957. The panel accepted the argument[42] that the scenario at hand was a case of "executive federalism", in which the Member states administrators where acting *for* the Union, which, in turn, would have to assume the responsibility for possible infringements of the WTO-Agreements. However, the Panel avoided to reject explicitly the US naming of three parties as Members complained against; it merely stated that the issue was the possible violation of tariff bindings pursuant to Art. II GATT by civil servants working for the Union.[43]

In *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff* [44] the ambiguity of the *LAN* Panel, which had been viewed as a minor, but nevertheless irritating nuisance, made way for a view of the EU more in line with present-day EU constitutional law:

> Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its Member States which in such a situation act as de facto organs of the Community, for which the Community would be responsible under WTO law and general international law in general.[45]

This is where the law stands today, as the Appellate Body had so far no occasion to express itself on the matter; the quoted position thought was picked up by the in *European Communities—Selected Customs Matters*[46]:

> . . .The Panel concludes that the authorities in the Member States – including customs authorities . . . and independent bodies, such as a judicial authority. . . – act as organs of the European Community, when they review and correct administrative action taken pursuant to EC customs law.

Thus, according to the state of play in the WTO Dispute settlement mechanism, the parallel membership of the Union and its Member states do not diminish the Union's role (and recognition) as the sole representative of the EU interests. Therefore, we would submit that the requirement of an "incompatibility" in the sense of Article 351 para. 2 TFEU does not exist in the context of the WTO's dispute settlement mechanism, thus making it impossible to construe a legal obligation of the Member states to terminate their membership.

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[42] Report of the Panel, *European Communities – Customs Classification of Certain Computer Equipment ("LAN"-case)*, WT/DS/62, 67, 68/R, on 4.9-4.11, 4.15.

[43] Report of the Panel, *European Communities – Customs Classification of Certain Computer Equipment ("LAN"-case)*, WT/DS/62, 67, 68/R, on 8.15-8.17.

[44] Report of the Panel, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff*, WT/DS/174/R, adopted 20 April 2005.

[45] Report of the Panel, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff*, WT/DS/174/R, on 7.98.

[46] Report of the Panel, *European Communities – Selected Customs Matters*, WT/DS/315/R, adopted 11 December 2006, on 7.553 et seq.

Never Change a Winning Team

Apart from the question whether the status quo of parallel membership is, as a matter of law compatible with WTO and EU law—which we answered in the preceding paragraphs—decision-makers will have to address the question whether it makes good sense from a policy perspective to keep things as they are. After all, all EU states apart from Luxembourg and possibly Sweden look at a difficult budget situation, and saving the money for the 27 Member states missions to the WTO in Geneva would be nothing to sneer at.

We submit that there are at least two good reasons to keep the unusual, expensive, and messy status quo as it is: We already pointed out that despite the consensus based WTO treaty practice, the 27 votes accorded to the Union may prove to be not completely irrelevant. Whereas the right to (at present 27, soon 28) votes pursuant Art. IX WTO Agreement might not be worth much, they might be worth something. At present there seems to be no downside for keeping it, so why throw it away?

However, such primitive good old-fashioned opportunism is not the most important aspect. Rather, the history of the CCP, which we only sketched here, shows that the relationship between Union and Member states is fluid. This is very visible at the time of this writing, when talks of *Grexit* and *Umbrellas* are part of our daily news. It is a truism also reflected in the treaty of Lisbon: Art. 48 TEU clearly allows that powers conferred today may be reclaimed by the sovereign Member states tomorrow.[47] Indeed, the Lisbon treaty simplified the preconditions to a possible change: By adapting Art. 207 TFEU to the present needs in the WTO, the Member states subscribed to the Court's view expressed in opinion 1/94 that Art. 207 TFEU is not a living, breathing interface to the world's (multilateral) trade regime(s), thus allowing the Union always be the representative of the Union's trade interests, but rather that the CCP is a normal conferred power that must be interpreted with due regard to the protection of the Member states' sovereignty and less with a view to maximize the Union's international presence. Thus, the present parallelism between Art. 207 and the subjects covered by the WTO Agreement is static and lacks the dynamism that it used to have due to the Court's interpretation of the legal fundament of the CCP, then Art. 113 TEC. Thus, if the scope of Article 207 TFEU would be reduced or if the WTO would receive added competences, there would be an urgent need for having the Member states back in a WTO membership role. In that case, it would not seem in the best interest to have them leave the WTO first.

[47] See Declaration No. 18 to the TFEU in relation to the delimitation of competences, *in fine*: "Equally, the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, *including* either to increase or *to reduce the competences conferred on the Union* in the said Treaties" (emphasis added).

Furthermore, it should be recalled that the Lisbon treaty explicitly recognizes the right of Member states to withdraw from the Union: Art. 50 TEU reflects the Member states' keen interest in not only safeguarding, but *visibly* safeguarding their position as sovereign states and legal entities of public international law, despite—maybe: because of—the still increasing integration of formerly national policies. The Member states cling to the notion that they are the Lords of the Treaties and the masters of their destiny. This includes very much the wish to be visibly taking part in the (highly imperfect) global governance of today, which takes place at formal and informal gatherings of states. By excluding the Member states from the WTO, the option of leaving the Union is rendered more burdensome (as it would already be), and thus could be viewed as a disloyal attempt to render the option contained in Art. 50 TEU less feasible.

To sum up: The peculiar parallel double membership of the Union and its Member states in the WTO is not harmful for the Union as a matter of law; to the contrary, it is slightly advantageous for the Union and its members as things stand today, and, more importantly, is necessary to not unduly limit the freedom of choice restated in the TFEU, including the rights pursuant to Art. 48 and 50 TEU. It follows that the Union would be violating its fiduciary duties vis-à-vis its members to undertake any steps that would endanger the present status of EU members in the WTO, as the parallel membership does not compromise the Union's effective use of its exclusive competence.

A Role for the Member States in the Conclusion of the Doha Round?

All areas currently negotiated in the Doha Development Round are covered by the exclusive competence provided for in Article 207 TFEU. Therefore a participation of the Member states is, as a matter of EU law, excluded unless the Doha Round would extend the areas of WTO law to subject matter areas beyond the scope of what is covered by Article 207 TFEU (or by Article 3 paragraph 2 TEU). As this seems highly unlikely, a participation of the Member states at the Doha Round Final Act would constitute an infringement of the basic commitment of Member states to not act within the realm of the exclusive competences of the Union, provided this would be attempted without prior authorization by the Union.

Article 2 para. 1 TFEU explicitly allows Member States to legislate and adopt binding acts even in the areas of exclusive competence of the Union, if the latter grants *ad hoc* the authorization to do so. With regard to Art. 2 para. 6 TFEU[48] this

[48] "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area".

re-empowerment should follow the proceedings provided by Article 207 TFEU.[49] Hence, it would seem advisable to pass a pertinent regulation empowering the Member states to fully use their rights as members of the WTO when participating in the in the Final Act of a Round of multilateral trade negotiations.

In fact, the question arises to what extend the Union's right to re-empower the Member states to benefit fully from their WTO membership could even be an obligation, based on principles of loyalty. Several arguments point into that direction: it seems that the German Constitutional Court took the position that if the Treaty of Lisbon would not allow Germany to participate, albeit in a coordinated way, in the works of the WTO, it would be unconstitutional and could thus not be ratified by Germany. In other Member states, similar positions exist. This argumentation would seem unpersuasive as a matter of EU law, and even from the perspective of German constitutional law, but they are the state of play in many Member states.

In light of the principle of loyal cooperation enshrined in Art. 4 para. 3 TEU, it would seem that the Union would be well advised to allow Member states to use their membership rights with regard to modifications of the WTO Agreement. We already pointed out that the WTO membership of the Member states does not harm the Union. On the contrary: in individual cases, the availability of more votes could even be an advantage. The participation of member states in the conclusion of a Multilateral trade round would not impede the Unions full enjoyment of its exclusive competence, provided it was pre-authorized by the Union. On the other hand, a refusal to allow the participation of Member states in WTO modification procedures could cause constitutional crisis in several Member states, as it would be, for example in the case of the Bundesverfassungsgericht, an indication of a loss of sovereignty not any longer compatible with the preservation of statehood mandated by the German constitution. Avoiding such a crisis seems a good enough reason to grant authorization to take part in the ratification of the WTO Agreement modifications. It seems that the Commission knows what fights to pick. We dare predict that this will not be one of the occasions.

[49] On this and concerning this problems, Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, EuR Beiheft 1/2010, p. 193 (199).

Part III
The New Institutional Framework of the CCP

New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy

Markus Krajewski

Introduction

The Lisbon Treaty's reforms of the constitutional basis of the common commercial policy fundamentally changed the institutional balance in this policy area. One of the most important shifts as far as democratic legitimacy is concerned is the greater role of the European Parliament (EP). The increased significance of the parliament has even been called the most important change in the Lisbon Treaty.[1] The present contribution examines the new responsibilities and functions of the EP in detail, with the central question being whether and to what extent these reforms have led to an improvement in the democratic legitimacy of the common commercial policy and a reduction in the democracy deficit. The shift in institutional balance when it comes to common commercial policy may be interesting in its own right from an interdisciplinary social science perspective. However, the results of the EU reform process reached by the Lisbon Treaty, must be primarily assessed according to whether they have contributed towards an improvement in the transparency, efficiency and democratic legitimation of the Union. These aims which were set down

This chapter is an updated version of my chapter in: Bungenberg and Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, which partly built on my remarks during a consultation hearing of the European Parliament's Committee on International Trade on 1 December 2010.

[1] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5; Equally postive is Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209.

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by the European Council in the Laeken[2] Declaration are the "raison d'être" of the Lisbon Treaty.

This paper commences with a brief illustration of the basic challenges and problems of the democratic legitimation of foreign-political trade and international regulation. The changes in the role of the European Parliament are not only be assessed against the background of the general aims of the reform process; additionally they are compared with the traditional parliamentary tasks and competencies in respect of foreign relations on a national state level. Democratic legitimation can always only be assessed relatively and not in accordance with absolute standards. Following on from the theoretical remarks in respect of the Parliament, the most important changes in the competencies and tasks of the European Parliament will be outlined. Next the resulting consequences for both the intra- and inter-institutional structure will be examined, and finally, the essay discusses if there have been or will be any commercial policy effects following the changes to this structure, and what these effects are.

Parliamentary Control and Democratic Legitimation of Foreign Affairs

The theory and practice of foreign policy is characterised by a dominance of the executive. In European political philosophy this tradition can be traced back to John Locke who wrote already in 1690:

> The [external] power is much less capable to be directed by (...) positive laws than the executive and so must be necessarily left to the prudence and wisdom of those whose hands it is in.[3]

The quotation expresses two aspects: firstly it confirms that foreign policy must be driven by the executive, and secondly strictly binding foreign policy to the rule of law is considered to be detrimental. Both the lesser importance of the parliament and the diminished obligation to be bound by the rule of law characterise the constitutional reality of the Member States of the European Union to this day.

For example, the German Federal Constitutional Court emphasises repeatedly that the German Basic Law provides the federal government with considerable room for manoeuvre of their own determination when it comes to the regulation of foreign affairs.[4] This has been the justification for consistently denying a greater parliamentary involvement in the organisation of foreign relations where this would go beyond the right to consent to international treaties pursuant to Art. 59 (2) of the

[2] European Council, Declaration of Laeken on the future of the European Union from 15th December 2001, on the internet: http://european-convention.eu.int/pdf/lknde.pdf.

[3] Locke, *Two Treatises of Civil Government*, 1690, Book II, Chapter XII, para. 146-147.

[4] See e.g. the Federal Constitutional, 2 BvE 5/07 (*Military deployment at the G8 summit in Heiligendamm*), BVerfGE 126, 55-77.

German Basic Law.[5] The fact that there is little parliamentary involvement and legal control is therefore rightly termed a *Lockean dilemma* by Ernst-Ulrich Petersmann in European constitutional teaching and practice.[6]

The minimal parliamentary involvement in foreign relations and the respective constitutional provisions lead to a situation whereby the democratic legitimation of international treaties is essentially lower than that of domestic legislation.[7] This is first of all due to the fact that the parliamentary legislator has no right to initiate legislation in respect of international treaties.[8] Contrary to law-making at the domestic level, the parliament is unable to actively propose the negotiation of a treaty or the accession to an existing treaty. Equally as important is the fact that the parliaments have no formal possibility to influence the content of international treaties. They have no formal right to propose amendments during negotiations, nor do they have the possibility to only consent to the signing of the treaty subject to modifications, restrictions or conditions. Instead the signed treaty is regularly presented to parliaments as a "fait accompli".[9] This applies particularly in the area of trade policy.[10]

The little formal influence is reinforced by the difficulty of parliaments in practice to obtain the necessary information which would enable a continual accompaniment and scrutiny of the government during treaty negotiations. Added to this is a lack of foreign economic-political interest on the part of the parliamentarians, as little significance for elections is attached to this subject matter. It can also be seen that in parliamentary systems of government the rejection of an international treaty which has been negotiated by the government leads to prohibitively high opportunity costs as a rejection effectively amounts to a vote of no confidence in the government which in turn has the support of the parliamentary majority. For this reason, in political practice in parliamentary systems of government, the rejection of an international treaty can practically be ruled out. This finding is relevant to the extent that the relationship between the parliament and the executive at the EU level is essentially different than in the parliamentary systems of government on a member-state level.[11]

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[5] Federal Constitutional Court, 2 BvE 1/03, (*AWACS deployment*), NJW 2008, 2018 (2021) = BVerfGE 121, 135; cf. also Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt*, 1986, p. 24 et seq.

[6] Petersmann, National Constitutions, Foreign Trade Policy and European Community Law, EJIL 3 (1992) 1, p. 1 et seq.

[7] Krajewski Democratic Legitimacy and Constitutional Perspectives of WTO Law, Journal of World Trade 35 (2001) 1, p. 167 et seq.

[8] Treviranus, *Außenpolitik im demokratischen Rechtsstaat*, 1966, page 36 et seq.

[9] Tomuschat/Schmidt (eds.), *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, VVDStRL 36 (1978), page 28; Zampetti, Democratic legitimacy in the World Trade Organization: the justice dimension, Journal of World Trade 37 (2003) 1, 105 (105).

[10] Howse, How to Begin to Think About the "Democratic Deficit" at the WTO, in: Griller (ed.), *International Economic Governance and Non-economic concerns*, 2003, page 79 et seq. (84).

[11] On this see "Evaluation from the perspective of democracy theory" below.

Parliamentarisation of the Adoption of Autonomous Trade Policy Instruments Through the Introduction of the Ordinary Legislative Procedure

In order to more precisely define the role of the European Parliament in common commercial policy and the consequences which result from this in respect of the question of democratic legitimation, it makes sense to differentiate between the adoption of autonomous instruments and the negotiation and conclusion of international agreements.[12] Until the Lisbon Treaty came into force, regulation in the area of autonomous commercial policy was based on an institutional model which has hardly been changed since the Treaties of Rome. Pursuant to Art. 133 (2) EC Treaty (Nice) the Commission made suggestions to the Council on how the common commercial policy could be carried out. The regulation process did not provide for any parliamentary participation. As such the common commercial policy belonged to one of the increasingly rare areas in which the European Parliament formally had no competencies.

The Lisbon Treaty puts an end to this anachronism and introduced the ordinary legislative procedure for autonomous commercial policy pursuant to Art. 295 TFEU. This means that the Parliament has become a co-legislator. From a European legislative perspective, the parliamentarisation of this policy area is at the same time a normalisation, as at the latest since the Lisbon Treaty the ordinary legislative procedure is to be seen as the standard procedure for European legislation.

Since the Lisbon Treaty, regulation in the area of commercial policy therefore corresponds to the standard legislative procedure in the EU. This has not remained without consequences for the practical work of the parliament: the Committee on International Trade (INTA) which (once again) has existed as an independent committee since 2004[13] now has the function of a legislative committee and is involved in a number of legislative procedures. This raises the question whether the committee of currently 31 members should not perhaps be enlarged in the next term, also in order that a sufficiently large number of rapporteurs are available for the numerous legislative procedures.[14]

Looking at the wording of Art. 207 (2) TFEU it is questionable what meaning is given to the formulation that the ordinary legislative procedure should only be applicable to "measures defining the framework for implementing the common commercial policy".[15] It appears to be undisputed that this cannot mean the passing

[12] Herrmann/Michl, Grundzüge des europäischen Außenwirtschaftsrechts, ZEuS 11 (2008) 1, page 81 et seq. (93).

[13] Between 1999 and 2004 foreign trade came under the remit of the Committee for Industry, External Trade, Research and Energy.

[14] I am grateful to Dr. Andreas Maurer from the Secretariat of the Committee on International Trade for his comments on this point.

[15] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, page 12.

of individual commercial policy measures, even if these are passed in the form of a Regulation, as would be the case with trade defence instruments. Not the form but the function of the measures is decisive. Without question the basic regulations for the autonomous commercial policy, i.e. the import and export regulations as well as the framework regulations for the trade defence instruments fall within the scope of application of Art. 207 (2) TFEU.[16] It is, however, unclear whether "specific" regimes, for example for the export of goods of cultural heritage[17] or the trading of goods which can be used as instruments of torture[18] are also covered by this. A further question concerns the form and the procedure for individual measures and legislative acts. Depending on whether or not these can continue to be passed in an individual case on the basis of Art. 207 (2) TFEU, the question is whether this amounts to delegated legislative acts pursuant to Art. 290 TFEU or implementing acts pursuant to Art. 291 (2) TFEU.[19] The influence of the parliament on the respective legislative act depends on the form of the measure and in what procedure it was passed.

Parliamentarisation of International Trade Agreements Through Reporting Obligations and Rights of Approval

Besides the strengthening of the parliament as a co-legislator in the area of autonomous commercial policy, the growth of power concerning the negotiation and conclusion of international trade agreements is of considerable importance. According to the relevant provisions of articles 133 and 300 EC Treaty (Nice), in the area of commercial policy the European Parliament did not even have the typical parliamentary right of consenting to or rejecting international treaties. International agreements were negotiated by the Commission on the basis of a mandate issued by the Council in consultation with a special committee of the Council (the so-called "133 committee"). The agreement was accepted by the Council on the advice of the Commission. Art. 133 EC Treaty did not provide for any right of involvement of the parliament, but referred instead to Art. 300 EC Treaty, the general provision on the conclusion of international treaties, according

[16] Müller-Ibold, Art. 207 TFEU, in: Lenz/Borchardt (ed.), *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5th Edition, 2010, paragraph.

[17] Regulation (EC) No. 116/2009 of the Council from 18th December 2008 on the export of goods of cultural heritage.

[18] Regulation (EC) No. 1236/2005 of the Council from 27th June 2005 concerning the trading of certain goods which could be used to carry out the death penalty, for torture, or other gruesome, inhuman or degrading treatment or punishment.

[19] On this see the suggestion of the Commission for a regulation defining the general rules and principles according to which the Member States control the of exercising of implementing powers by the Commission, KOM(2010) 83 finally and the corresponding report of the European Parliament from 6.12.2010, A7-0355/2010 (Rapporteur József Szájer).

to which the consent of the European Parliament was only envisaged for a small number of treaties, amongst others such treaties which would have led to the creation of a new institutional framework.[20] Moreover, the parliament did not formally participate in the negotiations; it merely had certain rights to information on the basis of an inter-institutional agreement.

The Lisbon Treaty led to a parliamentarisation and a normalisation of the negotiation and conclusion of international trade agreements while the over-all structure remains largely untouched, with the Commission having the sole right to propose and conduct negotiations and with the Council's authorisation to conduct negotiations and its competence to conclude them.[21] However, the procedure has been changed in two significant aspects to the benefit of the parliament.

Reporting in Accordance with Art. 207 (3) TFEU

On a primary law level, Art. 207 (3) 3 TFEU now provides that the Commission must report on international negotiations to both the special committee (since the Lisbon Treaty: the Trade Policy Committee) and the European Parliament. Both the wording and the purpose of this provision illustrate that the Parliament and the Commission must be treated equally in this respect. No justification for the unequal treatment when it comes to the providing of information can be found in Art. 207 (3) TFEU. The Commission has also promised to the European Parliament that it will apply equal treatment accordingly.[22] This is also provided for in the framework agreement between the Commission and the European Parliament of 20 October 2010.[23]

The right to receive reports goes beyond the mere indication of the status of the negotiations. Indeed Art. 207 (3) 3 TFEU covers all forms of information, in particular the forwarding of documents unless the Commission does not wish to forward these at all for strategic reasons relating to the negotiations or for other reasons which fall under its political discretion.

Political discretion which amounts to discrimination between the Council and the Parliament does not exist, however. In fact any differentiation between the two organs in respect of reporting would be an infringement of the TFEU. Annex 2 of

[20] The consent of the European Parliament to the Agreement Establishing the World Trade Organisation occurred on this basis.

[21] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5; Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (217).

[22] Letter from de Gucht, Member of the European Commission, to Professor Vital Moreira, MEP, from 26th October 2010.

[23] Framework agreement on the relationship between the European Parliament and the European Commission, paragraph 23 et seq, OJ 2010, L 304/47.

the new framework agreement contains adequate provisions concerning information that the Commission wishes to treat confidentially. Also the practice of the Commission of informing the Committee on International Trade about the status of negotiations in a non-public session is appropriate to prevent certain effects of publication.

The basic equal treatment of the Parliament and the Trade Policy Committee in respect of reporting has a significant effect on parliamentary practice.[24] Whilst the Committee on International Trade (INTA) of the Parliament meets on average once a month for a day and a half, the meetings of the Trade Policy Committee generally take place weekly. In addition, it has further topic-specific working groups, for example in the areas of services and investments. As such the Trade Policy Committee can acquire and process an unequally large amount of information. In contrast, the absorption capacity of the European Parliament needs to be further improved. The INTA committee will therefore also have to develop a new practice in this regard and possibly meet more often. Besides more regular meetings also the creation of sub-committees in accordance with Art. 190 Rules of Procedure of the European Parliament could be considered, for example in the areas in which the Trade Policy Committee also has working groups[25] or for the purpose of negotiating bilateral trade agreements.

In view of this, Art. 207 (3) 3 TFEU goes further than constitutionalising the previously existing information practice. Up until now it was neither ensured, nor generally recognised that the Parliament and the Trade Policy Committee were placed on equal terms by the Commission in respect of the information. The Parliament could not be sure that it had the same knowledge as the Trade Policy Committee. The inequality of power between the Parliament and the Trade Policy Committee connected with the (at least potential) asymmetry of information is levelled out by the Lisbon Treaty. As soon as and to the extent that the Parliament can as closely as possible match its ability to acquire and process information to that of the Trade Policy Committee, this effectively amounts to equality with the committee in this respect and also means an increase in influence over it.

It must be noted, however, that the Lisbon Treaty does not provide for equality in respect of a further involvement in the negotiations. The obligation of the Commission to carry out negotiations pursuant to Art. 207 (3) 3 TFEU "in consultation" with the Trade Policy Committee was deliberately not extended to the Parliament.[26]

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[24] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008. Available at: http://www.sieps.se, page 5.

[25] Working groups of the Trade Policy Committee exist for the areas of steel, textiles and other industry sectors, services and investments and mutual recognition. See Council of the European Union, List of Council preparatory bodies, 12319/10, 20th July 2010, page 3.

[26] Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 12, considers this limitation to be practically irrelevant as the Parliament would gain "significant" rights of approval. However, whether this assessment turns out to be correct remains to be seen.

The "masters of the treaties" intended to strengthen the Parliament in the common commercial policy but did not want to reach complete equality between the Council and the Parliament. As such, in the course of negotiations the Commission is only responsible to the Council in the form of the commercial policy commission and only obliged vis-a-vis the Council to consider its positions. The Parliament will only encounter this privilege of the Council, provided for by primary law, in the political sphere. The newly introduced obligation to consent to trade agreements offers leverage to this end.

Consent to International Agreements Pursuant to Art. 218 (6) TFEU

Since Art. 207 TFEU does not contain specific provisions for the involvement of the European Parliament in the conclusion of international agreements, pursuant to Art. 207 (3) 1 TFEU the general provisions of Art. 218 TFEU apply. In paragraph 6 this article provides for two forms of participation of the European Parliament in the conclusion of international agreements. The consent of the Parliament is required for a number of agreements or types of agreements expressly stipulated in Art. 218 (6) 2 a TFEU. The Lisbon Treaty partly continues the existing practice in this regard. For all types of agreements which are not expressly mentioned, the Parliament only needs to be consulted (Art. 218 (6) 2 b TFEU). In practice the most important case concerns agreements in areas in which the ordinary legislative procedure applies (Art. 218 (6) 2 a(v) TFEU). As mentioned above, the ordinary legislative procedure applies to measures which define the framework for implementing the common commercial policy. Therefore, the consent requirement also applies to international agreements in this area.

Extent of the Consent Requirement

It is not yet clear how far the consent requirement goes in the common commercial policy as it is limited to the area in which the ordinary legislative procedure applies.[27] In particular it is open to question whether also such agreements are included, which do not require implementation or transformation into law within the Union.[28] At least according to a strict interpretation, the ordinary legislative procedure cannot be applied to areas of common commercial policy which

[27] The Federal Constitutional Court refers to this as well in its Lisbon judgment, 2 BvE 2/08 et al., BVerfG, NJW 2009, 2267 (2290), paragraph 373 = BVerfGE 123, 267.

[28] Wouters/Coppens/De Meester, External Relations after the Lisbon Treaty, in: Griller/Ziller (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty*?, 2008, p. 143 et seq. (185).

exclusively concern the intergovernmental level, as these do not concern internal regulation within the Union. Accordingly, international agreements which do not need to be transformed are not covered by the consent requirement. This could become relevant in practice if, for example, a reform of the WTO Dispute Settlement Understanding (DSU) takes place not as part of a comprehensive agreement for the completion of multilateral trade negotiations, but instead in the form of a separate international treaty. Since the procedural rules of the DSU only apply on an intergovernmental level and do not require implementation in domestic or EU internal law, it could concern an area in which the ordinary legislative procedure does not apply.

However, this narrow interpretation of the term "area" probably does not correspond to the meaning and purpose of the standard. The extension of the parliamentary right of approval was one of the key aims of the reform process. It cannot be assumed that the provision of Art. 218 (6) 2 a(v) TFEU was intended to have a restrictive effect so that parliamentary approval should only be required when there is a strict parallelism of areas of international and EU internal regulation. Indeed the term "area" is to be understood to refer to a specific EU policy. As such it must be assumed that the entire "area" of the common commercial policy is to be considered. The ordinary legislative procedure applies to this, which means that corresponding international treaties require the consent of the parliament.

Evaluation from the Perspective of Democracy Theory

For the evaluation of the new consent requirement from a democracy theory perspective it must first of all be noted that the granting of a right of approval for international agreements in the context of the common commercial policy closes a gap in the democratic legitimation of commercial policy which has existed in Europe for several decades. It can, however, also be seen that the European Parliament has merely been granted the traditional parliamentary right to participate in international agreements, namely the right to consent to or reject them after the conclusion of the treaty. As stated above this does not involve any formal influence when it comes to the contents of the agreement. The possibilities open to the Parliament in the course of the ordinary legislative procedure for EU internal regulation do not exist for international agreements of the Union.

The constitutional context of the consent requirement provides the European Parliament with significantly greater room for manoeuvre than the parliaments of the Member States, which are all part of a parliamentary system of government. The relationship between the Commission and the Parliament is inherently different to the relationship between the government and the parliament in a parliamentary system of government. Despite the election of the Commission's president and the endorsement of the Commission by the Parliament (Art. 17 (7) EU Treaty), the commission is not reliant on a specific political majority in the Parliament. Conversely the majority of the Parliament does not view the Commission as "its" government. The European Parliament is therefore politically "freer" than the

parliaments of the Member States in exercising the right of approval. The threat of refusal to consent to an international agreement is therefore also not implausible. In fact the European Parliament has in the past on several occasions temporarily made use of its right to refuse consent, in particular in the case of association agreements, thereby being able to at least delay the entry into force of international agreements.[29] In respect of international agreements this constellation leads to the European Parliament being similar to United States Congress rather than the parliaments of the Member States.[30] Awareness of this is of considerable significance for the democratic legitimation of the common commercial policy. In practice when it comes to the parliamentary control over commercial policy it has been seen that only the US Congress can exercise practical and political control over the commercial policy of a member of the WTO.[31] This is due not least to the right of approval of international agreements, which can be exercised without the political restraints of government accountability.

First Practical Experience

Up until mid-2012 the EU concluded one international agreement in the area of commercial policy in which the parliamentary consent was necessary. Others will follow soon.[32]

Free Trade Agreements with Korea

The first international trade agreement ratified by the EU on the basis of the new provisions of the TFEU was the Free Trade Agreement with South Korea.[33] The EU-Korea FTA was initialled by both sides on 15 October 2009. The Council approved the FTA on 16 September 2010 and the Agreement was officially signed on 6 October 2010. The European Parliament gave its consent to the FTA on 17 February 2011 which has been provisionally applied since 1 July 2011. Prior to the signing of the agreement, the Parliament made it clear that it still desired changes

[29] Tomuschat, Art. 300 EC Treaty Rn. 40, in: von der Groeben/Schwarze (eds.), *Kommentar zum EU-/EG-Vertrag*, 6th Edition, 2003 with examples.

[30] Similarly Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (218).

[31] On the role of the US congress see Shaffer, Parliamentary Oversight of WTO-Rule Making, JIEL 7 (2004) 3, page 629 et seq (635 et seq). See also the contributions in Jackson/Sykes (eds.), *Implementing the Uruguay Round*, 1997.

[32] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[33] For an overview of the agreement see The EU-Korea Free Trade Agreement in practice, available at: http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf.

to be made to the supporting measures for the use of trade defence instruments within the framework of the agreement. During the first reading in 2010, the parliament had, amongst other things, requested that the proposal for a regulation on the implementation of the bilateral safeguard clause of the free trade agreement should be extended to provide the Parliament with its own right to apply for the commencement of proceedings to impose defence measures.[34] A compromise was reached in February 2011 which requires the Commission to carefully consider any request from the EP for the commencement of such proceedings.[35]

Free Trade Agreement with Colombia and Peru

The next commercial policy agreement which the EP has to consent to is the Free Trade Agreement with Columbia and Peru. The negotiations on this were completed in May 2010 and the agreement was initialled in March 2011. On the 26th of June of 2012 the Agreement was signed.[36] In the meantime the parliamentary consent procedure commenced and on 30 May 2012 the Rapporteur Mário David recommended to his colleagues to consent to the agreement.[37] In this context it is noteworthy that the agreement includes provision on a human rights which are of great importance to the EP.[38]

Negotiations with the ASEAN Countries

Even before the entry into force of the Lisbon Treaty, but in anticipation of the resulting increased parliamentary rights, the European Parliament commented in part on on-going negotiations, at the same time implicitly referring to its right to (refuse) consent. Notable in this context is in particular the conditional declaration of support by the European Parliament for the free trade agreement between the EU and the ASEAN countries. In its resolution of 8th May 2008 the Parliament declared its support in principle for such an agreement, but at the same time put

[34] Proposal for a Regulation of the European Parliament and the Council for the implementation of the bilateral protection clause in the free trade agreement between the EU and Korea (KOM(2010) 0049 – C7-0025/2010 – 2010/0032(COD)), First reading of the Parliament on 7th September 2010, P7_TA(2010)0301.

[35] Bilateral safeguard clause in the EU-Korea Free Trade Agreement, OJ 2011, C 188 E/93.

[36] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[37] Draft Recommendation on the proposal for a Council decision on the conclusion of the Trade Agreement between the European Union and Colombia and Peru (COM(2011)0569 – C7-0000/2012 – 2011/0249(NLE)).

[38] See Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (221).

up a list of demands pertaining to the content of the agreement.[39] The European Parliament demanded that the agreement contains provisions for the ratification of the core ILO labour standards and measures for the protection of the rainforest. In its declaration, which was issued prior to the entry into force of the Lisbon Treaty, the European Parliament pointed to the parliamentary consent requirement. In doing so the Parliament established a clear connection between its political demands and its right of approval, even without explicitly threating to reject the agreement.

Meanwhile the negotiations with ASEAN as a group have been suspended. Since the end of 2009 the EU has only been negotiating with Singapore and since 2010 additionally with Malaysia on a bilateral level.[40] As such, several of the European Parliament's demands, in particular where these concern Myanmar, are unlikely to be of relevance currently. Nevertheless, the resolution of the Parliament on the negotiations with ASEAN is a good example of how the Parliament can attempt to already assert influence on the content of a potential agreement during the negotiations.

This example illustrates two things. Firstly, it can be assumed that the Commission will at the very least bring up the Parliament's demands during the negotiations. This is likely to be the case if only because a widening of demands from within the EU will increase the Commission's scope for negotiation. Apart from this the Commission will not want to run the risk of jeopardising the approval process just by rejecting the Parliament's demands outright. Secondly, presumably the pressure on Parliament to approve a potential treaty will grow the more of its demands are met. Politically it will at least be very difficult to reject an agreement for reasons which do not relate to demands the parliament made in a conditional declaration of support. Basically, the rejection of an agreement in which the Parliament has actively participated at the negotiations stage is most unlikely. If the political circumstances change considerably, in particular in the partner countries, it cannot, however, be ruled out that the Parliament will reconsider its consent or at least delay it.

Consequences for the Inter- and Intra-institutional Structure

The changes presented have an effect on both inter-institutional relations and relations between the various parliamentary institutions. It is undisputed that the poles in the triangular relationship between the Parliament, the Council and the

[39] Resolution of the European Parliament from 8th May 2008 on commercial and economic relations with the Association of Southeast Asian Nations (ASEAN) (2007/2265(INI)), Abl. 2009, C 271 E/38.

[40] European Commission, Overview of FTA and Other Negotiations, 25 July 2012, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

Commission are shifting, whereby the Parliament's increase in competencies occurs almost certainly first and foremost to the detriment of the Council. The Commission did not lose any commercial policy responsibilities as a result of the Lisbon Treaty, but its position is weakened by the fact that it must share both domestic and external legislative power with the European Parliament. Just like in other fields, in this situation the Commission can attempt to form ad hoc strategic alliances with the Parliament, thereby further reducing the options open to the Council. This is, however, unlikely to be very noticeable in international negotiations as there the influence of the Council is in any case not as great as in the EU internal legislative procedure.

The treaty amendments also lead to an increase in importance of the Committee on International Trade (INTA). It is now a committee which is to be involved in legislative procedures. As already stated above, we will have to wait and see how the committee will react to the new challenges which go hand in hand with this. It is also likely that the European Parliament as a whole, and possibly in particular the INTA committee will gain significance on an international level. Comparisons with the US Congress lead to the presumption that the partner states of the EU will react to the increased significance of the Parliament and will possibly also directly contact individual MEPs on the INTA committee. In the same way it is conceivable that the committee will itself contact representatives of the partner states of the EU so as to contribute towards the policy-making process in the Parliament. In December 2010, for example, the committee met with the Chinese Ambassador to the EU for an informal exchange of views.[41]

Effects on the Common Commercial Policy

Against the background of the changes in the role and function of the European Parliament in the area of common commercial policy presented here, it is now possible to assess the effects of these changes.

Transparency

An initial aspect concerns the question of whether the parliamentarisation of the common commercial policy has also led to an increase in its transparency. In contrast to the Trade Policy Committee of the Council, the Committee on International Trade of the European Parliament meets in public—just as the plenary sessions of the Parliament are also public. In this way it becomes clear what

[41] Committee on International Trade, Minutes, Meeting of 1 and 2 December 2010, Agenda Item 30, INTA_PV(2010)1201_1.

positions the Parliament and the individual MEPs take on specific questions. As the committee is generally concerned with all commercial policy topics, even those which do not imply legislative measures, in this way an element of policy-making becomes apparent in the area of foreign trade. The result of this is an improved transparency of the common commercial policy. However, it is also apparent that the parliamentarisation does not lead to a situation where aspects which are kept secret by the other organs, in particular the Commission, become public through the discussions in the committee. Instead the Commission presents its report on the current status of the negotiations, which also contains political assessments of the negotiations, during so-called "in-camera sessions" of the committee to which the public have no access. The confidentiality provisions of the new inter-institutional framework agreement between the Commission and the Parliament already mentioned above are also intended to ensure this confidentiality. It is therefore hardly to be expected that the parliamentarisation of the commercial policy would, for example, lead to the publication of internal Commission documents. In fact the Parliament and the INTA committee have a considerable interest in maintaining the classification of information, as the Commission will otherwise not be very forthcoming with such information. As such it cannot be assumed that the parliamentarisation will contribute towards a general increase in the transparency of the common commercial policy.[42]

Democratic Legitimation

So as to assess the democratic legitimation of the common commercial policy it must first be appreciated that the introduction of the right of approval of the EP is to be viewed as "catch-up" parliamentarisation when compared with the competences of national parliaments. The Lisbon Treaty provided the European Parliament with the traditional parliamentary right of participation in the implementation of an international treaty that the parliaments of the Member States have had in part for centuries.[43] Against this background one could hold the view that the new rights of the European Parliament in the area of common commercial policy have not contributed significantly towards the democratisation of this policy area.

This view is strengthened by the fact that the broadening of the scope of the common commercial policy by the Lisbon Treaty will lead to a disempowerment

[42] Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 /219 et seq.) obviously sees this differently, treating democratic control and transparency as the same.

[43] Insofar as Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (218), maintains that the Bundestag never possessed comparable rights, this is only correct in respect of the right to information pursuant to Art. 207 (3) TFEU and for the period of time since the common commercial policy falls exclusively within the responsibility of the EC/EU.

of the national parliaments. Whereas due to the separation of responsibilities in certain areas of trade in services these were still involved in the common commercial property, at least insofar as they corresponding agreements were concluded as mixed agreements under the Nice Treaty, all international trade agreements fall solely within the remit of the Union unless the contain non-trade provisions such as the EU-Peru/Colombia Agreement. As the German Federal Constitutional Court determined in its judgment on the Lisbon Treaty looking at Art. 59 (2) German Basic Law, this loss of competencies in the Member States leads to a removal of the active participation of the parliaments of the Member States.[44] This loss is not just of a formal nature,[45] but instead leads in practice to lesser parliamentary control over multilateral commercial agreements. Whether the remaining rights the German Bundestag has to obtain information through the federal government will alleviate this loss from a democratic perspective is doubtful.[46]

However, it must also be seen that with the right of approval the Lisbon Treaty has closed a significant gap in parliamentary participation and thereby removed a considerable deficit in the democratic legitimation of the common commercial policy. At the latest since the ECJ's Opinion 1/75[47] it has been recognised that the common commercial policy falls exclusively within the remit of the Community or the Union respectively. As such it was not only removed from the area of competence of the Member States; indeed the national parliaments could no longer vote on agreements which were exclusively within the scope of the common commercial policy.[48] The national parliaments were only involved in the conclusion of mixed agreements for which the Community/Union and the Member States were jointly responsible. The common commercial policy was no longer subject to the control of the national parliaments. The transfer of competence for commercial policy to the EC/EU did not, however, mean parliamentary participation and control on an EC/EU level. The Europeanisation of the common commercial policy instead resulted in its de-parliamentarisation and therefore also to a loss of democracy in this area. This erosion of competence and democratic legitimation has now

[44] BVerfG, 2 BvE 2/08 et al., BVerfG, NJW 2009, 2267 (2290), paragraph 374 = BVerfGE 123, 267. Cf. also Krajewski, External trade law and the Constitution Treaty: towards a federal and more democratic common commercial policy? CML Rev. 42 (2005) 1, page 91 et seq (126) and Bungenberg, Außenbeziehungen und Außenhandelspolitik, EuR 2009 Supplement 1, page 195 fet seq (211).

[45] However Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, Swedish Institute for European Policy Studies (Sieps), European Policy Analysis 8-2008, available at: http://www.sieps.se, page 5, states "On paper this looks like a loss of parliamentary control".

[46] The Federal Constitutional Court attributes considerable importance to this right to information. BVerfG, 2 BvE 2/08 et al., NJW 2009, 2267 (2290), paragraph 375 = BVerfGE 123, 267, does not, however, comment on the practical-political effects of this right.

[47] ECJ, Opinion 1/75, *Local Costs*, [1975] ECR, 1355.

[48] Against this background it is also surprising that the Federal Court of Justice has dealt with the common commercial policy at all, this was an area in which the Bundestag and the Federal Council has comparatively little influence in any case.

been eliminated: the entire area of multilateral commercial policy is exclusively the competence of the EU, which, as shown, has led to a complete withdrawal of the national parliaments from this area. However, at the same time the common commercial policy is subject to the control and the right of approval of the European Parliament.

Further it can be seen that the European Parliament's right of approval is exercised against a different political-parliamentary background than the right of approval of a member state's parliament. Since all EU Member States have parliamentary systems of government, rejections of international treaties on the member state level can practically be ruled out. The rejection of an agreement which has been negotiated by a government would amount to a vote of no confidence. The European Parliament does not find itself in this "straitjacket", which is why its right of approval is probably practically more significant than the rights of approval of the national parliaments. Finally we must remember that not only the right of approval but also the right to information was granted to the Parliament in Art. 207 (3) TFEU.[49] Comparable rights are seldom found in the constitutional frameworks of the Member States.[50]

If we compare the loss of the parliamentary participation of the national parliaments to the European Parliament's acquisition of greater possibilities to assert its influence, it is difficult to come to a conclusive result. At least in the area of common commercial policy the Lisbon Treaty has not on the whole led to a further de-parliamentarisation of this area. Due to the structurally different political context in which the European Parliament exercises its participation rights, it can instead be assumed that the common commercial policy will see a greater parliamentarisation as a result of the Lisbon Treaty.

The development of the level of parliamentarisation is illustrated—greatly simplified—in Fig. 1.[51] The illustration shows on the one hand that overall the parliamentarisation of the common commercial policy has increased, but that in this policy area the participation of the national parliaments and the European Parliament respectively exists to a different extent and can, or could therefore contribute to a different extent towards parliamentarisation. In future the precise extent of parliamentarisation of the common commercial policy will, however, decisively depend on how the Parliament utilizes the new rights in political discourse with the Commission and the Council.

[49] On this see "Reporting in accordance with Art. 207 (3) TFEU" above.

[50] On parliamentary rights of participaton from a comparative law perspective, see Abbott/Riesenfeld (eds.), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, 1994.

[51] In the diagram 1993/1994 is taken as a turning point because the Maastricht Treaty granted the European Parliament a right of approval for certain agreements, and because with the extension of multilateral commercial policy to the areas of services and intellectual property upon completion of the Uruguay Round central areas of commercial policy fell within the shared competence enabling Member States to ratify multilateral and regional trade agreements which covered services and intellectual property.

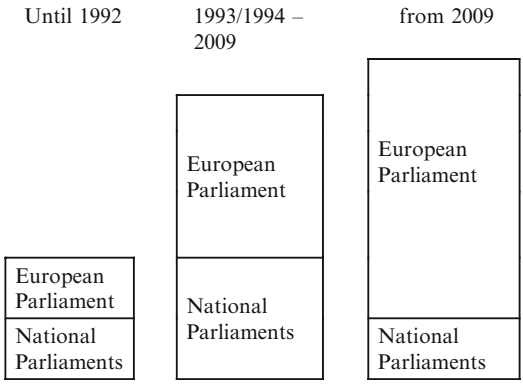

Fig. 1 Development of the parliamentarisation of European commercial policy

Politicisation

The last-mentioned considerations lead on to the question of whether the parliamentarisation of the common commercial policy can also contribute towards its politicisation.[52] We must first of all remember that belonging to the Union's foreign policy, in accordance with Art. 205 TFEU the common commercial policy is subject to the general objectives of Art. 21 EU Treaty and is as such no longer "merely" oriented towards the aims of liberalisation of trade and investments.[53] This objective, which amongst other things includes the protection of human rights, sustainable development and environmental protection, corresponds to demands made of the common commercial policy over and over again in the past (also) in the European Parliament. It can therefore be assumed that the Parliament will utilise the new normative orientation of the common commercial policy and will formulate demands which deviate from traditional, rather trade-liberalising expectations.[54] The Committee on International Trade has been dealing for some time with the possibility of entrenching corporate social responsibility (CSR) in international trade agreements and also with the question of incorporating human rights and social and environmental standards in such agreements.[55] It can be presumed that

[52] Similarly Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (211).

[53] On this see the contribution by Vedder, Linkage of the Common Commercial Policy to the General Objectives for the Union's external Action, in this volume. See also Krajewski, The Reform of the Common Commercial Policy: coherent and democratic?, in: Biondi/Eeckhout/Ripley (eds.), *EU Law after Lisbon*, 2012, p. 292-311.

[54] Similarly Bungenberg, Außenbeziehungen und Außenhandelspolitik, EuR 2009 Supplement 1, page 195 fet seq (213).

[55] Committee of International Trade, draft of a report on the social responsibility of companies in international commercial agreements (2009/2201(INI)), 14.9.2010, Rapporteur: Harlem Désir, as well as a draft of a report on human rights, social and environmental norms in international commercial agreements (2009/2219(INI)), Rapporteur: Tokia Saïfi, 9.9.2010.

by doing so the intention is to develop parliamentary standards for future European commercial policy.

The increase in the competence of the European Parliament in the legislative area of the common commercial policy does, however, also mean that the day-to-day work of the Parliament and in particular its Committee on International Trade will be characterised more than ever before by its dealing with the core commercial policy topics of import and export policy and trade defence measures. In addition, the work of the committee will also be increasingly subjected to votes on various legislative measures.

Finally, it can be assumed that in future, besides general political issues, the European Parliament will more strongly articulate industry policy and partly even protectionist interests. In the above-mentioned declaration on the Free Trade Agreement between the EU and Korea, the Parliament particularly had an eye on the car industry and requested that the Commission monitors this sector as there was a danger that it was subject to strong competition.[56] It cannot be ruled out that potentially protectionist intentions are the underlying reason for this request. Against this background the Parliament and the INTA Committee are likely to increasingly be the target of lobbyist activities.[57]

Summary: Three Theses on Common Commercial Policy Following Lisbon

The result of what has been reflected on here can be summed up in three theses:

1. The Lisbon Treaty has led to a politicisation and plurality of goals of the common commercial policy. As the "most political" organ of the European Union, the European Parliament will use this change and strengthen it further. This politicisation can also lead to a better visibility of the common commercial policy in general European political discourse.
2. The common commercial policy has not on the whole become more transparent through the Lisbon Treaty. The shaping of political opinion in the European Parliament does for the most part take place in a transparent way, but the extending of the European Parliament's rights has not led to the policy making in the departments of the Council and the Commission being better understandable publicly.
3. The Lisbon Treaty has resulted in a considerable expansion of the rights of the European Parliament whilst at the same time marginalising the national parliaments. The European Parliament's new rights reach the constitutional

[56] Press release No. 20100621IPR76426 from 23.6.2010, "Green light from Trade Committee for safeguard clause in EU-South Korea trade accord".

[57] Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (221).

level of parliamentary participation in international agreements and national regulation that can be considered to be the standard for parliamentary-democratic systems. The participation rights of the European Parliament do not, however, go beyond this standard. Nevertheless the European Parliament can exercise its rights in a different political context, which is not possible in the nation states. It can therefore be concluded that the Lisbon Treaty will on the whole lead to a greater parliamentarisation of the common commercial policy, thereby also reducing the democracy deficit in this policy area.

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The Common Commercial Policy Under the Influence of Commission, Council, High Representative and European External Action Service

Hans-Georg Dederer

Introduction

A little more than a decade ago, the European Council adopted the Laeken Declaration.[1] It raised, rather rhetorically, the question: "Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?". "Europe" will be able to live up to this leadership role today and in the future only if its political architecture, i.e. the European Union (EU), features the requisite weight among other global players.

Concerning in particular economic globalization, the Union has by now—after the entry into force of the Treaty of Lisbon—a considerably broad range of competences.[2] Europe's strength and standing amongst other global economic powers significantly depend on whether and to what extent the Union manages to act unisonously in the area of trade policy.

[1] Laeken Declaration on the Future of the European Union (Annex I to the Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1; available at: http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf).

[2] See especially the extended scope of the Common Commercial Policy according to Art. 207 (1) cl. 1 TFEU. See also: Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (204); Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 150; Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (189 et seq.); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 9. It is also worth mentioning that the Common Commercial Policy falls within the exclusive competence of the EU (Art. 3 (1)(e) in conjunction with Art. 2 (1) TFEU).

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For, in fact, quite a number of EU institutions appear to be competent as regards the Union's external action: the European Council, its President,[3] the Foreign Affairs Council as a distinct configuration of the Council, the High Representative of the Union for Foreign Affairs and Security Policy, who also chairs the Foreign Affairs Council and holds the position of the Commissioner being in charge of external relations, the Commission as such,[4] as well as the new European External Action Service and, last but not least, the Parliament. Hence, the question arises how competences are distributed among the aforementioned multiplicity of institutions.

Overview of the Allocation of Powers in the Field of the CCP

The Treaty of Lisbon has brought about extensive organisational reforms, in particular with regard to the Common Commercial Policy. In addition to Council and Commission, which one may consider ageing actors in the area of the Common Commercial Policy,[5] the High Representative and the European External Action Service have come into play.[6] For the purposes of an overview of the allocation of powers among the different EU institutions in the area of the Common Commercial Policy, we have to draw a distinction between unilateral trade measures on the one hand and international treaties on the other hand.

[3] Rivalling the High Representative (cf. Art. 27 (2) cl.1 TEU), the President of the European Council is in charge of the external representation of the Union on issues concerning the Common Foreign and Security Policy (CFSP) (Art. 15 (6)(2) TEU). Contrary to views held by some authors (*e.g.* Pache, Organgefüge und Handlungsträger der EU nach Lissabon, in: Pache/Schorkopf (eds.), *Die Europäische Union nach Lissabon*, 2009, p. 19 (27); Weber, Vom Verfassungsvertrag zum Vertrag von Lissabon, EuZW 19 (2008) 1, p. 7 (9)) the President does not merely fulfil a ceremonial function (also rightly critical: Ohler, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 68). The external representation of the EU falls solely within the competence of the President ("at his level and in that capacity (*sc.* as President)") insofar as "strategic guidelines" laid down by the European Council in the field of the CFSP are concerned (cf. Art. 15 (6)(2), 16 (6)(3), 26 (1)(1) TEU). By contrast, the High Representative is solely in charge of the external representation of the EU insofar as the CSFP has been spelled out by the Council (cf. Art. 18 (2) cl.2, 26 (2)(1), 26 (3), 27 (1), (2) cl.1 TEU). See Dederer, Zur Gewaltenteilung in der Union: Checks and Balances, institutionelles Gleichgewicht oder Konfusion?, in: Hoffmann/Naumann (eds.), *Europäische Demokratie in guter Verfassung?*, 2010, p. 89 (94).

[4] And within the Commission numerous Commissioners concerned with particular aspects of EU external action (e.g. development; trade; international cooperation; humanitarian aid and crisis response; enlargement and European neighbourhood policy).

[5] See Streinz, *Europarecht*, 2008, 8th edition, para. 742 et seqq.

[6] And, of course, the European Parliament as well. See Krajewski, New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy, in this volume, who elaborates extensively on the European Parliament's role.

Unilateral Trade Measures

The Treaty on the Functioning of the European Union (TFEU) provides that unilateral trade measures shall be adopted in accordance with the ordinary legislative procedure.[7] Hence, the adoption of unilateral measures falls within the competence of the European Parliament and the Council which act as lawmakers on an equal footing within the framework of the ordinary legislative procedure.[8] The Commission has primarily the right of legislative initiative.[9]

However, lawmaking in accordance with the ordinary legislative procedure is restricted to the adoption of "regulations" defining the "framework" for the implementation of the Common Commercial Policy only.[10] Therefore, Parliament and Council acting as the Union's legislature may only pass "basic regulations", but not regulations providing for detailed commercial policy (safeguard) measures in a particular case.[11] "Basic regulations" may, of course, confer implementing powers

[7] Art. 207 (2) TFEU. For further information see Müller-Ibold, Common Commercial Policy after Lisbon: The European Union's Dependence on Secondary Legislation, in this volume.

[8] See Art. 289 (1) cl.1, 294 TFEU; cf. also Art. 14 (1) cl.1, 16 (1) cl.1 TEU.

[9] Art. 289 (1) cl.1, 294 (2) TFEU; cf. also Art. 17 (2) cl.1 TEU. The Commission is, of course, also involved in some of the subsequent steps of the ordinary legislative procedure: see Art. 294 (6) cl.2, (7)(c), (9), (11), (15) TFEU.

[10] Art. 207 (2) TFEU.

[11] Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 152; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 AEUV, para. 88; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (819); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 12; Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 22; see also Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (110). Art. 207 (2) TFEU does not serve as a legal basis for the adoption of individual measures. The clear wording of Art. 207 (2) TFEU (English: "framework", French: "cadre", German: "Rahmen") does not allow for any other interpretation. This approach, which strictly adheres to the limits of interpretation imposed by the clear wording of a legal basis for Union action, is supported by the principle of limited attributed powers (Art. 5 (1) cl.1, (2) TEU). Even the "implied powers"-doctrine cannot lead to any other conclusion because this doctrine is – according to the ECJ (ECJ, Case 8/55 *Fédération Charbonnière de Belgique v. High Authority of the European Community for Coal and Steel* [1956] ECR I, 292 (300 et seq.) – merely a rule of interpretation. Thus, the "implied powers"-doctrine cannot apply where the law leaves no margin of interpretation – as is the case in Art. 207 (2) TFEU.

upon the Commission[12] which would be subject to Member State control within the context of the reformed "comitology" procedure.[13]

International Treaties

Inherently more complex but basically just as clear are the rules governing the competences for the conclusion of international treaties. Generally, in the area of the Common Commercial Policy, the standard procedure for the conclusion of agreements between the Union and third countries[14] applies—with certain rather significant modifications, though. Like in the standard procedure, the Council exhibits the essential powers. It is the Council's competence to authorize the opening of negotiations,[15] to adopt negotiating directives[16] and to conclude the agreements.[17]

Departing from the standard treaty negotiating procedure, however, the initiative to open negotiations falls exclusively within the competence of the Commission.[18] The High Representative has—deviating from the standard procedure—no such right.[19] In addition, the Commission is solely responsible for conducting the negotiations.[20] In this respect, the Council's right to nominate the Union negotiator[21] is vacated. However, the Commission shall conduct the negotiations "in

[12] Art. 291 (2), (3) TFEU. – Alternatively, in accordance with Art. 290 TFEU, the EU legislature could also delegate to the Commission the power to adopt non-legislative acts of general application (see Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, European Policy Analysis 8–2008, p. 4, available at: http://www.sieps.se/sites/default/files/427-20088epa.pdf).

[13] See Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (EU L 55/13), based upon Art. 291 (3) TFEU. As long as existing basic acts related to the Common Commercial Policy have not undergone any amendments the specific procedures, which have been laid down in these basic acts without being subject to the former comitology decision (Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (EC L 184/23)), still apply and are not affected by the new Comitology Regulation (EU) No. 182/2011 (see KOM/2010/83/FINAL, p. 6; recital 21 and Art. 13 Regulation (EU) No. 182/2011).

[14] Art. 207 (3)(1), 218 TFEU.

[15] Art. 207 (3)(2) cl.1, 218 (2), (3) TFEU.

[16] Art. 207 (3)(3) cl.1, 218 (2), (4) TFEU.

[17] Art. 207 (4), 218 (2), (5), (6) TFEU.

[18] Art. 207 (3)(2) cl.1 TFEU.

[19] Art. 218 (3) TFEU.

[20] Art. 207 (3)(2) cl.1 TFEU.

[21] Art. 218 (3)(2) TFEU. The answer to the question of who will act as Union negotiator depends on the subject matter of the agreement (see Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (196); also Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 218 AEUV, para. 13 et seq.). If the agreement focuses on the CFSP the Council will nominate the High Representative as Union negotiator. In all other cases, the Council will nominate the Commission.

consultation" with a special committee appointed by the Council. This so-called "Trade Policy Committee", which is staffed with senior officials, is merely an advisory body.[22] It may control whether the Commission complies with the negotiating directives issued by the Council.[23]

Furthermore, the Commission has to report regularly on the status of negotiations to both Parliament and the aforementioned committee.[24] This ensures—in accordance with established practice[25]—that Parliament is involved already in the negotiating phase. In a resolution adopted by the European Parliament[26] concerning the revision of the Framework Agreement on the relations between the Parliament and the Commission,[27] the Parliament requests that the Commission commits itself to "immediate and full information to Parliament at every state of negotiations", "in particular on trade matters". This is not only important for reasons of transparency.[28] Rather, it is essential with regard to parliamentary consent to the treaty. For at the closing stage of the treaty negotiation procedure,[29] Parliament may only approve or reject the treaty in its entirety (i.e. on a "take it or leave it"-basis[30]).

[22] Note also the French ("en consultation avec") and the German wording ("im Benehmen mit").

[23] Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810).

[24] Art. 207 (3)(3) cl.2 TFEU.

[25] Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (212); Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810); Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 63 (70); Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (111). See also the Framework Agreement on relations between the European Parliament and the European Commission (Annex XIV to the Rules of Procedure of the European Parliament).

[26] European Parliament resolution on a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term, 09 February 2010, Doc.-No. B7-0091/2010.

[27] Annex XIV to the Rules of Procedure of the European Parliament as of March 2011.

[28] Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 23; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810).

[29] Art. 218 (6)(2) TFEU.

[30] Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, European Policy Analysis 8–2008, p. 1, available at: http://www.sieps.se/sites/default/files/427-20088epa.pdf. See also Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (129); Herrmann, The Lisbon Treaty Expands the EU's External Trade and Investment Powers, ASIL Insight 14 (2010) 28, IV.

Like in the standard treaty negotiating procedure,[31] the decision concluding the agreement has to be adopted by the Council.[32] However, the Council decision will require prior approval by Parliament[33] if the agreement, depending on its contents, predetermines Parliament as (at least co-deciding) law-making body.[34] The scope of Parliament's consent power seems to be still unclear, though.[35]

[31] Art. 218 (2), (5), (6) TFEU.

[32] Art. 207 (4) TFEU.

[33] Art. 207 (4) TFEU does not supersede Art. 218 (6) TFEU. See also Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 70 et seq.

[34] Reaching the same conclusion: Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810 et seq.); Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (197, 199); see also Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 72 et seq.

[35] According to the view presented here, purpose and aim of parliamentary consent to "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required" (Art. 218 (6)(2)(a)(v) TFEU), is to synchronize "internal" and "external" parliamentary participation: International agreements covering fields, in which internally, i.e. within the Union, consent by Parliament is required in order to pass a legislative act, may only be concluded upon prior approval by Parliament. Therefore, on the one hand, an international treaty in the area of the Common Commercial Policy is not only subject to parliamentary approval in cases in which the treaty affects "the framework for implementing the common commercial policy" within the meaning of Art. 207 (2) TFEU (Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 71 et seq.), i.e. in cases in which the treaty affects the (potential) amendment or (potential) enactment of "basic regulations". On the other hand, an international treaty in the field of the Common Commercial Policy is not automatically subject to parliamentary approval simply because the "ordinary legislative procedure" applies in the field of the Common Commercial Policy (Herrmann, The Lisbon Treaty Expands the EU's External Trade and Investment Powers, ASIL Insight 14 (2010) 28, IV; Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration*, EuR Beiheft 1, 2010, p. 193 (196); see also Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 154). The decisive question is whether the trade agreement predetermines Parliament in legislating matters to which the ordinary legislative procedure (or a special legislative procedure where consent by Parliament is required, respectively) applies. For example, a trade agreement like the SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures 1994, L 336/40) must be taken into consideration when passing secondary EU legislation in the area of environmental, health and consumer protection. Legislative acts in those fields are often adopted on the basis of Art. 114 (1) cl.2 TFEU (Approximation of Laws) or on the basis of Art. 192 (1) TFEU (Environment). Both legal bases require that secondary legislation is adopted in accordance with the ordinary legislative procedure. Thus, the conclusion of a trade agreement like the SPS Agreement needs parliamentary consent (arguably of the same opinion Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810)). In practice, however, all trade agreements might be submitted to Parliament for approval anyway (Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, European Policy Analysis 8-2008, p. 4, available at: http://www.sieps.se/sites/default/files/427-20088epa.pdf).

Usually, the Council has to adopt the decision concluding the agreement by a qualified majority,[36] but in exceptional cases unanimously.[37] The requirement of unanimity provides every Member State with a veto right and, therefore, weakens the EU's capability to act in the area of trade policy.[38] Nevertheless, the unanimity requirement remains objectively justified in those areas in which the TFEU requires unanimity for the adoption of internal secondary legislation on the same subject matter.[39] In this regard, however, the requirement of unanimity will likely be restricted to decisions concluding agreements on direct foreign investments.[40] In all other cases, the unanimity requirement has the character of a political compromise intended to take into account national sensitivities with regard to certain service sectors.[41] For example, the Council decides unanimously on the conclusion of agreements "in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity" and "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". These provisions contain

[36] Art. 207 (4)(1) TFEU.

[37] Art. 207 (4) (1-2), TFEU.

[38] Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (811); more cautious Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (201).

[39] Art. 207 (4)(2) TFEU. Likewise Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10. This provision also applies to so-called "horizontal agreements", i.e. trade agreements which also contain provisions unrelated to trade in services, commercial aspects of intellectual property or direct foreign investments without, however, marginalizing those provisions which are directly related to trade in services, commercial aspects of intellectual property or direct foreign investments (Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 27; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 26; Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, CMLRev. 42 (2005) 1, 91 (122); Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (806, 811); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10.

[40] Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (806 et seq.); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10; see also Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 28 et seqq.; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 26.

[41] Art. 207 (4)(3) TFEU.

numerous rather vague legal terms leaving a wide margin of appreciation to the Member States.[42]

Influence of the High Representative

In the area of the Common Commercial Policy, the powers of the Council and the Commission have not undergone any revolutionary changes under the Treaty of Lisbon. By contrast, the influence of the Parliament has increased significantly. Its far-ranging involvement in both unilateral trade measures and international trade agreements will minimize the so-called "democratic deficit" considerably.[43]

Owing to the High Representative's institutional position combined with his or her specific competences in the area of the Common Foreign and Security Policy

[42] With regard to "trade in social, education and health services" (Art. 207 (4)(3)(b) TFEU), it is correctly held that unanimity is required if only *one* Member State plausibly asserts to be negatively affected: Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 33; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 27; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (809); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 11; Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (200)). By contrast, some authors argue that the "exception culturelle" laid down in Art. 207 (4)(3)(a) TFEU requires that *all* 27 Member States of the EU share the opinion that the Union's cultural and linguistic diversity is at risk: Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 32; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (808); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 11; similarly Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 27. However, correctly held, it suffices that a concrete and significant risk with regard to the culture or language of only one Member State is a "risk prejudicing the Union's cultural and linguistic diversity" within the meaning of Art. 207 (4)(3)(a) TFEU. Therefore, what is decisive is the plausible assertion of only one Member State that its culture and language is concretely and significantly threatened. Purpose and aim of Art. 207 (4)(3) TFEU support the view that this provision ought to be construed uniformly in its entirety. Art. 207 (4)(3) TFEU intends to grant every Member State a veto right. Such a veto right makes sense only for such a Member State which is specifically and negatively affected by service agreements within the meaning of Art. 207 (4)(3) TFEU. In such a case, the Member State will exercise its veto right typically in its own national interest, not in the common interest of the Union. Reaching the same conclusion: Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (200).

[43] See also Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (811); Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (199) and the article by Krajewski, New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy, in this volume.

(CFSP), the High Representative might unfold dynamics which cannot be fully pre-estimated.[44]

For example, with regard to the former Treaty establishing a Constitution for Europe it was argued that the Common Commercial Policy was subordinate to the CFSP. It was further argued that, as a consequence, the Commissioner for Trade was also subordinate to the High Representative (then labelled the "Minister for Foreign Affairs").[45] We disagree with this assumption: There is, at least on the basis of the Treaty of Lisbon, no such kind of hierarchy between the Common Commercial Policy or the Commissioner for Trade on the one hand, and the CFSP or the High Representative on the other hand.

Position of the High Representative

The High Representative personifies a "trinity" of functions that were held separately "before Lisbon" by (1) the Secretary-General of the Council as High Representative for Common Foreign and Security Policy, (2) the President of the General Affairs and External Relations Council and (3) the Commissioner for External Relations.[46] Correspondingly, "after Lisbon", the High Representative is (1) head of the CFSP (and as such acting as an EU institution of its own)[47] as well as (2) President of the Foreign Affairs Council[48] and (3), within the Commission, Commissioner being in charge of foreign relations.[49] Furthermore, (4) the High Representative participates in the work of the European Council.[50] The latter function of the High Representative usually remains unmentioned or simply overlooked.

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[44] The same holds true for the European Parliament.

[45] Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (107 et seq.), who backs his argument that the Commissioner for Trade is subordinate to the High Representative by referring exemplarily to the High Representative's "koordinierende Weisungsbefugnis" ("coordinating authority to issue directives"). Thym, Außenverfassungsrecht nach dem Lissaboner Vertrag, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p. 173 (180), seems to follow the same approach. He assumes that the position of the High Representative as Vice President of the Commission implicates "Vorrechte [...][*sic!*] bei der Ausarbeitung, Annahme und Durchführung der suprationalen Außenbeziehungen" ("prerogatives [*sic!*] regarding the drafting, adoption and execution of supranational foreign affairs").

[46] Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (200); Thym, Außenverfassungsrecht nach dem Lissaboner Vertrag, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p. 173 (180).

[47] Art. 18 (2) cl.1 TEU; see also Art. 18 (2) cl.2, 26 (3), 27 (1), (2) TEU.

[48] Art. 18 (3), 27 (1) TEU.

[49] Art. 18 (4) cl.1, 3 TEU.

[50] Art. 15 (2) cl.2 TEU.

Being part of three EU institutions and, in addition, an independent EU institution[51] at the same time seems to militate in favour of abundant competences and, thus, powerfulness of the High Representative. One has to take into consideration, though, that the High Representative, as an independent EU institution, is embedded in a clear hierarchy. He conducts the Union's CFSP,[52] carries out the CFSP as mandated by the Council[53] and represents the Union for matters relating to the CFSP.[54] It is the Council, however, who frames and defines the CFSP.[55] The Council, in turn, is bound to the general guidelines and strategic lines as defined by the European Council.[56] Admittedly, the High Representative also plays a part within these institutions: within the Foreign Affairs Council as its President with the right of initiative[57] and within the European Council by participating in its work.[58] Nevertheless, in neither of these institutions, he or she holds a right to vote.[59] Above all, if the Foreign Affairs Council is convened to discuss Common Commercial Policy issues, the High Representative must be replaced by the Minister in charge of foreign trade[60] of that Member State which holds the presidency of the Council.[61,62] Moreover, concerning his or her function as Commissioner being in charge of external relations, the High Representative's powers are significantly restricted by the "principle of

[51] Thus, describing the High Representative as "double-hatted" is highly misleading and should therefore be abandoned. Also rightly critical Sydow, Der Europäische Auswärtige Dienst, JZ 66 (2011) 1, p. 6 (9).

[52] Art. 18 (2) cl.1 TEU.

[53] Art. 18 (2) cl.2, 26 (3), 27 (1) TEU.

[54] Art. 27 (2) TEU.

[55] Art. 26 (2)(1) TEU.

[56] Art. 26 (1)(1), (2)(1) TEU.

[57] Art. 18 (2) cl.2, (3), 27 (1) TEU. One has to note, of course, that also the Member States have a right of initiative (Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (192)).

[58] Art. 15 (2) cl.2 TEU.

[59] Because the High Representative is neither a member of the European Council (see Art. 15 (2) cl.2 TEU: "take part in its work") nor a member of the Foreign Affairs Council (see Art. 18 (3) TEU: "shall preside over the Foreign Affairs Council"). The right to vote is an exclusive right of the Member States or their representatives respectively (see Art. 15 (2) cl.1 TEU, Art. 235 (1)(2) cl.2 TFEU; Art. 16 (2) TEU). Of the same opinion Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 15 EUV, para. 5; Artikel 18 EUV, para. 11; Cremer, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 2011, 4th edition, Art. 18 EUV, para. 14.

[60] In Germany, this would currently be the Federal Minister of Economics and Technology.

[61] Cf. Art. 16 (9) TEU.

[62] Art. 2 (5)(2) in conjunction with footnote 1 of the Council's Rules of Procedure (Annex to the Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) (L325/35)).

collegiality"[63] and the "departmental principle"[64] as well as by the organizational and managerial control exercised by the President of the Commission.[65, 66] Therefore, e.g., the High Representative's vote does have no more weight than the other Commissioners' votes,[67] and he or she has to respect the other Commissioners' right to run their departments independently and on their own responsibility as well as the President's competence to lay down guidelines.

This institutional position of the High Representative makes clear that he or she cannot, *ex officio*, accord the CFSP preponderance over the Common Commercial Policy or any other foreign policy. The High Representative's omnipresence (participating in three EU institutions) does not lead to his or her omnipotence—neither *de iure* nor *de facto*.

Embedment of the Common Commercial Policy in the Union's External Action

Of course, the Common Commercial Policy is embedded in the Union's external action as a whole. But the external action of the Union and the CFSP, headed by the High Representative and carried out under the authority of the Council, are not the same—which would or could mean by implication that the Common Commercial Policy was fully embedded in, and, thus, possibly only subordinate to the CFSP. Rather, the external action of the EU consists of several foreign policies on the same hierarchic level. One of those foreign policies is the CFSP, another one is the Common Commercial Policy.

[63] Cf. Art. 17 (6)(1)(b) TEU, Art. 250 (1) TFEU. According to the principle of collegiality, all members of the Commission are coequal, having especially the equal right to vote. It further means that decisions assigned to the Commission as such must be taken by the Commission as a collegiate body, i.e. all members of the Commission shall debate and decide the particular issue and, thus, assume collective responsibility. See Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 251 AEUV, para. 1.

[64] Cf. Art. 17 (6)(1)(b) TEU, Art. 248 cl.1, 2 TFEU. The departmental principle means that every Commissioner runs his or her department assigned to him or her by the President of the Commission independently and on his or her own responsibility. For more information see Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 248 AEUV, para. 2.

[65] "Presidential principle", meaning the President of the Commission has the power to create and assign portfolios and to lay down guidelines within which the Commission is to work (cf. Art. 17 (6)(1)(a),(b) TEU, Art. 248 cl.1,3 TFEU).

[66] Of course, those restrictions must keep within the limits which might derive from the High Representative's position as an independent EU institution (i.e. as head of the CFSP) and his position as President of the Foreign Affairs Council (Art. 18 (4) cl.4 TEU)).

[67] Apart from that, the High Representative is also bound by the Commission's majority decisions.

Notwithstanding the assumption put forward here that the various foreign policies of the EU are coequal,[68] the Common Commercial Policy will presumably become more "politicized" than before, i.e. it will probably be influenced politically by other foreign policies as well as exploited politically for purposes of the other foreign policies.[69] This would, however, flow from the Common Commercial Policy's linkage to the value like interests and objectives, which comprehensively capture the Union's external actions,[70] but also from the principle of consistency[71] and the far-reaching substantial participation of Parliament.[72] For

[68] The following considerations support the idea that the CFSP and the Common Commercial Policy (as well as all other foreign policies) are coequal. The CFSP and the Common Commercial Policy are strictly separated within the EU treaty framework. The CFSP is (almost comprehensively) laid down in the Treaty on European Union (Art. 23 to Art. 46 TEU). Additionally, Art. 218 TFEU provides for the conclusion of international treaties (see Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (196)). The Common Commercial Policy, by contrast, is fully governed by the Treaty on the Functioning of the European Union (Art. 206 et seq. TFEU). TEU and TFEU are two separate but coequal treaties (Art. 1 (3) cl.2 TEU, Art. 1 (2) cl.2 TFEU). Furthermore, the TEU provides for a clear separation of procedures and powers: The implementation of the CFSP does not affect the procedures and powers for the implementation of all the other foreign policies including the Common Commercial Policy – and vice versa (Art. 40 TEU). The ECJ monitors compliance with these provisions (Art. 24 (1)(2) cl.6 TEU, Art. 275 (2) TFEU). In addition, in view of their position within the context of TEU and TFEU, both CFSP and Common Commercial Policy are subordinate to the general rules governing the external action of the Union (cf. Art. 21 et seq. TEU and Art. 205 TFEU in conjunction with Art. 21 et seq. TEU). This means that the same principles and objectives that guide the Union's external actions overall are also applicable to both the CFSP and the Common Commercial Policy (Art. 21 (1), (2), (3)(1) TEU; Art. 205 TFEU). Moreover, the objectives obviously concern not only general foreign policy (see especially Art. 21 (2) TEU). To implement those principles and objectives the European Council has been endowed with the duty and power to identify, and to decide on, the strategic interests and objectives of the Union in all fields of its external action, i.e. also in the field of the CFSP and the Common Commercial Policy (Art. 22 (1)(1-2) cl.1 TEU, Art. 205 TFEU). Proposals for such decisions can be made by the High Representative with regard to the CFSP and by the Commission with regard to all other foreign policies. Irrespective of their subject matter (CFSP on the one hand, other external action on the other hand), such proposals have always to be submitted jointly by the Commission and the High Representative (Art. 22 (2) TEU; Art. 205 TFEU; similar provisions in Art. 215 (1) cl.1 TFEU; for a different approach, however, see Art. 218 (3) TFEU). The Common Commercial Policy is therefore, after all, subordinate only to the (legally binding) strategic interests and objectives framed by the European Council, but not to the CFSP.

[69] Concerning the "politicization" argument see Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (128 et seqq.); Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (108); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 19 et seq.

[70] Art. 205 TFEU in conjunction with Art. 21 (1), (2), (3)(1) TEU. For further information see Vedder, Linkage of the Common Commercial Policy to the General Objectives for the Union's external Action, in this volume, p. 121 et seqq.).

[71] Art. 21 (3)(3) cl.1 TEU; see also Art. 7 TFEU.

[72] Cf. footnotes 24–36.

Parliament is expected to press for "exogenous" objectives and purposes especially in the area of the Common Commercial Policy.[73]

In addition to the general "politicization" of the Common Commercial Policy, critics also fear its "intergovernmentalization".[74] But the Common Commercial Policy's "intergovernmentalization" would also result from the principle of consistency,[75] because, according to this principle, the Common Commercial Policy has to be coordinated with the CFSP (as well as with all other foreign policies). On the basis of the current Treaties, consistency between the "intergovernmental" CFSP[76] and the "supranational" Common Commercial Policy can become practical and effective only by accepting that the Common Commercial Policy comes to a certain extent under Member State influence stemming from the CFSP.[77]

[73] Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (129 et seq.); Herrmann, The Lisbon Treaty Expands the EU's External Trade and Investment Powers, ASIL Insight 14 (2010) 28, IV. See also Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (212 et seq.); Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (111). On occasion, the fact that the Common Commercial Policy might be affected more severely by other foreign policies than in the past is accepted only reluctantly. The general "politicization" of the Common Commercial Policy is simply the compelling consequence of historical developments: The former Economic Community has (already long ago) evolved into a political Union – also in the field of foreign affairs.

[74] Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (107 et seq.); see also Krenzler, Die Außenhandelsbefugnisse der EU, in: Schwarze (ed.), *Der Verfassungsentwurf des Europäischen Konvents*, 2004, p. 385 (390); Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (803); Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (194 et seq., 196 et seq).

[75] Art. 21 (3)(2) cl.1 TEU; cf. Also Art. 7 TFEU.

[76] On the CFSP's being intergovernmental in character see Pechstein, Die Intergouvernementalität der GASP nach Lissabon, JZ 65 (2010) 9, p. 425.

[77] The fact that the Common Commercial Policy has to adhere to the principles and objectives that guide all external action of the Union (Art. 205 TFEU in conjunction with Art. 21 (1), (2), (3)(1) TEU) causes a certain "intergouvernmentalization" of the Common Commercial Policy as well (on this in detail Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (107). Because it is these principles and objectives, on the basis of which the European Council has to identify the strategic interests and objectives which are, in turn, also binding on the Common Commercial Policy (Art. 205 TFEU in conjunction with Art. 22 (1)(1), (1)(2) cl.1,2 TEU). The European Council acts on a recommendation from the Council (Art. 22 (1)(3) cl.1 TEU). Within both the Council and the European Council, the Member States are represented on a governmental level.

Albeit, one should view the phenomenon of "intergovernmentalization" in a more stress-free way for two reasons.[78] First, the TEU provides for, and the ECJ monitors, the allocation of powers with regard to the CFSP on the one hand and the Common Commercial Policy on the other hand.[79] Second, the European Parliament, which enjoys significantly increased participatory powers[80] in the area of the Common Commercial Policy, likes to act as "supranational antagonist" defying the Council and the Member States represented therein.[81]

Regarding the Union's capacity to act on the international playing field, it is indispensable that the external action of the Union presents itself as a whole in a coherent way. All foreign policies of the EU, in particular the CFSP and the Common Commercial Policy, must be framed, identified and implemented in a coherent and concerted way according to the principle of consistency.[82] "Chinese Walls" separating the several foreign policies of the Union would also be entirely unreasonable in terms of global politics. Both TEU and TFEU equally share this deeper rational insight.[83] Consistency, of course, also requires institutional as well as procedural linkages between the Union's foreign policies.

Consequences as Regards the Influence of the High Representative on the Common Commercial Policy

It is the High Representative whom the Member States have enthroned as the institutional crosspoint of such linkages.[84] The High Representative is integrated

[78] Likewise Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (803); Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (196 et seq., 199).

[79] Art. 40 in conjunction with Art. 24 (1)(2) cl.6 TEU. In addition, with regard to the conduct of the Common Commercial Policy, the ECJ may review, via Art. 205, 207 (1)(2) TFEU, compliance with the principle of consistency as laid down in Art. 21 (2)(3) cl.1 TEU as well as adherence to the principles and objectives set out in Art. 21 (1), (2), (3)(1) TEU (cf., Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (195)). However, the ECJ will have to leave a certain margin of appreciation to those EU institutions which are competent for ensuring consistency and for identifying the principles and objectives guiding the Union's external action.

[80] Cf. footnotes 24–36.

[81] See also Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (109, 111).

[82] Art. 21 (3)(2) cl.1 TEU.

[83] As has been spelled out before, all external action is subordinate to a common set of objectives and principles (Art. 21 (1), (2), (3)(1) TEU, Art. 205 TFEU) as well as to the principle of consistency (Art. 21 (3)(2) cl.1 TEU; cf. also Art. 7 TFEU).

[84] See also Thym, Außenverfassungsrecht nach dem Lissaboner Vertrag, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p.173 (179, 186).

into the Council and the Commission, i.e. into those two institutions which have, according to the Treaties, the primary responsibility to ensure consistency of the Union's external action and to cooperate to that effect.[85] To this end, the High Representative has to assist the Council and the Commission[86] and, in this vein, ensure consistency of the Union's external action.[87] Hence, it is logically consistent that the High Representative holds a key position, as mentioned above, within the Council and the Commission.

After all, characterizing the High Representative as an institution being "hung up" between Council and Commission and having, thus, "divided loyalties",[88] seems a little bit too exaggerated and pessimistic. In case of colliding courses of action adopted by the Council in the field of CFSP on the one side and by the Commission in the field of trade policy on the other side, the High Representative is not supposed to side with either the Council or the Commission. Rather, he or she is expected to exert all his or her strength in order to coordinate CFSP and trade policy.[89] If the High Representative's coordinating efforts within the Commission have failed, Council and Commission must—as provided for in the Treaty[90]—cooperate in order to ensure consistency of the Union's external action. In doing so, the High Representative has—as provided for by the Treaty[91]—to support both institutions.[92] For example, he or she may propose to the Council to redefine the CFSP or some of its aspects. In collaboration with the Commission, the High Representative may submit joint proposals to the Council concerning recommendations to the European Council in order to enable the European Council to define the greater strategic interests and objectives in the areas of the CFSP and the Common Commercial Policy authoritatively in a concerted way.[93]

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[85] Art. 21 (3)(2) cl.2 TEU.

[86] Art. 21 (3)(2) cl.2 TEU.

[87] Cf. Art. 18 (4) cl.1 TEU.

[88] Cf. Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 143. See also Hummer, Gemeinsame Außen-, Sicherheits- und Verteidigungspolitik sowie Solidaritätsklausel, in: Hummer/Obwexer, *Der Vertrag über eine Verfassung für Europa*, 2007, p. 307 (314), who points to the "funktionelle Spannungsverhältnis durch die gleichzeitige Zuordnung zur supranationalen Sphäre der Kommission und zur intergouvernementalen Sphäre des Rates" ("functional tension resulting from the simultaneous assignment to the supranational sphere of the Commission and the intergovernmental sphere of the Council").

[89] Art. 18 (4) cl.3 TEU.

[90] Art. 21 (3)(2) cl.2 TEU.

[91] Art. 21 (3)(2) cl.2 TEU.

[92] Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (193), points out correctly that the High Representative "durch seine Bindung an Kommission und Rat eine wichtige Brückenfunktion einnehmen (kann), die Konflikte schon im Ansatz vermeiden hilft" ("due to his or her liaison with both the Commission and the Council, may take a mediating position which could be instrumental in preventing conflicts right from the start").

[93] Art. 22 (2) TEU.

During a particular treaty negotiating procedure in the area of the Common Commercial Policy, the High Representative would not be able to stand up to the Commission pushing a course of action which was, according his or her viewpoint, in sole conformity with the CFSP. Of course, the Foreign Affairs Council may route the treaty negotiations conducted by the Commission by issuing guidelines.[94] However, the High Representative does not preside over this distinct Council configuration if the Council addresses questions pertaining to the Common Commercial Policy, e.g. to the conclusion of trade agreements.[95] Within the Commission, the High Representative has merely the competence to "coordinate" the various foreign policies,[96] i.e. to harmonize the CFSP and the Common Commercial Policy, but not the competence to assert unilaterally a trade policy option which is from his or her point of view the only CFSP-compliant one.[97] The High Representative is also unable to do so purely as a matter of fact because the specific expertise required with regard to the often highly technical issues of the Common Commercial Policy continues to lie with the Commission, in particular with the Commissioner for Trade and the Directorate General for Trade.[98]

By contrast, it is of advantage to the High Representative if the subject matter of an international agreement relates essentially to the CFSP, i.e. if, e.g., questions of external trade are not covered or merely constitute an ancillary aspect. In such cases, the initiative to enter into treaty negotiations lies a priori solely with the High Representative whom the Council will also nominate as the Union negotiator.[99]

All these aspects which concern the formal legality of the treaty negotiating procedure are, of course, subject to judicial review by the ECJ to which especially the Commission may submit a case.[100] It is, therefore, quite unlikely that the High

[94] Art. 207 (3)(3) cl.1 TFEU.

[95] Art. 2 (5)(2) of the Council's Rules of Procedure (fn. 62).

[96] Art. 18 (4) cl.3 TEU.

[97] See in contrast, e.g., Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (200), according to whom the High Representative has the power "die GHP… gegebenenfalls dem stärker mitgliedstaatlichen Einfluss unterliegenden GASP-Bereich zuzuordnen (*sic!*)" ("to allocate (*sic!*) the Common Commercial Policy, where appropriate, to the CFSP-area on which the Member States exert stronger influence").

[98] Cf. Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, European Policy Analysis 8-2008, p. 3, available at: http://www.sieps.se/sites/default/files/427-20088epa.pdf.

[99] Cf. Art. 218 (3) TFEU. See also in and at fn. 20–21.

[100] See, in particular, the advisory opinion procedure (Art. 218 (11) TFEU), which the Commission may initiate. Cf. on this Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape, 2008*, p. 188 (196), who argues that the ECJ may only review whether the procedure was manifestly erroneous; see also on the ECJ's competence of judicial review with regard to treaties in the area of the CFSP according to Art. 218 (11) TFEU Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 218 AEUV, para. 34; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 218 TFEU, para. 20.

Representative will wantonly ignore the lines of demarcation between CFSP and trade policy.[101]

Relevance of the European External Action Service

The High Representative cannot be considered to be specifically powerful by pointing to the European External Action Service (EEAS). Of course, the EEAS is the "administrative infrastructure" of the High Representative. In particular, the EEAS has to support the High Representative in his or her function as head and representative of the CFSP.[102] Nonetheless, the EEAS is not solely attached to the High Representative. For example, the EEAS also has to support the Commission in the field of the Common Commercial Policy and to co-operate with the services of the Commission.[103]

In addition, the Commission may instruct the Union delegations to third countries and to international organizations,[104] despite the fact that these delegations form a part of the EEAS[105] which, in turn, is subordinate to the High Representative.[106] The Commission's competence to issue instructions to delegations is particularly indispensable for purposes of the Common Commercial Policy[107] because it is solely the Commission which has the competence to represent the Union externally with regard to trade policy.[108] Moreover, the staff possessing specific expertise in the field of trade policy has remained with the Commission and has not been transferred to the EEAS.[109] Similarly, the Union

[101] See also Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (803).

[102] Art. 27 (3)(1) TEU.

[103] Art. 2 (2), 3(1) Decision 2010/427/EU (Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) (OJ EU L 201/30)).

[104] Art. 5 (3)(2) Decision 2010/427/EU.

[105] Art. 1 (4) Decision 2010/427/EU.

[106] Art. 1 (3) Decision 2010/427/EU.

[107] With regard to the necessity of a "enge Einbindung" ("close integration") of the EEAS into, and a "starke Anbindung" ("strong link") of the EEAS to, existing structures and the Commission and its services, see Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (194 et seq.).

[108] Art. 17 (1)(6) TEU. Subject to the competences of the President of the European Council and the High Representative in the field of the CFSP (see fn. 3), the Commission's power of external representation is all-embracing (Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (191, 193)).

[109] Cf. Annex to the Decision 2010/427/EU. See also Knoop, Der Außenminister der Europäischen Union und der Europäische Auswärtige Dienst, in: *Festschrift für Götz*, 2005, p. 93 (104); Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (194).

delegations' personnel occupied with questions relating to foreign trade is not in attendance on the EEAS, but on the Commission.[110]

At least in theory, conflicting instructions seem to be conceivable,[111] if, e.g., a delegation receives instructions, which are hardly compatible with each other, from the EEAS on the one hand and the Commission on the other hand.[112] This problem has been realized from the beginning. The Council Decision on the EEAS prorogued the issue until the conclusion of an agreement between Commission and EEAS, though.[113]

What may be more problematic is that the delegations are also subordinate to the instructions of the High Representative. It is not only the Council Decision on the EEAS[114] but also primary law[115] which ensures that the delegations are placed directly under the authority of the High Representative. According to its clear wording, the TFEU[116] seems to designate the High Representative as the sole institution being empowered to direct the EEAS. In a rather cryptic way, the Council Decision on the EEAS provides that the Commission has to execute its instruction powers, conferred upon it only by secondary law,[117] "in accordance with" the power of the High Representative to direct the EEAS, conferred upon him or her by primary law.[118] Bringing about such "accord" will, in practice, entail a certain demand for coordination between the Commission and the High Representative.[119]

Summary

In view of the institutional interweavements presented here, it is not easy to sum up our observations. In the area of the Common Commercial Policy, pivotal powers are vested primarily with the Parliament, the Council and the Commission.

[110] EU press release 'EEAS decision – main elements' of 8 July 2010 (MEMO/10/311), at 2.

[111] Delving into this problem Sydow, Der Europäische Auswärtige Dienst, JZ 66 (2011) 1, p. 6 (10).

[112] Cf. Art. 5(3) Decision 2010/427/EU.

[113] Recital 13 of the Decision 2010/427/EU. Concerning this problem see Knoop, Der Außenminister der Europäischen Union und der Europäische Auswärtige Dienst, in: *Festschrift für Götz*, 2005, p. 93 (105).

[114] Art. 5(3)(1) Decision 2010/427/EU.

[115] Art. 221(2)(1) TFEU.

[116] Art. 221(2)(1) TFEU.

[117] Art. 5 (3)(2) Decision 2010/427/EU.

[118] Art. 5 (3)(2) Decision 2010/427/EU.

[119] Despite the fact that primary law subjects the EEAS to the authority of the High Representative only, his or her instructions will not prevail over instructions issued by the Commission if the Commission and the High Representative are unable to reach an "accord" within the meaning of Art. 5 (3)(2) Decision 2010/427/EU. Such a conclusion would contradict our reasoning in and at fn. 68–101. See, however, Sydow, Der Europäische Auswärtige Dienst, JZ 66 (2011) 1, p. 6 (10), according to whom the Commission's exercise of its competence to instruct Union delegations "die grundsätzliche Leitungsverantwortung des Hohen Vertreters nicht in Frage stellen dürfe" ("must not contest the High Representative's primary responsibility to direct [the EEAS]").

Parliament and Council are coequal legislative bodies with regard to unilateral trade measures. Their enactment depends on the Commission's initiative, though. With regard to the conclusion of international treaties, both the initiative to open negotiations and the conduct of negotiations always fall exclusively within the competence of the Commission. Of course, the Commission needs to be authorized by the Council, which may direct the Commission's negotiations by issuing directives and which has to adopt the decision concluding the treaty. The Commission has to inform Parliament during the treaty negotiations on a regular basis. Generally speaking, treaties in the field of the Common Commercial Policy may not to be concluded any more without Parliament's consent.

Within the Commission, the High Representative is not superior to the Commissioner for Trade who is still fully responsible for the Common Commercial Policy. The High Representative's task is to ensure consistency of the Union's external actions by coordinating the CFSP and the Common Commercial Policy, i.e. by harmonizing those two foreign policies. Therefore, the relationship between the CFSP and the Common Commercial Policy is not unidirectional squeezing the Common Commercial Policy in a corset plaited by the CFSP. The influence of the High Representative on the doubtlessly increasing "politicization" and "intergovernmentalization" of the Common Commercial Policy should, thus, not be overestimated.

The EEAS will not boost the High Representative's vigour either. Especially in the field of the Common Commercial Policy, the EEAS has to support the Commission and its services as well. What is more, the EEAS has not swallowed up the Commission's staff being in charge of the Common Commercial Policy. As a consequence, the highly technical expertise needed for purposes of the Common Commercial Policy remains with the Commission. In addition, the personnel being responsible for trade issues within the Union delegations to third countries or to international organizations will be deputed by the Commission. Moreover, the Commission has the power to issue instructions to delegations in the area of the Common Commercial Policy.

Of course, the "on-road test" of the allocation of powers in the area of the Common Commercial Policy under the Treaty of Lisbon has just begun. In the end, it will also depend quite naturally on the personalities of the actors how smooth the Common Commercial Policy "after Lisbon" will be driven in light of the quite complex institutional "wheelwork" provided for in the Treaties.

Trade Policy Under the Treaty of Lisbon

Godelieve Quisthoudt-Rowohl

Introduction

The aim of the Treaty of Lisbon is to democratise the European Union significantly. In particular, it provides for a strengthening of the powers of the European Parliament. The common commercial policy of the European Union is particularly affected by this.

Since the Treaty of Lisbon came into force on 1 December 2009, and even before that, we have found ourselves in a state of continuous crisis. At the beginning of 2010, the economic and financial crisis posed enormous challenges to the European Union. So far, thanks to a concerted effort on the part of the European Council—working in conjunction with the European Institutions—it has been possible to respond consistently and comprehensively to the crisis. Europe has been protected from the worst ravages.

However, the decisive action of the European Council led to a situation whereby the Council assumed a series of additional powers—contrary to the spirit of Lisbon. Council President Herman van Rompuy exploited the crisis to establish his authority in Brussels. It did not take long for the consequences to become clear: in Brussels, direct competition has arisen between the European Commission and the European Council, as evident in the disagreements between Mr van Rompuy and Mr Barroso. This runs contrary to the Treaty of Lisbon, which, like the previous treaties, is completely clear on this issue: the European Council has sole authority when it comes to issuing guidelines, while the Commission has the immediate right of initiative in all European affairs; the legislature consists of the European Parliament and the Council of the European Union, acting jointly, and no one else.

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The European Parliament

For the European Parliament, the innovations of the Treaty of Lisbon are the necessary adjustments for the progress of European integration. The democratisation of the European legislature was long overdue. The institutional innovations in the area of international trade policy are just one important aspect among many.

However, the democratic advances are particularly evident here: unlike in the US, foreign relations within Europe have always been the realm of the Executive. This will also have to remain the case. Nonetheless, the move to involve the European Parliament to the extent to which this has now been done was a necessary step. The European Parliament, acting together with the Council of the European Union, now adopts the 'measures defining the framework for implementing the common commercial policy' (Article 207(2) TFEU). In addition, Parliament must approve every agreement with third states. This places trade policy on a stable democratic footing, while at the same time retaining the freedom and flexibility it needs in order to negotiate with third parties. Democratic control and reliability are delicately balanced.

Primary Law and Practice

The precise forms in which the Lisbon Treaty provisions will be implemented in practice remain to be seen. The following questions arise: How likely is it that the European Parliament will say 'no' to a trade agreement? What impact will non-governmental organisations have on future trade policy? Will Parliament in future play a role even at the stage at which a negotiating mandate is issued? To what extent will the political differences and political majorities be manifest in the common commercial policy?

In fact, only two Articles in the TFEU (Articles 206 and 207) touch directly on the way in which the European Union deals with trade policy, in a text of just one A4 page in length. The European Parliament is mentioned precisely twice there. However, if one considers the questions just asked, as well as the broad range of the common commercial policy and its impact on the domestic economy and the entire foreign policy of the European Union, then it soon becomes clear that the Treaty provisions simply lay down the broad outlines on the basis of which trade policy then actually has to be implemented. This applies on both an institutional and a substantive level.

Legal provisions always need to have life breathed into them; i.e. they need to be interpreted. The less detailed the provisions are that the legislature and the parties to the Treaties have adopted, the truer this is. The interpretation of laws and treaties is not a one-off occurrence but rather a dynamic process that is constantly giving rise to new questions and changes of interpretation. In particular, the provisions need to be put into practice immediately after a new treaty or item of legislation comes into force. The various opposing groups lobby for the interpretation that best suits their interests. This is exactly what is happening in Brussels currently.

If one considers the case-law of the European Court of Justice in relation to the common commercial policy, it is evident that the interpretation and implementation of primary law in the area of European trade policy are nothing new. On a number of occasions in the past, the ECJ has been required to rule on what issues fall under the common commercial policy and are therefore the sole responsibility of the European Union. Although the Treaty of Lisbon clarified this specific question directly (see Article 207(1), which explicitly subordinates all areas of international trade to the common commercial policy), the 'problems' are now arising elsewhere, in particular as regards the 'new' interaction between the institutions.

However, one thing is clear: the more the Commission and Council involve the European Parliament in negotiations and proposed legislation from the outset, the more likely it is that swift progress will be made and the less likely it is that an agreement will be rejected by the European Parliament. An intelligent approach to the new institutional structures by all parties concerned will be of decisive importance for future EU action in the field of international trade. However, in negotiating the future rights of Parliament, what will ultimately matter most of all will be Parliament's perseverance. The decisions now being made will decisively influence the interpretation of the Treaty for years, if not decades, to come.

The Treaty of Lisbon gives the European Parliament more power in relation to trade policy than the national parliaments of the Member States enjoy. However, the negative example of the US, where 'parliament' (Congress) can block any kind of progress, hangs over EU trade policy like a black cloud.

Transparency and Politicisation of Trade Policy

Requests are repeatedly made for negotiations on trade agreements to be more transparent. In an exception to the media penetration in all areas of life, international negotiations unusually take place behind closed doors. There is no alternative to this. The key principle behind all negotiations, whatever their level, is trust. Before the parties finally agree, their mutual demands must be dealt with in confidence. Any lapse in trust will necessarily slow down negotiations, if not derail them altogether.

The inclusion of interest groups of all kinds in the political decision-making structures is closely linked to the demand for greater transparency. Many people warn against the further politicisation of international trade policy in the context of the involvement of the European Parliament. The first point to be made here is that international trade policy has become increasingly politicised completely independently of internal European processes. Globalisation has made people extremely aware of trade and rightly so. The results are by no means all negative. Thus, proposals from the Interparliamentary Assembly of the WTO, which has no formal participatory rights, have provided an important impetus within the WTO and among its members. Aspects such as environmental and social standards play an increasingly important role in trade talks, benefiting all sides. Similarly positive effects can also result from the greater role of the European Parliament.

We are already witnessing a significant increase in the interest groups represented in the Committee on International Trade (INTA). The forceful intervention of trade unions in the discussion of free trade agreements with Peru and Columbia is just one example of this. Politicians and civil society need to act with care in their mutual relations. We should not allow the loudest argument and perhaps the one which makes the biggest public impact to prevail, but rather the best argument or the best compromise.

The European Parliament, in particular the Committee on International Trade, has unquestionably gained in importance. The Members of Parliament have suddenly become the focus of attention for foreign governments, industry and various non-governmental organisations. Even with the best will in the world, it is no longer possible to accede to all the requests for meetings. The profile of the European Parliament has risen immensely abroad in the wake of the first 'NO' to SWIFT. This focus entails an enormous challenge. Specific trade issues, foreign policy strategies and questions such as human rights and environmental, social and labour standards must be reconciled. It is important not to lose sight of the actual goal: to promote trade in the democratic spirit of the Treaty of Lisbon.

Separating the Executive and Legislature

With all this in mind, one might form the impression that the European Parliament needs to generate more power at any price. However, this is not the point. Legislative and executive tasks must continue to be kept strictly separate. In the case of negotiations on a free trade agreement, the aim cannot be to bring Parliament to the negotiating table and, in the case of implementation provisions, to put Parliament in charge of implementing regulations or directives. A strict separation is vital in this respect. Effective parliamentary control must be assured, and Parliament must exercise realistic and substantial final responsibility. This is precisely the spirit of the Treaty of Lisbon. Parliament must work and campaign to ensure it is put into practice.

Summary

- The democratic deficit in international trade policy has been overcome by the Treaty of Lisbon. The fundamental change in trade policy sought by the Treaty needs to be put into practice. This must be achieved, even if it proves difficult for the existing protagonists to abandon familiar paths and habits.
- In addition to the laying down of fundamental provisions in the form of primary law, the key lies in interpretation *in* practice and *through* practice.
- Strict separation of legislative and executive responsibilities must be assured into the future. The Lisbon Treaty has not changed this in any way. Far from it.

- A good balance must be found during debates in the European Parliament between higher social and environmental standards in trade policy and the interests of European industry. Trade policy should not be overwhelmed by extraneous issues.

Part IV
The Normative Framework of the CCP After Lisbon

Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action

Christoph Vedder

Introduction: European External Relations in a Globalized World

In 2005, the conference on the EU's external economic policy according to the Treaty establishing a Constitution for Europe (TCE) dealt with the objectives of the Common Commercial Policy (CCP) and of the external action of the EU.[1] With the ratification of the Treaty of Lisbon, it is time to analyse the CCP in the context of the general principles and objectives, which are applicable to the EU's external action within the TEU and the TFEU.

Starting point for this analysis is the "Laeken Declaration on the Future of the European Union" of the European Council meeting in Laeken on 14 and 15 December 2001. Besides setting the course for the substance of the TCE, the declaration contains remarkable conclusions about "Europe's new role in a globalised world".[2] Under the impression

[1] Vedder, Ziele der Gemeinsamen Handelspolitik und Ziele des auswärtigen Handelns, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 43 et seq.

[2] Presidency Conclusions of the European Council Meeting in Laeken on 14 and 15 December 2001, Annex I, Bulletin EU 12-2001, under point I.27: "Beyond its borders, in turn, the European Union is confronted with a fast-changing, globalised world. Following the fall of the Berlin Wall, it looked briefly as though we would for a long while be living in a stable world order, free from conflict, founded upon human rights. Just a few years later, however, there is no such certainty. The eleventh of September has brought a rude awakening. The opposing forces have not gone away: religious fanaticism, ethnic nationalism, racism and terrorism are on the increase, and regional conflicts, poverty and underdevelopment still provide a constant seedbed for them.

What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the

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of September 11, new threats for peace and security were identified: religious fanaticism, ethnic nationalism, racism and terrorism, regional conflicts, poverty and underdevelopment. Within a "fast-changing, globalised world", Europe has "a leading role to play in a new world order". In this regard, the Union wants "to play a stabilising role worldwide" and be an example for other countries and people.

The Laeken Declaration emphasises that the EU's intent is "to shoulder its responsibilities in the governance of globalisation" as a power, which fights against "all violence, [. . .] terror and [. . .] fanaticism, but which also does not turn a blind eye to the world's heartrending injustices". Europe seeks to change world affairs in a way that does not only favour the rich, but also the poorest countries on earth. Europe strives to be a power "seeking to set globalisation within a moral framework". This ambitious commitment is directly linked with Art. III-292 TCE and, after the failure of the TCE, with the relevant provisions within the TEU and TFEU.

One of the most essential developments of the TCE and the Lisbon Treaty in comparison to the EU and EC Treaty (as amended by the Treaty of Nice) is the concentration of the EU's external competences within a policy of its own. These competences were beforehand—during the existence of the EC—gradually developed and scattered all over the Treaties. Whereas in the TCE the external action of the Union was addressed in a sole section, the rules concerning the foreign relations were yet again divided between the TEU and TFEU, but connected through the principles and objectives for the whole of the EU's external action as mentioned in Art. 21 TEU. Thus, the entire external action of the EU must be guided by the ambitions as expressed in the Laeken Declaration.

The Arrangement of the External Policy Objectives of the Union

The general external policy principles and objectives—complying with the mandate of the Laeken Declaration—first found entrance in Art. III-292 and Art. III-293 TCE which comprised the general values and objectives of the Union as enshrined in Art. I-2 and I-3 TCE. The specific commercial policy objectives were to be found in Art. III-314 TCE.

Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law.

Now that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation. The role it has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development".

Under the Treaty of Lisbon, the general objectives of the Union's external action as first phrased in Art. III-293 TCE, are identically restated in Art. 21 TEU. The new Art. 21 TEU only provides for the changed terminology from the TCE to the Lisbon Treaty—"High Representative" instead of "Minister for Foreign Affairs", "Treaties" instead of "Constitution"—and adapts to the legislative procedure and systematic structure of the legal acts provided by the TEU and TFEU. The same applies to Art. 22 TEU in comparison to Art. III-293 TCE and to the specific commercial policy objectives in Art. 206 TFEU compared to Art. III-315 TCE. The EU's objectives to be followed in its external action as mentioned in Art. 21 TEU accord literally with Art. 2 TEU and Art. I-2 TCE. Even though the objectives of the EU as mentioned in Art. 3 TEU do generally accord with Art. I-3 TCE, they were extended by two points. Especially the introduction of "the protection of [the EU's] citizens", according to Art. 3 para. 5 TEU, is of relevance here. Thus, the relevant provisions concerning the objectives of the CCP and the general external action of the EU are—except the usual terminological and structural changes—identical with the ones of the TCE.[3]

CCP Objectives, Art. 206 TFEU

According to the since 1958 unchanged Art. 206 TFEU, the EU commits itself to contribute "to the harmonious development of world trade, the progressive abolition of restrictions on international trade, [...] and the lowering of customs and other barriers". With the Lisbon Treaty "the progressive abolition of restrictions [...] on foreign direct investment" was added. Art. 206 TFEU was drafted in 1958 with the intention of the former EEC to prevent fears of protectionist and foreclosure effects that were affiliated with the creation of the customs union.

The development of world trade and the abolishment of trade barriers were the essential objectives of the GATT. Moreover, the EEC was no party to the GATT

[3] Therefore, one can refer to the commentaries on the TCE: Hummer, Art. III-292, Art. III-293, Art. III-314 TCE, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar*, 2007; Heintschel von Heinegg, Art. I-2, Art. I-3 TCE, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar*, 2007; Calliess, Art. I-2 TCE, in: Calliess/Ruffert (eds.), *Verfassung der Europäischen Union*, 2006; and Ruffert, Art. I-3 TCE, in: Calliess/Ruffert (eds.), *Verfassung der Europäischen Union*, 2006; with regard to TEU/TFEU, see: Hummer, Art. 21, Art. 22 TEU, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012; Heintschel von Heinegg, Art. 2, Art. 3 TEU, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012; Callies, Art. 2, Art. 3 TEU, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011; Cremer, Art. 21, Art. 22 TEU, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011; Hahn, Art. 206 TFEU, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011; Schwarze, Art. 2 TEU, in: Schwarze (ed.), *EU-Kommentar*, 3rd ed. 2012; Becker, Art 3 TEU, in: Schwarze (ed.), *EU-Kommentar*, 3rd ed. 2012; Terhechte, Art. 21, Art. 22 TEU, in: Schwarze (ed.), *EU-Kommentar*, 3rd ed. 2012; Osteneck, Art. 206 TFEU, in: Schwarze (ed.), *EU-Kommentar*, 3rd ed. 2012; Pechstein, Art. 3 TEU, in: Streinz (ed.) *EUV/AEUV. Kommentar*, 2nd ed. 2012; Regelsberger/Kugelmann, Art. 21 TEU, in: Streinz (ed.) *EUV/AEUV. Kommentar*, 2nd ed. 2012; Nettesheim/Duvigneau, Art. 206 TFEU, in: Streinz (ed.) *EUV/AEUV. Kommentar*, 2nd ed. 2012.

and thus not formally bound by its obligations.[4] The objectives mentioned in Art. 206 TFEU re-appear as substantial elements of the CCP in Art. 207 para. 1 sentence 1 TFEU. This specific commercial policy-related objective is inherent in any WTO abiding commercial policy. Since the EU is a member of the WTO, the provision confirms the EU's obligations arising out of its WTO membership and has no independent meaning beyond that aim. However, Art. 206 TFEU can—as a standard of control—affect the validity of secondary commercial policy acts. This is in particular the case in situations in which the ECJ finds that it is not in a position to revise an EU secondary act on the basis of WTO law.[5]

General Objectives for the EU's External Action, Art. 21 TEU

New[6] and far beyond the trade related objectives is the alignment of the CCP with the objectives governing the EU's external action in general. In an excessive regulatory technique, Art. 21 para. 3 subpara. 1 alternative 1 TEU and the general reference in Art. 205 TFEU as well as the specific—but actually redundant and therefore purely demonstrative—reference in Art. 207 para. 1 sentence 2 TFEU make the general principles and objectives of the EU's external action provided for in Art. 21 para. 1 and 2 TEU mandatory also in the field of the CCP. Art. 21 para. 1 TEU incorporates the values of the Union in Art. 2 TEU and Art. 3 para. 1 and para. 5 TEU establish objectives for the EU also for its external action.

Art. 21 para. 3 subpara. 1 TEU extends the scope of application of the objectives laid down in Art. 21 para. 1 and para. 2 TEU to both Title V TEU, i.e. the CFSP and CSDP that are dealt with in Art. 23 et seqq. TEU, and Art. 206 to Art. 222 TFEU which collect the external competences as formerly contained in the first pillar of the EU. Since the external action of the EU is—differently from what the TCE foresaw—not dealt with in a single section but split up in the TEU and TFEU, it was deemed necessary to once again explicitly refer to the principles and objectives contained in Art. 21 TEU in Art. 205 TFEU for the EU's external policy action contained in the TFEU. Similarly, Art. 207 para. 1 sentence 2 TFEU incorporates the general external policy objectives in stating that "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

[4] The conclusion that the EEC is a de facto member of the GATT was only reached later on by the ECJ, Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR, 1219.

[5] For this established case law, see e.g. ECJ, Case C-280/93, *Germany v. Council*, [1994] ECR I, 4973, para. 109 et seqq.; ECJ, Case C-149/96, *Portugal v. Council*, [1999] ECR I, 8395, para. 41 et seqq.

[6] Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon Urteil, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration. Die Europäische Union nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, EuR-Beiheft (2010) 1, p. 193 (206): "fundamentally new legal basis".

The EU's Internal Policies in the Service of the External Action

Art. 21 para. 3 TEU does not only oblige the Union to apply the external action principles and objectives to its particular external competences, but extends their scope, in its second alternative of subpara. 1 also to "the external aspects of its other policies", i.e. the internal policy areas of the EU.

Consistency of the EU's External Policy and Its External and Internal Policies

A coherent pattern of the new Union law is its strong linkage between the policy areas conferred to the EU among one another. This does specifically apply for the external action. Next to Art. 7 TFEU, which, as before, affects the consistency among the EU's internal policies, Art. 21 para. 3 subpara. 2 TFEU demands both, horizontal consistency between the various areas of the EU's external action and vertical consistency between the external and internal policy areas. Consistency is to be safeguarded by Council and Commission assisted by the High Representative,[7] according to Art. 21 para. 3 subpara. 2 TEU. Thereby, not only the "external aspects" of the internal policies but the whole range of the EU's internal policies will come under the influence of the Union's external action objective.

Preclusion of Competence Extension

Art. 3 para. 6 TEU and Art. 207 para. 6 TFEU exclude that the principles and objectives set forth for the external action will lead to an extension of the EU's competences and affect the principle of conferral. This self-evident principle can be traced back to the Laeken Declaration and will affect the realization of the EU's external action objective.[8]

The General External and the Intrinsic CCP Objectives Governing the CCP

The objectives mandatory for the CCP arise out of three sources, one intrinsic and two exogenous:

- the specific commercial policy objectives, mentioned in Art. 206 TFEU;
- the general objectives for the EU's external action are laid down in Art. 21 para. 2 TEU;

[7] See below "Conflict of Objectives, Politicization of the CCP".

[8] See below "Mandatory Orientation Towards the General Objectives for the Union's External Action".

- furthermore, according to Art. 21 para. 1 TEU, the Union shall be guided within its action on the international scene "by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world".

Hereby, the Union externalizes its internal constitutional values. These are enumerated in Art. 21 para. 1 TEU. Simultaneously, Art. 21 para. 1 TEU does implicitly also refer to Art. 2 TEU, which does formulate the basic values of the EU in general. The "principles" mentioned in Art. 21 para. 1 TEU do not only include the "values" on which "the Union is founded", but also the Union's objectives as enumerated in Art. 3 TEU. Art. 3 para. 5 TEU, which is not mentioned in Art. 21 TEU, names the principles and objectives "the Union shall uphold and promote [. . .] [i]n its relations with the wider world". Art. 3 para. 1 TEU names, as a general objective of the Union, the promotion of "peace" and the promotion of "its values and the well-being of its peoples".

The provisions just mentioned phrase the relevant values, principles and objectives for the Union's external action in overlapping and non-identical wording. This might give reason to controversial judicial and political arguments in detail. Yet, looking at the full set of the objectives, one can identify 14 objectives which must be adhered to in the conduct of the CCP. Moreover, the cross sectoral obligations of Art. 8 to 13 TFEU must be respected.[9]

The Commercial Policy Objectives, Art. 206 TFEU

The specific commercial policy objectives mentioned in Art. 206 TFEU, apply since 1958 unmodified. The only exception is the newly added obligation for "the progressive abolition of restrictions [. . .] on foreign direct investment". These objectives aim for the development and liberalization of world trade. This obligation has been intrinsic to the CCP from the beginning. Today, its major function is to shape the EU's commercial policy in accordance with WTO law.[10]

The General External Action Objectives Governing the CCP, Art. 207 para. 1 sentence 2 TFEU

The general objectives governing the EU's external action, refer, on the one hand, naturally to the security of the Union and, on the other hand—in conformity with the Leaken Declaration—altruistically to international security, global concerns such as protection of the environment and economic development, and the respect for political values. The latter are the fundamental rights of the western hemisphere historically cumbersomely achieved in Europe. The pursuance of these altruistic objectives is, in a globalized world with various threats, also always self-serving for the security of the Union and its citizens.

[9] Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 3rd ed. 2010, p. 133.
[10] See above "CCP Objectives, Art. 206 TFEU".

The various principles and objectives for the external action of the Union cannot be analysed in detail.[11] Their impact can yet be conceived without a detailed analysis. Not only the antagony between economic interest and advocacy for human rights illustrates that the EU's external action principles and objectives can come into conflict with each other.[12]

Integration of All Countries into the World Economy, Art. 21 para. 2 lit. e TEU

Through Art. 21 para. 2 lit. e TEU the Union is obliged to "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade". With the restriction of trade barriers, the obligation comes close to the specific commercial policy objective of Art. 206 TFEU, which similarly aims at the elimination of trade restrictions. However, this general objective extends *ratione personae* yet far beyond the scope of WTO membership and includes all countries within its scope. With regard to content, Art. 21 para. 2 lit. e TEU is broader in substance than Art. 206 TFEU because "integration [...] into the world economy" does not only embrace the elimination of trade barriers, but in particular also includes the strengthening of the economic and trading power of countries and is thus interrelated with the overall economic development.

Free and Fair Trade, Art. 3 para. 5 TEU

According to Art. 3 para. 5 sentence 2 TEU, the EU is obliged "to contribute to [...] free and fair trade". The objective of free trade flows exemplarily out of the EU's WTO membership and is in regard of its substance identical to the WTO obligation. However, "fair trade" is yet independent of the Union's WTO obligations[13] and includes the realization of adequate prices for producers and the adherence of social and labour standards.

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[11] Not even the commentaries contain such a detailed analysis: Hummer, Ar.t III-292 TCE, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar,* 2007; Geiger, Art. 21 TEU, Art. 2 TEU and Art. 3 TEU, in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar,* 5th ed. 2010; Bitterlich, Art 2 TEU, Art 3 TEU and Art. 21 TEU, in: Lenz/Borchardt (eds.), *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*, 5th ed. 2010; in most detail Kaufmann-Bühler, Art. 21 TEU, para. 8 et seqq., in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der Europäischen Union*, 46th suppl. 2011; Regelsberger/Kugelmann, Art. 21 TEU, in: Streinz (ed.) *EUV/AEUV. Kommentar*, 2nd ed. 2012; Terhechte, Art. 21, Art. 22 TEU, in: Schwarze (ed.), *EU-Kommentar*, 3rd ed. 2012; Hummer, Art. 21 TEU, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012; Cremer, Art. 21 TEU, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011.

[12] See below "Conflict of Objectives, Politicization of the CCP".

[13] The term "fair trade" can be interpreted to solely include WTO-conform trade; however, the term is used in a broader understanding, see Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (163 et seqq.): "equitable trade".

Safeguard Security, Independence and Integrity, Fundamental Values and Interests of the Union, the Well-Being of Its Peoples and the Protection of Its Citizens, Art. 3 para. 1, Art. 3 para. 5 sentence 1, Art. 21 para. 2 lit. a TEU

Essential for any foreign policy is the safeguard of the security and the interests of the actor. This natural and self-involved objective of the EU's external action policy is thus not only mentioned in the catalogue of objectives of Art. 21 para. 2 TEU at a first place, but also in Art. 3 TFEU, which does restate the objectives of the EU in general, and which, at the forefront, in its paras. 1 and 2 phrases this objective before the other external action objectives.

Art. 3 para. 1 TEU obliges the Union "to promote [. . .] its values and the well-being of its peoples". According to Art. 3 para. 5 TEU, the EU "shall uphold and promote its values and interests and contribute to the protection of its citizens". Art. 21 para. 2 lit. a TEU obliges the Union to "safeguard its values, fundamental interests, security, independence and integrity". The security of the Union is according to Art. 24 para. 1 TEU, the primary function of the CFSP and—in the view of a Common European Defence Policy yet to be developed—also of the CSDP and may lead at last resort in case of an armed aggression against the territory of a member state to the obligation for aid and assistance as enshrined in Art. 42 para. 7 TEU.[14] The security of the Union and its citizens against terrorist attacks, which is and will very be often embraced in international terrorist activities outside the territory of the Union, is secured through the solidarity clause of Art. 222 TFEU which includes an obligation to assist as set forth in Art. 222 para. 2 TFEU.[15]

Democracy, Rule of Law, Human Rights and Human Dignity, Art. 2, Art. 3 para. 5, Art. 21 para. 1, Art. 21 para. 2 lit. b TEU

The Union has committed itself to the core values of democracy, the rule of law and human rights through Art. 2 internally, and, as the fundamental principle for its external action, through Art. 3 para. 1, Art. 3 para. 5 sentence 1 and Art. 21 para. 1 TEU. Democracy, the rule of law and fundamental or rather human rights are provided in Art. 21 para. 1 TEU as principles and in Art. 21 para. 2 lit. b TEU as objectives of the Unions external action, while Art. 3 para. 5 sentence 2 TEU only mentions human rights within the enumeration of the external action principles. The latter mentions in particular "the rights of the child". The respect for human dignity is particularly stressed in Art. 21 para. 1 and Art. 2 TEU. The protection of minorities which belongs to the internal principles of the Union, is, however, neither particularly mentioned in Art. 3 para. 5 TEU nor in Art. 21 para. 1 TEU. The international protection of

[14] For the CFSP and CSDP, see Vedder, Möglichkeiten und Grenzen effektiven Krisenmanagements durch die EU – Der rechtliche Rahmen, in: Isak (ed.), *Krise, Kompetenz, Kooperation. Beiträge zum 9. Österreichischen Europarechtstag 2009*, 2010, p. 15 et seqq.

[15] Vedder, Art. I-43 TCE, para. 3, 5 and Art. III-329 TCE, para. 2, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar*, 2007; Vedder, Art. 222 TFEU, para. 1, 3, 5, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012.

minorities is however included through the general objective to respect international law. It is remarkable that within the broad field of human rights, the sole mentioning of the rights of the child highlights *in concreto* a single individual aspect of this field.[16]

Ensuring the values of the Union—as well as its interests—is, according to Art. 42 para. 5 TEU, also a task of the CSDP. The development of democracy, the rule of law and human rights was in Art. 177 para. 2 EC Treaty (as amended by the Treaty of Nice) an explicit objective of the development policy. Today, Art. 208 para. 1 TEU still embraces this development assistance policy objective through reference to the general principles and objectives of the Union's external action.

Freedom and Equality, Solidarity and Mutual Respect Among Peoples, Art. 2, Art. 3 para. 5, Art. 21 para. 1 TEU

Freedom and equality belong to the fundamental values of the Union as enshrined in Art. 2 TEU, of which, however, solely the "principle of equality" is repeated in Art. 21 para. 1 TEU. The fundamental value "freedom", which is mentioned in Art. 2 TEU independently of human rights as a value of a state and social order, is embraced in the principles of democracy, rule of law and human rights even without explicit mentioning. The "mutual respect among peoples" as mentioned in Art. 3 para. 5 TEU, is not explicitly repeated in Art. 21 TEU, but is included through the respect for international law. It is difficult to construe the meaning of the term solidarity which was introduced into the primary law of the Union through the TCE and today through Art. 3 para. 5 and Art. 21 para. 1 TEU.[17] While the term solidarity in Art. 2 sentence 2 TEU is meant as a social value engraved in the communities of the Member States of the Union—and the term solidarity is used with different meanings and context within various parts of the TEU and TFEU—solidarity in the meaning of Art. 3 para. 5 and Art. 21 para. 1 TEU should, within its context, be interpreted as solidarity in relation to third—non-member—states.

Respect for and Strengthening of International Law and, in Particular, the Principles of the UN Charter, Art. 3 para. 5, Art. 21 para. 1, Art. 21 para. 2 lit. b TEU

Within Art. 3 para. 5 TEU the Union commits itself "to contribute to [...] the strict observance and the development of international law, including respect for the principles of the United Nations Charter". The "respect for the principles of the United Nations Charter and international law" is invoked in Art. 21 para. 1 TEU as a relevant principle for the development of the Union, without mentioning this function

[16] Convention on the Rights of the Child of 20 November 1989 (entered into force 2 September 1990), 1577 U.N.T.S. 3; see in that regard Schorlemer/Schulte-Herbrügge (eds.), *1989–2009. 20 Jahre UN-Kinderrechtskonvention*, 2010.

[17] See Vedder, Art. I-43 TCE, para. 1 f., in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar,* 2007; Vedder, Art. 222 TFEU, para. 1 f., in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012.

in Art. 2 or 3 TEU. Moreover, Art. 21 para. 2 lit. b TEU expresses the development and strengthening of "the principles of international law" as an external action objective.

The respect for international law, and in particular, the UN Charter is expressed as a fundamental principle for the Union, for the first time in 1997 in the fifth accession requirement established by the Luxembourg European Council.[18] Thus the Union commits itself to conduct its international relations in accordance with international law and according to Article 21 para. 2 lit. b TEU, the Union is obligated to advocate the observance of international law worldwide. The Union, as an international organisation, commits itself to the observance of the rules of international law, especially the rules of customary international law, while treaties which are concluded by the Union are binding according to Article 216 para. 2 TFEU.

Peace-Keeping, Conflict Prevention and International Security, Article 3 para. 1, Art. 3 para. 5, Article 21 para. 2 lit. c TEU

According to Article 3 para. 1. TEU, the preservation and promotion of peace is an essential objective of the Union, which is extended in Article 21 para. 2 lit. c TEU to conflict prevention and the strengthening of international security. Contributing to "peace-keeping, conflict prevention and strengthening international security" in accordance with the UN Charter is an explicit objective of the CSDP. In order to achieve this objective, the Union may conduct missions according to Article 42 para. 1 TEU.[19] Besides the defence of the Union itself, which is of minor relevance in present world affairs, the operational capacity of the Union for peace-keeping and conflict prevention internationally is a main task of the CSDP as part of the CFSP.[20]

That this aim may only be pursued under the observance of international law and according to Article 21 para. 2 lit. c TEU, especially "in accordance with the purposes and principles of the United Nations Charter" can be already concluded from the commitment for the observance of international law. However, this article specifically refers to the rules of the UN Charter which establish the system of collective security, in particular the rules of Chapter VII of the UN Charter and moreover other important principles, such as the obligation for the peaceful settlement of disputes in Art. 33 UN

[18] Conclusions of the Presidency of 12./13.12.1997, Bull. EU 12/1997 p. 9: "The members of the conference must share a common commitment to peace, security and good neighbourliness, respect for other countries' sovereignty, the principles upon which the European Union is founded, the integrity and inviolability of external borders and the principles of international law and a commitment to the settlement of territorial disputes by peaceful means, in particular through the jurisdiction of the International Court of Justice in The Hague".

[19] See Vedder, Möglichkeiten und Grenzen effektiven Krisenmanagements durch die EU – Der rechtliche Rahmen, in: Isak (ed.), *Krise, Kompetenz, Kooperation. Beiträge zum 9. Österreichischen Europarechtstag 2009*, 2010, p. 18, 25 et seq.

[20] See Vedder, Möglichkeiten und Grenzen effektiven Krisenmanagements durch die EU – Der rechtliche Rahmen, in: Isak (ed.), *Krise, Kompetenz, Kooperation. Beiträge zum 9. Österreichischen Europarechtstag 2009*, 2010, p. 17 et seq.

Charter. The reference to the Helsinki Final Act and the Charter of Paris[21] in Article 21 para. 2 lit. c EUV refers specifically to security in Europe under the aegis of the OSCE, whereas the UN Charter is applicable to peace-keeping on the global plane.

Sustainable Development, Article 3 para. 5, Article 21 para. 2 lit. d TEU

The commitment to "sustainable development of the Earth" as stipulated by Art. 3 para. 5 TEU is substantiated by Art. 21 para. 2 lit. d TEU to "the sustainable economic, social and environmental development of developing countries". It is remarkable that the term sustainable development aims not only at the economy but also at the society and the environment. The primary objective is, according to Art. 3 para. 5 and Art. 21 para. 2 lit. b TEU, the eradication of poverty. This essential objective is reiterated by Art. 208 para. 1 subpara. 2 TFEU as a special objective of the development cooperation.

Preservation and Improvement of the Quality of the Environment, Sustainable Management of Natural Resources, Art. 21 para. 2 lit. f TEU

Art. 21 para. 2 lit. f TEU obliges the Union "to preserve and improve the quality of the environment", without embedding this objective in the external policy objectives of Art. 3 para. 5 TEU. However, Art. 21 para. 2 lit. f TEU aims at the development "of international measures" for the protection of the environment, whereas Art. 191 TFEU makes the objectives of "preserving, protecting and improving the quality of the environment" the subject of the internal and external environmental policy of the Union itself. A crucial aspect of the global environmental policy is "the sustainable management of natural resources", to which the Union committed itself by virtue of Art. 21 para. 2 lit. f TEU "in order to ensure sustainable development", thus establishing a connection to development cooperation. The "rational utilization of natural resources" is an objective of the environmental policy of the Union according to Art. 191 para. 1 TFEU.

Combating Climate Change, Article 191 para. 1 TFEU

The objective of "combating climate change" internationally is addressed neither in Art. 21 TEU nor included in Art. 2 and 3 TEU. The objective was introduced by Art. 191 para. 1, fourth indent TFEU, which according to Art. 174 para. 1 EC Treaty (as amended by the Treaty of Nice) generally aimed at the international management of regional and global environmental problems. Thereby the Union responded to the G-8 Summit in Heiligendamm in summer 2007. As late as during the course of the deliberations on the Lisbon Treaty, combating climate change was

[21] Final Act of the Conference on Security and Cooperation in Europe of 1.8.1975 and Charter of Paris of 27.5.1997, in: Fastenrath (ed.), *KSZE/OSZE: Dokumente der Konferenz über Sicherheit und Zusammenarbeit in Europa*, 26th suppl. 2010, documents A.1 and A.2.

put on the international agenda.[22] This very essential external policy objective was inserted in the provisions on the environmental policy, because one did not want to re-open deliberations about the central provision of Art. 21 TEU at that stage.

Security of Energy Supply, Art. 194 para. 1 TFEU

Likewise, the "security of energy supply" was not included in the catalogue of Art. 21 TEU, but can be found in the newly introduced environmental policy provision of Art. 194 para. 1 lit. b TFEU. This objective has, in view of the global allocation of energy sources, implicitly also an external aspect. The energy supply of the Union from external sources is of special importance for the CCP, since fossil fuels and electric energy constitute goods in the meaning of the CCP.[23] The importance of the security of energy supply for the Union has led to the fact that the Union is a party to the Energy Charter.[24]

Aid in Case of Natural or Man-Made Disasters, Humanitarian Aid, Art. 21 para. 2 lit. g TEU, Art. 214 TFEU

As part of the principle of solidarity[25] as mentioned in Art. 21 para. 1 TFEU, the Union obliges itself in Art. 21 para. 2 lit. g TEU to "assist populations, countries and regions" in case of "natural or man-made disasters". The solidarity clause of Art. 222 TFEU as the last provision of the TFEU dealing with the Union's external action is yet not only applicable in cases of reciprocal aid between the Member States, but also covers terrorist threats and attacks.[26]

This general objective is implemented—not solely and exclusively—by Art. 214 TFEU, which invests the Union with a legal basis for its humanitarian aid action.[27] Accordingly, the Union provides "ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters [. . .]".

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[22] Conclusions of the Presidency of 21./22.6.2007, Article I.27 and attachment 2 Article A.4; Summit Declaration "Growth and responsibility in the world economy" of 7.6.2007, p. 18 et seqq., available at: http://www.g-8.de/Content/EN/Artikel/__g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateId=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf.

[23] Vedder/Lorenzmeier, Art. 133 EC-Treaty, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union,* 38th suppl. 2008, para. 304 et seqq.

[24] Energy Charter Treaty of 17 December 1994, [1998] OJ L 69/1; on that account see also Bamberger/Wälde, The Energy Charter Treaty, in: Roggenkamp/Redgwell/Rønne/del Guayo (eds.), *Energy Law in Europe*, 2nd ed. 2007, p. 145 (145 et seqq.).

[25] See above "Freedom and Equality, Solidarity and Mutual Respect Among Peoples, Art. 2, Art. 3 para. 5, Art. 21 para. 1 TEU".

[26] Khan, Art. 222 TFEU, para. 3, in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar*, 5th ed. 2010; Vedder, Art. I-43 TCE, para. 2, 5, in: Vedder/Heintschel von Heinegg (eds.), *Europäischer Verfassungsvertrag. Handkommentar,* 2007; Vedder, Art. 222 TFEU, para. 2, 5, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht. Handkommentar*, 2012.

[27] Kotzur, Art. 214 AEUV, para. 1 et seqq., in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar*, 5th ed. 2010; Ollmann, Art. 214 TFEU, para. 1 et seqq., in: Lenz/Borchardt (eds.), *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*, 5th ed. 2010.

Global Governance, Multilateralism, Art. 21 para. 2 lit. h TEU

According to Art. 21 para. 2 lit. h TEU, the Union commits itself to "promote an international system based on stronger multilateral cooperation and good global governance". This is the most ambitious of the objectives. "Good global governance" does, in particular, cover the fight against corruption, organized crime and the maintenance or establishment of working state structures to prevent the emergence of failed states.

Beyond that, the terminology of "good global governance" implies that the states of the world are lead by democratic legitimized governments which are responsible[28] towards its peoples and which exhibit a free democratic order, based on human rights. In that regard, "good global governance" includes the export of the Union's own fundamental values, such as democracy, rule of law and human rights, as mentioned in Art. 21 para. 1 and Art. 21 para. 2 lit. b TEU.

Within this last and most fundamental objective, the Union also commits to multilateralism as an instrument of international relations. The strive for the objectives of Art. 21 TEU within the international cooperation is mentioned on several instances within the Treaties[29] and is expressed for the overarching CFSP in Art. 32, 34 and 35 TEU.

The CCP in the Service of the External Action of the Union

With its CCP, the EC, now EU, has pursued other than commercial policy objectives as well. This is in particular true for the trade agreements the EU has concluded with third states. Similarly, this is increasingly the case of autonomous legislation implementing the CCP. Since the 1960s, "development through trade" was generally an accepted strategy of the EU's development cooperation policy.

The Dispute About Finality

With its Natural Rubber Agreement opinion of 1979[30] and the cases Tariff Preferences of 1987,[31] Werner and Leifer of 1995,[32] as well as Dorsch Consult of 1998[33] and finally

[28] "responsible governance" is claimed in many international treaties concluded by the EG and in many political documents of the organs of the EU, see below "Commercial Policy Agreements".

[29] e.g. Art. 21 para. 2 lit. f TEU, Art. 191 para. 1 bullet point 4 TFEU, Art. 32, 34, 35 TEU.

[30] ECJ, Opinion 1/78, International Agreement on Natural Rubber, [1979] ECR 2871.

[31] ECJ, Case 45/86, *Tariff Preferences*, [1987] ECR 1493.

[32] ECJ, Case C-70/94, *Werner*, [1995] ECR I, 3189, para. 10 et seq. ECJ, Case C-83/94, *Leifer*, [1995] ECR I, 3231, para. 9.

[33] ECJ, Case T-184/95, *Dorsch Consult*, [1998] ECR II, 667.

Bosphorus of 1996,[34] the ECJ clarified that the EU, through commercial policy instruments—in that case international agreements but also secondary legislative acts—also and even exclusively can pursue policy objectives other than solely commercial ones, i.e. development assistance, environmental policy,[35] and security policy[36] objectives.

Thus, the ECJ cleared the way to put the CCP instruments in the service of non-CCP objectives. Yet, under the new legal situation after the Lisbon Treaty, the question arises, whether the Union *must* put the CCP in the service of other, non-CCP objectives.[37]

Commercial Policy Agreements

Pure trade agreements according to Art. 207 TFEU are scarce and very often relate to specific products of specific countries and can hardly be associated with any further objectives. Horizontal trade agreements, i.e. agreements which cover all goods, with third states or a group of states, became, so far as they are of preferential nature, as a general rule, part of—with regard to their substance—further-reaching agreements, which are concluded as association agreements according to Art. 217 TFEU. Horizontal non-preferential trade provisions can normally be found in cooperation agreements, which are not only based on the EU's CCP competences but also on additional competences, since they cover further subjects.[38] Even though such agreements are no pure trade agreements in the meaning of Art. 207 TFEU, they exhibit in their core, a CCP provision.

The analysis of treaty practice shows that the CCP is not anymore an end in itself, but is rather used for further reaching purposes. The free trade agreement between the Union and South Korea which was signed on 6 October 2010[39] and, thus, based on Art. 207 TFEU and other articles, is nevertheless a trade agreement that has been negotiated according to the previous legal situation. However, it is a model of a new generation of trade agreements in the pursuit of the "new commercial policy"

[34] ECJ, Case C-84/95, *Bosphorus*, [1996] ECR I, 3953.

[35] ECJ, Opinion 2/00, *Cartagena Protocol*, [2001] ECR I, 9713, para. 23, in particular the assertion of the commission, para. 35, shows that commercial policy can be open for environmental aims.

[36] Prior to the creation of a special legal basis for trade embargos by the Maastricht Treaty in the form of Art. 228a TEEC, now Art. 215 TFEU, trade embargos were – and basically still are today – trade policy instruments, quantitative restrictions to imports and exports at level zero, Vedder/Lorenzmeier, Art. 133 EC-Treaty, para. 88 et seqq., in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

[37] For the implementation of this commitment from a competence perspective, see below "Political Implementation of Non-commercial Policy Objectives within CCP".

[38] E.g. Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, [1997] OJ L 327/3.

[39] 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, [2010] OJ L 127/1.

based on the Commission's communication "Global Europe: Competing in the World" of 2006.[40] This new strategy relates virtually exclusively to commercial and economic aspects and does not yet reflect the general external action objectives. However, the agreement with South Korea in its Art. 1.1 lit (g) recognizes "that sustainable development is an overarching objective" and in Art. 1.1 lit. (h) refers to the recognition of the standard of environmental and labour laws.[41] Also, Art. 13. 1 f. contains a chapter about "Trade and Sustainable Development".[42]

Human Rights Clauses

Human rights clauses, which on a reciprocal basis incorporate the respect for human rights as an integral part of the respective agreement, belong to the constant repertoire of CCP, but also other agreements of the EC.[43]

The Cotonou Agreement

The Cotonou Agreement of the year 2000,[44] as successor to the Lomé Agreement and its predecessors, which reach back to the 1960s, is an early and meaningful example for connecting with CCP instruments. The preamble and Art. 9 f. of the Cotonou Agreement formulate, as objectives of the agreement the sustainable development of economy and society, the integration of the parties into the world economy,[45] protection of the environment and the preservation of natural resources,[46] the respect

[40] Communication from the Commission of 6 October 2006, COM (2006) 567 final.

[41] "to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties".

[42] In Art. 13.4 the Parties recognize the fundamental rights at work of the ILO; furthermore, the Union and South Korea accept in Art. 13.5 that responsible international environmental governance as well as international environmental agreements, especially the Kyoto Agreement and the future fight against climate change, are of significance.

[43] E.g. Cooperation Agreement between the European Community and the People's Republic of Bangladesh on partnership and development of 22 May 2000, [2001] OJ L 118/48; Council Decision concerning the conclusion of the Cooperation Agreement between the European Community and the Islamic Republic of Pakistan of 29 April 2004, [2004] OJ L 378/23; Simma/Aschenbrenner/Schulte, Human rights considerations in development cooperation activities of the European Community, in: Alston/Bustelo (eds.), *The European Union and Human Rights*, 1999.

[44] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L 317/3 as amended in [2005] OJ L 209/27 and [2010] OJ L 287/3.

[45] Preamble: "Affirming their commitment to work together towards the achievement of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy; [...]".

[46] Art. 20 para. 1: "The objectives of ACP-EC development cooperation shall be pursued through integrated strategies [...].In this context [...]shall aim at: [...] e) promoting environmental sustainability, regeneration and best practices, and the preservation of natural resource base".

for human rights, especially rights dealing with the social and working life, democracy and rule of law,[47] good governance,[48] regional "peace building and conflict prevention and resolution",[49] fight against terrorism,[50] cooperation in countering the proliferation of weapons of mass destruction,[51] climate change,[52] ratification of the Rome Statute,[53] fight against HIV/AIDS,[54] as well as cross-cutting themes.[55]

[47] Art. 9 para.1 sub.-para. 2: "Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development".

[48] Art. 9 para. 3 sub.-para. 1: "In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development". Art. 9 para. 3 sub.-para. 2: Good governance [. . .] shall [. . .] constitute a fundamental element of this Agreement."

[49] Art. 11 para. 1: "The Parties shall pursue an active, comprehensive and integrated policy of peace building and conflict prevention and resolution, and human security, and shall address situations of fragility within the framework of the Partnership. This policy shall be based on the principle of ownership and shall in particular focus on building national, regional and continental capacities, and on preventing violent conflicts at an early stage by addressing their root-causes, including poverty, in a targeted manner, and with an adequate combination of all available instruments".

[50] Art. 11a: "The Parties reiterate their firm condemnation of all acts of terrorism and undertake to combat terrorism through international cooperation, in accordance with the Charter of the United Nations and international law [. . .] the Parties agree to exchange:

– Information on terrorists groups and their support networks; [. . .]".

[51] Art. 11b para. 1: "the proliferation of weapons of mass destruction [. . .] represents one of the most serious threats to international stability and security. [. . .] this provision constitutes an essential element of this Agreement".

[52] Art. 32a: "The Parties acknowledge that climate change is a serious global environmental challenge and a threat to the achievement of the Millennium Development Goals [. . .] cooperation shall:

a) recognise the vulnerability of ACP States and in particular of small islands and low-lying ACP States to climate-related phenomena".

[53] Art. 11 para. 7: "In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:

– share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and

– fight against international crime in accordance with international law, giving due regard to the Rome Statute.

The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments".

[54] Article 31a: "Cooperation shall support the efforts of ACP States to develop and strengthen across all sectors policies and programmes aimed at addressing the HIV/AIDS pandemic and preventing it from hampering development".

[55] Art. 20 para. 2: "Systematic account shall be taken in mainstreaming into all areas of cooperation the following thematic or cross-cutting themes: human rights, gender issues, democracy, good governance, environmental sustainability, climate change, communicable and non-communicable diseases and institutional development and capacity building. These areas shall also be eligible for Community support".

Euro-Mediterranean Agreements

The EU has concluded Euro-Mediterranean Agreements with the southern and eastern neighbouring countries of the Mediterranean Sea within the framework of the Mediterranean Strategy, and in recent times as part of the Union for the Mediterranean.[56] Such Euro-Mediterranean Agreements include democracy and the rule of law, the respect for human rights and international law as well as for the UN Charter as integral parts of the respective treaties.[57] The Euro-Mediterranean Agreements of the new generation include in continuation of the afore concluded association agreements a free trade regime.[58]

Stabilisation and Association Agreements with the Western Balkans

The Stabilisation and Association Agreements which have been concluded with the Western Balkan States, especially those which emanated out of the dissolution of former Yugoslavia, clearly serve far-reaching policy objectives such as the cooperation with the ICTY.[59] They also include the option for accession to the Union, which, in the light of Art. 49 TEU that provides the requirements for

[56] Founded at the European Mediterranean Conference of 13 July 2008 in Paris, Joint Declaraton of the Paris Sumit for the Mediterranean, available at: http://www.auswaertiges-amt.de/cae/servlet/contentblob/363400/publicationFile/3694/EuroMed-ErklParis.pdf.

[57] E.g. Art. 2 of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part of 18 July 2005, [2005] OJ L 265/1: "Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and international policies of the Parties and shall constitute an essential element of this Agreement".

[58] E.g. Art. 6 of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part of 18 July 2005, [2005] OJ L 265/1.

[59] Art. 2 et seqq. of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part of 9 April 2011, [2004] OJ L 84/1; Art. 2 et seqq. of the Stabilisation and Association Agreement the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part of 29 October 2001, [2005] OJ L 26/1; Art. 1 of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part of 29 April 2008, [2010] OJ L 28/1; Art. 1 of the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part of 16 June 2008, [2008] OJ L 169/10; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part of 12 June 2006, [2009] OJ L 107/165; Art. 2 and 4 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part of 15 October 2007, [2010] OJ L 108/3.

accession to the Union, must be seen in a particular context. However, the first major step on that way consists in the establishment of a free trade regime.

Autonomous CCP Legislation

Also, autonomous commercial policy instruments, generally regulations stand beyond their trade-related subject matter in the service of non-commercial objectives. Unlike trade agreements in which the EU, with its bargaining power, is free to include non-commercial policy objectives, the EU—as a WTO member—is bound by WTO law when it issues autonomous CCP instruments. Regulations which include non-commercial matters must be in conformity with WTO law. Concerning trade in goods, such provisions must be justified through Art. XX GATT—which foresees general exceptions for specific legitimate interests—or Art. XXI GATT—which foresees security exceptions. Such commercial policy instruments can be effective in accomplishing especially environmental and human rights objectives.

Generalized System of Preferences

The Generalized System of Preferences (GSP) is in existence since 1971 and rotationally renewed by regulation.[60] It grants—on the basis of an UNCTAD agreement—preferential access for goods of developing countries to the EU market, therefore creates a unilateral free trade area. Similarly to the Lomé Agreement and confirmed by the ECJ,[61] the GSP from its beginning served for the implementation of development cooperation objectives.

Today, the GSP stands also in the service of other external action objectives mentioned in Art. 21 para. 2 TEU. According to Art. 7 et seqq. of Regulation 732/2008,[62] economic incentives are granted if a state complies with the principles of sustainable development and responsible good governance. It is essential under the regulation that the respective state has "effectively implemented" a number of international agreements enlisted within the regulation that are concerned with subjects such as human rights, rights of workers, safety at work, child and forced labour, environmental protection, and the fight against drugs and crime. Such beneficial treatment is actually granted to 15 mainly Latin American countries.

[60] For a description, see Vedder/Lorenzmeier, Art. 133 EC-Treaty, para. 273 et seqq., in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

[61] ECJ, Case 45/86, *Tariff Preferences*, [1987] ECR 1493.

[62] Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences from 1 January 2009 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, [2008] OJ L 211/1 as amended [2011] L 145/28. This Regulation is according to its Art. 32 para. 2 applicable until "31 December 2013 or until a date laid down by the next Regulation, whichever is the earlier". A Commission proposal for a new Regulation of the European Parliament and the Council applying a scheme of generalised tariff preferences can be found in COM(2011) 241 final.

Another effective way of implementing a value-oriented commercial policy is the possibility under Art. 15 et seqq. of the GSP regulation to withdraw preferential arrangements from a beneficiary state in case of "serious and systematic violation" of the above mentioned agreements concerned with the protection of human rights and labour standards, or if the state does not effectively fight against drugs and crime. Such withdrawals were actually implemented against Sri Lanka, Belarus and Myanmar.[63] The Union is currently reviewing if the situation in Myanmar allows a full re-instatement of Myanmar to the GSP.[64]

The Capture of the CCP for CFSP Objectives

Since 1980, trade embargos were based on the CCP power within the EC Treaty.[65] The introduction of a specific competence for economic embargos through the Maastricht Treaty does not change the fact that a trade embargo is a quantitative restriction and therefore a CCP instrument. Trade embargos were and still are instruments aimed at international security, exclusively. This is evidenced by the necessity of a prior decision within the CFSP framework, in Art. 215 TFEU.

The trade regime in dual-use goods, which was originally regulated within the CFSP,[66] was, under direct reference to the ECJ judgements Werner, Leifer and Centro-Com[67] and therefore recognizing the exclusive competence of the Union, transformed into a regulation based on the sole foundation of the former Art. 133 EC Treaty.[68]

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[63] According to Art. 19 IV of the Regulation No 732/2008: Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, [2010] OJ L 45/1; Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, [2006] OJ L 405/1; Council Regulation (EC) No. 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, [1997] OJ L 85/8.

[64] Joint statement of EU High Representative Catherine Ashton and EU Trade Commissioner Karel de Gucht on Burma-Myanmar of 15 June 2012, MEMO/12/449.

[65] Proof: Vedder/Lorenzmeier, Art. 133 EC-Treaty, para. 90 et seqq., in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

[66] Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council of the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods, [1994] OJ L 367/8, and Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, [1994] OJ L 367/1.

[67] ECJ, Case C-70/94, *Werner*, [1995] ECR I, 3189, para. 10 f.; ECJ, Case C-83/94, *Leifer*, [1995] ECR I, 3231, para. 9; ECJ, Case C-14/95, *Centro-Com*, [1997] ECR I, 81, para. 26 et seqq.

[68] Council Decision 2000/402/CFSP of 22 June 2000 repealing Decision 94/942/CFSP on the joint action concerning the control of exports of dual-use, [2000] OJ L 159/218 and Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology goods, [2000] OJ L 159/1, following Council Regulation (EC) No 394/2006 of 27 February 2006 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, [2006] OJ L 74/1; see also Vedder/Lorenzmeier, Art. 133 EGV, para. 17, 53, 182, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

After trade in weapons and military items had been regarded by the Member States as being completely outside the CCP because of Art. 346 TFEU and its predecessors, the trade in weapons firstly fell in the scope of the CFSP in 1998.[69] However, aspects of trade in arms start to be covered by the CCP.[70]

Goods which are covered by non-proliferation regimes for nuclear, biological and chemical weapons are subject of the Dual-Use Regulation. As unilateral acts of the Union, such measures are justified through the security exception of Art. XXI GATT.

The CCP in the Service of the Environmental Policy

A restriction or prohibition of trade in specific species of flora and fauna and products thereof have proved to be efficient instruments for environmental protection. Thus, the Union implemented the Washington Agreement for the protection of endangered species (CITES) through unilateral regulations since 1994.[71] This far-reaching barrier to trade is justified by Art. XX lit. g GATT.[72] Furthermore, the EU has set conditions for the "placing on the market of seal products".[73]

[69] European Union Code of Conduct Arms Exports of 8 June 1998, Doc. 8675/2/98 Rev. 2; replaced by Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, [2008] OJ L 335/99; and the Common military list of the European Union of 27 February 2012, [2012] OJ C 85/1; the Common Position 2008/944/CFSP obliges the Member States to pay attention to the respect for human rights and the maintenance of peace and security when licensing the export of munitions; see also Thirteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, [2011] OJ L 382/1; Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, [2002] OJ L 191/1; Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, [2003] OJ L 156/79; Council Decision 2009/1012/CFSP of 22 December 2009 on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP among third countries, [2009] OJ L 348/16.

[70] ECJ, Case C-91/05, *ECOWAS*, [2008], ECR I, 3651 para. 71 et seq. Eeckhout, The EU´s Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism, in: Biondi/Eeckhout/Ripley (eds.), *EU-Law After Lisbon,* 2012, p. 265 (270 et seqq.).

[71] Council Regulation (EEC) No 3626/82 of 3 December 1982, [1982] OJ L 384/1; replaced by Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L 61/1; lastly amended by Commission Regulation (EU) No 101/2012 of 6 February 2012 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, [2012] OJ L 39/133.

[72] In detail see Vedder/Lorenzmeier, Art. 133 EGV, para. 188 f. in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

[73] Art. 3 Regulation (EC) No 1007/2009 of 16 September 2009 of the European Parliament and of the Council on trade in seal products, [2009] OJ L 286/38: "The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence".

Integration of the CCP into the General External Policy

According to the established practice of the EU, trade agreements and autonomous trade regulations have been in the service of general external policy objectives as now formulated within the TEU.

The substantial scope and legal intensity of the implementation of non-commercial policy objectives in the instruments of the Union vary in relation to the respective third parties involved and their willingness to accept the implementation of further-reaching objectives, such as in the field of human rights. General external policy objectives can be found in the preambles of trade agreements, and increasingly as fundamental obligations in the operative parts of such agreements. The determination of non-commercial policy objectives as a fundamental basis of the agreed cooperation entitles the Union to suspend contractual obligations according to Art. 60 VCLT or to terminate an agreement according to Art. 62 VCLT in case of non-compliance.[74]

Political Declarations

The integration of the CCP into the general framework of external relations of the Union has for a long time been the subject of Commission documents.[75] On the occasion of the conclusion of commercial agreements, the European Parliament (EP), through resolutions or comments on the respective agreement, emphasizes the significance of clauses on the protection of human rights and on other non-commercial policy objectives.[76]

After the entry into force of the Lisbon Treaty, on 16 September 2010 the European Council adopted the "EU External Relations Strategy 2010"[77] which seeks a "more integrated approach" for the entire external policy and internal policies of the Union to achieve strategic interests and objectives. This integrated approach which also includes the national policies of the Member States, covers besides trade as one of

[74] ECJ, Case C-162/96, *Racke*, [1988] ECR I, 3688, para. 42.

[75] Communication from the Commission to the EP, the Council, the Economic and Social Committee and the Committee of the Regions of 20 October 2005, COM (2005) 525, "European values in the globalised world"; Communication from the Commission of 6 December 2006, COM (2006) 763 final, "Europe's trade defence instruments in a changing global economy, A Green Paper for public consultation"; Communication from the Commission to the Council and the EP of 24 October 2006, COM (2006) 631 final, "EU – China: Closer partners, growing responsibilities"; Communication from the Commission to the Council, the EP, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006, COM (2006) 567 final, "Global Europe: Competing in the World, A Contribution to the EU's Growth and Jobs Strategy".

[76] See e.g. European Parliament resolution of 24 April 2008 on the free trade agreement between the EC and the Gulf Cooperation Council, [2009] OJ C 259E/83.

[77] See Annex I para. a) Conclusions of the European Council of 16 September 2010, EUCO 21/1/10 REV 1, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116547.pdf.

many other objectives, the fight against climate change, security of energy supplies, global development, migration and visa affairs.[78]

Impact of the General External Action Objectives on the CCP

Until today, there is little CCP practice under the Lisbon Treaty which can show to what extent the general external action objectives shape the conduct of the CCP. The trade agreement with South Korea which is the first in a row of envisaged trade agreements of a new generation has been negotiated under the Nice Treaty. In recent jurisprudence of the Court, only the Kadi decision of 30 September 2010 mentions Art. 21 TEU, however without relevance to the outcome of the decision.[79]

Expansion of the General External Objectives

The inclusion of external policy principles and objectives in Art. 21 TEU essentially codifies the already established practice of the Union, which is expressed by the conclusion of international agreements, in particular but not exclusively agreements concluded within the CCP, or by autonomous legislation of the Union. Art. 21 TEU continues the objectives of the CFSP formulated in the Treaty of Maastricht, as they were lastly phrased in Art. 11 and Art. 3 para. 2 TEU (as amended by the Treaty of Nice) and expands them on the entire external action of the Union. In addition, Art. 21 TEU includes objectives, which were before and are even today requirements for specific external policies, e.g. in the field of environmental protection in Art. 191 TFEU, for the development cooperation in Art. 177 para. 2 EC Treaty (as amended by the Treaty of Nice), which purported for the development cooperation policy, *inter alia*, the objectives of democracy, rule of law and human rights.

[78] Annex I para. a) Conclusions of the European Council of 16 September 2010, EUCO 21/1/10 REV 1, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116547.pdf: "The importance of issues like climate change, energy policy, trade, development or Justice and Home Affairs issues, including migration and visa policy in dealings with partners and at a multilateral level must be fully taken into account in preparations for summits and international events. In this regard the European Union should further enhance the coherence and complementarity between its internal and external policies. The practice of holding orientation debates well before summits should be further developed, with a particular emphasis on setting priorities and concrete tasking".

[79] ECJ, Case T-85/09, *Kadi*, [2010] ECR II, 5177, para. 115.

Mandatory Orientation Towards the General Objectives for the Union's External Action

The introduction of the general external policy objectives in Art. 21 TEU does, however, change the legal quality of the hitherto existing practice in respect to the CCP. The consideration of non-trade-related objectives within the CCP practice has, until now, only been made possible through the ECJ case law.[80] The power to conduct the CCP *enabled* the EU to pursue other objectives. As the ECJ case law was concerned whether the Union *can* follow non-commercial policy objectives through its competences, the question is nowadays, whether the Union is *obliged* to align its CCP with the range of general objectives set forth in Art. 21 TEU.

Self-commitment Under Treaty Law

Art. 21 TEU constitutes up through the many references, *inter alia*, in Art. 207 para. 1 sentence 2 TFEU, a primary law based self-commitment of the Union and its organs[81] to pursue also within the CCP the implementation of the general external policy objectives. The predecessors of Art. 206 TFEU have been seen to be of binding character by the ECJ[82] and the prevailing literature.[83] However, the Union's organs enjoy a wide margin of discretion. Art. 131 EC Treaty (as amended by the Treaty of Nice) was not seen to have direct effect[84]; third states could not derive any claim from that provision.[85]

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[80] See above "The Dispute about Finality".

[81] Kaufmann-Bühler, Art. 21 TEU, para. 6, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der Europäischen Union,* 46th suppl. 2011: "Selbstbindung"; Nettesheim/Duvigneau, Art. 206 TFEU, para. 25, in: Streinz (ed.) *EUV/AEUV. Kommentar*, 2nd ed. 2012; Vedder, Ziele der Gemeinsamen Handelspolitik und Ziele des auswärtigen Handelns, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 43 (46).

[82] See ECJ, Case 112/80, *Dürrbeck*, [1981] ECR, 1059, para. 42 et seqq.; ECJ, Case 245/81, *Edeka v. Germany*, [1982] ECR, 2745, para. 22; ECJ, C-150/94, *UK v. Council*, [1998] ECR I, 7235, para. 64.

[83] Vedder, Art. 131 EC-Treaty, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der Europäischen Union*, 41st suppl. 2010, para. 14; Hahn, Art. 206 TFEU, para. 7, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011; Müller-Ibold, Art. 206 TFEU, para. 3, in: Lenz/Borchardt (eds.), *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*, 5th ed. 2010; Kahn, Art. 206 TFEU, para. 3, in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar,* 5th ed. 2010: "unionsrechtliches bindendes Programm"; Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (160).

[84] Vedder, Art. 131 EC-Treaty, para. 16, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union,* 40th suppl. 2009; Nettesheim/Duvigneau, Art. 206 TFEU, para. 5, in: Streinz (ed.), *EUV/AEUV*, 2nd ed. 2012; Osteneck, Art. 206 TFEU, para. 4, in: Schwarze (ed.), *EUV/AEUV. Kommentar*, 3rd ed. 2012.

[85] Vedder, Art. 131 EC-Treaty, para. 14, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union,* 40th suppl. 2009; Hahn, Art. 206 TFEU, para. 4, in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 2011.

These deliberations must be transferred to Art. 21 TEU: the provision is legally binding and justiciable, yet it does include for the EU organs a wide margin of discretion in applying it.[86] The binding character follows from the indicative phrasing of the norm. The intensity of its binding character, however, is yet diversified by the wording of the respective objectives, which speak of "foster", "support", etc. The few authors, who address the legal nature of the objectives set forth in Art. 21 TEU, express the view that the objectives under Art. 21 TEU are legally binding.[87]

Scrutiny by the ECJ

As secondary law,[88] trade agreements and legislative acts that are based on Art. 207 TFEU can be reviewed by the ECJ for their conformity with the Union's primary law. Thereby, the standard of review may also include the principles and objectives for the Union's external action provided by Art. 21 para. 1 and para. 2 TEU. The ECJ may either render an opinion according to Art. 218 para. 11 TFEU, or a judgement in an annulment procedure according to Art. 263 para. 1 TFEU, which both can be initiated by, inter alia, the EP or the Commission.

Political Implementation of Non-commercial Policy Objectives within the CCP

Within the Union's framework, especially the EP, but also the Commission are hitherto willing to strive for the external policy objectives.[89] Since, under the Lisbon Treaty, the fundamental trade-related acts are henceforth enacted according to Art. 207 para. 2 TFEU through the ordinary legislative procedure, the EP, for the

[86] Explicitly: Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (161 et seqq.); Kahn, Art. 206 TFEU, para. 3, in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar*, 5th ed. 2010; Bungenberg, Außenbeziehungen und Außenpolitik, in: Schwarze/Hatje (eds.) *Der Reformvertrag von Lissabon*, EuR-Beiheft (2009) 1, p. 195 (242): "klarer Auftrag".

[87] Krajewski, The Reform of the Common Commercial Policy, in: Biondi/Eeckhout/Ripley (eds.), *EU-Law After Lisbon,* 2012, p. 292 (296 et seqq.); Hahn, Art. 207 TFEU, para. 4 f., in: Callies/Ruffert (eds.) *EUV/AEUV. Kommentar*, 4th ed. 201; Nettesheim/Duvigneau, Art. 207 TFEU para. 24 et seqq. in: Streinz (ed.), *EUV/AEUV*, 2nd ed. 2012**,** Osteneck, Art. 207 TFEU, para. 4, in: Schwarze (ed.), *EUV/AEUV. Kommentar*, 3rd ed. 2012.

[88] International agreements concluded on the basis of Art. 218 TFEU have according to consistent case law of the ECJ the rank of secondary law, however with primacy before autonomous secondary law, ECJ, Case 181/73, *Haegmann*, [1974], ECR, 449 (460); ECJ, Case C-308/06, *Intertanko*, [2008] ECR I, 4057, para. 42.

[89] Brok, Die neue Macht des Europäischen Parlaments nach "Lissabon" in Bereichen der gemeinsamen Handelspolitik, Integration 33 (2010) 3, p. 209 (216 et seqq.); Bungenberg, Going Global? The EU Commercial Policy After Lisbon, in: Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (129); before the ratification of the Lisbon Treaty, see European Parliament resolution of 24 April 2008 on the free trade agreement between the EC and the Gulf Cooperation Council, [2009] OJ C 259E/83.

first time, has a co-decision power in the CCP.[90] The reference of essential CCP acts to the ordinary legislative procedure entails that, according to Art. 218 para. 6 subpara. 2 lit a (v) TFEU, trade agreements need the approval of the EP.[91] Moreover, association agreements, which cover trade arrangement also require the approval of the EP according to Art. 218 para. 6 subpara. 2 lit. a (i) TFEU.

If the Union wants to include non-commercial policy objectives within trade agreements with third states, the success of such efforts depends upon the political capability of the Union to induce the parties to the agreements to accept such provisions. Even though the Union, measured by its imports and exports of goods and services, is amongst the two biggest trade partners in the world, it is not certain that the Union can actually enforce its objectives in every instance. The contrast between commercial and economic interests, on the one hand, and an active human rights policy, on the other hand, is well-known.

Competence and Choice of Legal Basis

According to the case law of the ECJ, trade agreements and autonomous commercial policy acts can, partially or entirely, be in the service of non-trade-related objectives.[92] Yet, the more such instruments serve objectives other than commercial policy ones, e.g. in the field of development cooperation or environmental policy, the more urgently the question arises, upon which legal basis such instruments must be based. The determination of the correct legal basis results from the intention and predominant subject-matter of the respective legislative act.[93] This differentiation will not be affected by the general external policy objectives in Art. 21 TEU.[94]

The obligation to implement the general external action objectives does not entail an extension of powers, not even of particular existing competences, such as the CCP.[95] The existing scope of the CCP in respect of substance and instruments is not touched and remains unchanged as determined before the ratification of the Lisbon Treaty by both the ECJ and prevailing literature on this subject.[96]

The limits of the power to conduct the CCP mark the borderline for the inclusion of substantial non-commercial policy topics in CCP instruments. These limits must

[90] On this subject see the contribution of Krajewski, New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy, within this volume.

[91] Cf. the contribution of Krajewski, New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy, within this volume.

[92] See above "The Dispute about Finality".

[93] ECJ, Opinion 2/00, *Cartagena Protocoll*, [2001] ECR I, 9713, para. 22 et seqq.

[94] Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (165).

[95] See above "Preclusion of competence extension".

[96] See e.g. Vedder/Lorenzmeier, Art. 133 EC-Treaty, para. 29 et seqq., 57, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 38th suppl. 2008.

in future be determined through case law and actual practice under the Lisbon Treaty. If measures exceed the CCP limits, the Union's legislative acts or agreements can and must, as the case may be, be based on other competences, such as for development cooperation or environmental policy in the case of the Cartagena Protocol.[97]

For general objectives such as democracy, rule of law and human rights, but also global governance, a particular substantial competence of the Union is missing. However, according to Art. 207 para. 1 TFEU, the CCP competence to pursue the general external action objectives includes the power to put the agreements and legal acts in the service of the general objectives mandatory for the conduct of all external action. In particular the grant of trade benefits can be made conditional upon the fulfilment of non-commercial policy objectives, as it has already been consistently done in practice so far. Whether the obligation to respect the general external action objectives extend beyond such conditional linkages[98] is questionable.

The Union's International Obligation to Implement the General External Action Objectives

With the codification of the principles and objectives governing its external action, the Union does not solely reveal itself as a responsible political actor, worried about the world's well-being. In fact, with the codification of the principles and objectives of its international action in Art. 21 TEU and other parts of the TEU and TFEU, the Union responds to international obligations arising out of international treaties and customary international law, or which exist due to non-legal commitments.

The Union is either directly,[99] so far as it acts on the international plane because of its competences instead of the Member States, or through the Member States indirectly, without being a party to the respective treaty, bound by international agreements. The latter is *inter alia* true for the ICCPR and ICESCR, as well as other human rights treaties such as the Convention on Rights of the Child,[100] under the condition that all Member States are parties to such international treaties.

[97] ECJ, Opinion 2/00, *Cartagena Protocol*, [2001] ECR I, 9713, para. 44.

[98] Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (164).

[99] See e.g. the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006, [2010] OJ L 23/35; see also Treaty of Amity and Cooperation in Southeast Asia of 24 February 1976 to which the Union acceded to through Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, [2012] OJ L 154/; the Council Decision takes special regard to the aim of the treaty to "promote peace, stability and cooperation in the region" and "calls for the settlement of disputes by peaceful means, the preservation of peace, the prevention of conflicts and the strengthening of security in Southeast Asia", thus, "the rules and principles set out in the Treaty correspond to the objectives of the Union's common foreign and security polity".

[100] See above "Democracy, Rule of Law, Human Rights and Human Dignity, Art. 2, Art. 3 para. 5, Art. 21 para. 1, Art. 21 para. 2 lit. b TEU".

In consequence, the ECJ has occasionally consulted both UN Human Rights Covenants as international binding obligations for the Union.[101] Even though the Union is no member of the UN, it is, according to the ECJ, bound by the UN's mandatory measures which are adopted by the Security Council under Chapter VII of the UN Charter.[102]

Through its general external action objectives as a self-commitment, the Union avows itself to other international obligations such as the UN Millennium Development Goals[103] or human rights of third generation.[104] As an example, in the field of development cooperation, Art. 208 para. 2 TFEU explicitly provides that "The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations".

Value-Orientated Foreign and Trade Policy

Through Art. 21 TEU, the Union commits itself by means of primary Union law–thus absorbing international obligations and values—to an active, value-orientated foreign policy, in general, and an international trade policy, in particular, which, besides the liberalization and expansion of world trade, is above all aimed at sustainable development, the preservation of the environment and sustainable management of natural resources, promoting democracy and the rule of law, the respect for human rights, and international peace and security within the framework of the UN, and international relations on the basis of international law and the promotion of good global governance.

[101] ECJ, Case 347/87, *Orkem*, [1989] ECR, 3283, para. 31; ECJ, Joined Cases C-297/88 and C-197/89, *Dzodzi*, [1990] ECR I, 3763, para. 68; ECJ, Case C-249/96, *Grant*, [1996] ECR I, 621, para. 44.

[102] See CFI, Case T-315/01, *Kadi*, [2005] ECR II, 3649, para. 193: "Nevertheless, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it"; ECJ, Joined Cases C-402/05 P and C-415/05, *Kadi/Al Barkaat*, [2008] ECR I, 6351, para. 293: "Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations".

[103] UN GA Res. 55/2, *United Nations Millenium Declaration of 18 September 2000*, UN GOAR, 55th Sess., Supp. No. 49, p. 4.

[104] Tomuschat, *Human Rights: Between Realism and Idealism*, 2nd ed. 2008, p. 25 (54 et seqq.).

Conflict of Objectives, Politicization of the CCP

The external policy objectives serve for the achievement of international values but do not necessarily aim at the same direction and can conflict with each other. This is in particular true for possible conflicts between specific commercial policy objectives and the wider foreign policy objectives such as the promotion of human rights. The various codifications of the objectives in the Union's primary law do not lead to a prioritization of particular objectives.[105] Conflicts of objectives could be solved by the following guidelines:

Specific objectives of particular external policy fields such as the CCP objectives in Art. 206 TFEU can be unrestrictedly pursued as long as they do not create a conflict with the general objectives.[106]

However, Art. 21 TEU superimposes on the special commerce policy objectives of Art. 206 TFEU the more general trade-related objectives such as "the integration of all countries into the world economy" according to Art. 21 para. 2 lit. e TEU and especially the obligation to "free and fair trade" in Art. 3 para. 5 TEU. "Fair" does not solely mean trade in conformity with WTO law, but also includes social considerations and the equitable allocation of trade advantages, especially an adequate price for traded goods that approximates work, expended resources and other factors.[107]

The alignment of the CCP with the general objectives of the external action leads to a politicization of the CCP[108] in that not only specific CCP objectives are to be pursued. Inevitably, Art. 207 para. 1 sentence 2 TFEU has put the CCP in the service of the wider objectives which govern the whole of the EU's external action.

Vice versa, mentioning trade related objectives in Art. 21 para. 2 TEU does also lead to an integration of non-commercial external policy fields into the CCP objectives.

The embedment of the CCP into non-commercial policy objectives is not new as practice shows. New is solely the legal obligation to consider non-commercial

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[105] Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 3rd ed. 2010, p. 133; Bungenberg, Going Global? The EU Commercial Policy After Lisbon, in: Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (128); Dimopoulos, The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy, EFAR 15 (2010) 2, p. 153 (166 f).

[106] Vedder, Art. 131 EC-Treaty, para. 15, in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, 40th suppl. 2009; Kahn, Art. 206 TFEU, para. 4, in: Geiger/Khan/Kotzur, *EUV/AEUV, Kommentar,* 5th ed. 2010.

[107] See above "Free and fair trade, Art. 3 para. 5 TEU".

[108] Bungenberg, Going Global? The EU Commercial Policy After Lisbon, in: Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (128); Bungenberg, Außenbeziehungen und Außenpolitik, in: Schwarze/Hatje (eds.) *Der Reformvertrag von Lissabon*, EuR-Beiheft (2009) 1, p. 195 (212); Boysen/Oeter, Außenwirtschaftspolitik, in: Schulze/Zuleeg/Kadelbach (eds.), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 2nd edition, 2010, § 32, para. 124; with criticism: Nettesheim/Duvigneau, Art. 206 TFEU, para. 39 et seqq., in: Streinz (ed.), *EUV/AEUV*, 2nd ed. 2012

policy objectives. An independent CCP of its own, if it had existed before the Lisbon Treaty, will now be less distinctive.[109] The general external policy objectives will—as far as WTO law permits—overarch the CCP.

To this end, the CFSP together with the CSDP will provide the substantial and institutional framework. The High Representative, through his or her function to assist the Council and the Commission in ensuring "consistency between the different areas of its external action and between these and its other policies", according to Art. 21 para. 3 subpara. 2 TEU, gains some influence on the CCP.[110]

Especially the European Council has a major institutional and substantial influence on the CCP. According to Art. 22 TEU, it is the European Council's task to identify, through decision, on the basis of the objectives set forth in Art. 21 TEU, the "strategic interests and objectives of the Union" in the field of the CFSP and "other areas of the external action of the Union", thus also within the field of the CCP. Such decisions can be connected with a prioritization of certain objectives in regard to a specific country or region and/or in regard to a specific subject-matter.

The institutional and substantial integration of the CCP in the CFSP is a consequence of the abolition of the Union's pillar-structure. Despite the fact that the ECJ still exercises no jurisdiction over the CFSP according to Art. 24 para. 1 subpara. 2 TEU and Art. 275 TFEU, continues to have jurisdiction to defend the CCP against violations, according to Art. 275 para. 2 TFEU in conjunction with Art. 40 TEU. The general objectives do yet become part of the CCP by means of Art. 207 para. 2 sentence 2 TFEU. Similarly, through the principle of consistency and its concretion via Art. 22 TEU, other policy fields, including the CFSP, are connected with the CCP.

The External Economic Constitution of the Union

Parallel to the economic constitution of the Union,[111] whose main pillars are free and social market economy with a distinctive competition law and the control of state aid together with the fundamental freedoms of the internal market, one can determine an external economic constitution of the Union under the Lisbon Treaty. The essential elements of the Union's external economic constitution are the liberalization of trade in conformity with WTO law, the integration of countries into the global economy, fair trade, the usage of commercial policy instruments for the purpose of sustainable

[109] Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 3rd ed. 2010, p. 149: termination of the single status of the CCP; Nettesheim/Duvigneau, Art. 206 TFEU, para. 38, in: Streinz (ed.), *EUV/AEUV*, 2nd ed. 2012

[110] On this subject see the contribution of Dederer, The Common Commercial Policy under the influence of Commission, Council, High Representative and European External Action Service, within this volume.

[111] Nowak, Binnenmarktziel und Wirtschaftsverfassung der Europäischen Union vor und nach dem Reformvertrag von Lissabon, in: Schwarze/Hatje (eds.) *Der Reformvertrag von Lissabon*, EuR-Beiheft (2009) 1, p. 129.

global development, global protection of the environment on the basis of sustainable management of natural resources, global peace and security policy and good global governance, which is committed to democracy, the rule of law, human rights and responsible governance.

However, the awareness that commercial policy instruments can be used to achieve and implement international policy objectives and values, has come a long way. The embargo against South Rhodesia that was implemented by the UN Security Council through the Resolution of 16 December 1966, was implemented by Germany solely through a circular decree on external commerce of 21 December 1966[112] and Hans-Peter Ipsen, within his legal opinion on the embargo, did not respond at all to the EEC and its already existing exclusive competence for a CCP.[113]

The CCP and the external trade law of the Union are part of a value-orientated integral external policy of the Union. The Union has obliged itself to act internationally as an entity which is based on western-occidental values and to pursue these values as the Laeken Declaration[114] already pointed out. This constitutional commitment to a value-based global governance must be seen as unique.[115] As the world's largest economic power, the Union—especially through its exclusive competence over the CCP—has significant impact on the implementation of these objectives. As a community of values, constitutionally built upon common political and societal values—instead of a national identity that is unreachable for the Union—the Union is a model for a post-national community of states in a globalized world. In this spirit, "supranational" turns into "post-national".

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[112] German Bundesanzeiger No. 241 of 24 Dezember 1966.

[113] Ipsen, Außenwirtschaftsrecht und Außenpolitik. Rechtsgutachten zum Rhodesien-Embargo, 1967.

[114] Cf. above "Introduction: European external relations in a globalized world".

[115] Bungenberg, Going Global? The EU Commercial Policy After Lisbon, in: Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (128); approves this determination that had been made in 2005: Vedder, Ziele der Gemeinsamen Handelspolitik und Ziele des auswärtigen Handelns, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag,* 2006, p. 43 (47).

Common Commercial Policy After Lisbon: The European Union's Dependence on Secondary Legislation

Till Müller-Ibold

Introduction

The European Union's common commercial policy has a dual purpose. On the one hand, it operates in the sphere of public international law, and serves to define the EU's position towards other countries or international organizations. In particular, in applying its common commercial policy, the Union acts to conclude, amend, or rescind international agreements and to adopt unilateral measures vis-à-vis its international counterparts.

On the other hand, the EU's common commercial policy is also implemented "inward," applying to EU citizens and others doing business within the EU. For example, certain international commercial agreements have direct effect in the domestic legal order of the EU Member States. After acceptance and ratification, they become an "integral part" of the European legal system.[1] EU citizens are able to rely on these agreements and cite them as legally binding instruments to EU institutions and Member States "when, regard being had to [their] wording and the purpose and nature of the agreement[s] [themselves], the provision[s] contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[2]

However, to the extent the Union or Member States wish to impose any burdens on their citizens or otherwise require performance from their citizens as a result of such agreements, secondary implementing legislation is typically required.

[1] ECJ, Case C-431/05, *Merck Génericos – Productos Farmaceuticos v. Merck & Co. Inc.*, [2007] E.C.R., I-7001, para. 31; ECJ, Case C-549/07, *F. Wallenthin – Hermann v. Alitalia*, [2008] E.C.R., I-11061, para. 28; CFI, Case T-367/03, *Yedas v. Council et all.*, [2006] E.C.R., II-873, para. 38.

[2] ECJ, Case 12/86, *Demirel*, [1987] E.C.R., 3747, para. 14; ECJ, Case C-432/92, *Anastasiou*, [1994] E.C.R., I-3116, para. 23; ECJ, Case C-265/03, *Simutenkov*, [2005] E.C.R., I-2579, para. 21.

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In this regard, the Treaty of Lisbon has brought about a number of changes that affect the Union's ability to introduce and modify secondary implementing legislation of the EU's common commercial policy. In particular, Art. 207 (2) TFEU requires the issuance of "framework regulations" to implement common commercial policy measures within the EU, while Art. 291 TFEU requires a more standardized legislative process to govern the Commission's transposition measures. The following considerations deal with these changes, as well as the resulting need to increasingly rely on secondary implementing legislation to govern the internal application of international agreements.

Implementing the Common Commercial Policy Before the Treaty of Lisbon

Before turning to the most recent developments, it is useful to recall certain elements that have characterized the implementation of the European Union's common commercial policy in the framework of the EC Treaty—specifically elements in place before the Treaty of Lisbon came into effect on December 1, 2009.

Commercial Policy Implemented Through International Agreements

The European Union (or, rather, at the time, the European Communities) has shaped its common commercial policy largely through the negotiation and conclusion of international agreements. However, the practical implementation of this policy required more than agreements alone. Following the negotiation, acceptance and entry into force of such agreements, their proper implementation, as well as the need for any amendments or adjustments, required continual monitoring.

The Scope of Relevant Agreements

The EC has been party to a large variety of international agreements. Their number has increased over time as the competencies of the EC have grown. A cursory glance at some of the existing agreements illustrates their broad scope.
Multilateral agreements:

Agreements reached in the framework of the WTO[3] (*e.g.* GATT, GATS, TRIPS);
International commodity agreements in the context of UNCTAD.[4]

[3] Agreement establishing the World Trade Organisation (WTO), O.J. 1994 L 336/3, including related agreements, the conclusion of some of the WTO agreements fell, however, within the scope of competences of the Member States.

[4] For example, Agreement of June 27, 1980, establishing the Common Fund for Commodities (in Germany, the parliament approved by a law of June 4, 1985), cf. the report of the Federal

Plurilateral agreements:

The Cotonou Agreement with the ACP group[5];
The EEA Agreement.[6]

Bilateral agreements:

The Free Trade Agreement between the EC and Switzerland[7] (and earlier with Austria[8] and the other EFTA countries);
Agreements between the EC and the USA, (*e.g.* on the trade in wine or in large commercial aircraft)[9];
Separate agreements on agriculture between the EC and Iceland and Norway respectively[10];
Additional European Agreements[11] and other association agreements with individual states.[12]

Government of June 23, 2000, BT-Drs. 14/3647; one of these Commodity Agreements, for instance, is the International Natural Rubber Agreement which has since been terminated. See Opinion 1/1978, [1979] E.C.R., 2871. For information generally on UNCTAD's activities in this area see http://www.unctad.org/templates/WebFlyer.asp?intItemID=5391&lang=1; UNCTAD Special Unit on Commodities, http://www.unctad.info/en/Special-Unit-on-Commodities/.

[5] Partnership agreement between the European Union and the African, Caribbean and Pacific Group of States ("ACP countries"), signed in Cotonou on June 23, 2000, O.J. 2000 L 317/3.

[6] Agreement on the European Economic Area, O.J. 1994 L 1/3.

[7] Agreement between the European Economic Community and the Swiss Confederation, O.J. 1972 L 300/189.

[8] Agreement between the European Economic Community and the Republic of Austria, O.J. 1972 L 300/2.

[9] Council Decision of 14 November 2005 concerning the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the United States of America on matters related to the wine trade; O.J. 2005 L301/14; Council Decision of July 13, 1992, on the conclusion of an Agreement between the European Economic Community and the Government of the United States of America concerning the Application of the GATT Agreement on Trade in Civil Aircraft, O.J. 1992 L301/31. In all, the United States and Europe are connected through over 126 bilateral or multilateral agreements (Treaties Office Database of the Commission, April, 2012).

[10] See Council Decision of 20 December 1995 on the conclusion of the agreements in the form of exchange of letters between the European Community, on the one hand, and the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation, on the other hand, pertaining to certain products of agriculture, O.J. 1995 L327/17.

[11] See the former Europe Agreements concluded with Romania, O.J. 1994 L 357/2, and with Bulgaria, O.J. 1994 L 358/3 (they lapsed with the accession of the concerned countries to the EU).

[12] For instance, see the Stabilization and Association Agreement between the European Communities and its Member States on the one hand, and the Republic of Montenegro on the other hand, O.J. 2010 L 108/3; Stabilization and Association Agreement between the European Communities and its Member States on the one hand, and the Republic of Albania on the other hand, O.J. 2009 L 107/166.

General Implementing Legislation

Following entry into an international agreement, the EC, in many (but not all) cases, proceeded to adopt implementing legislation. This legislation enabled the relevant European institutions to specify the EC's position within the framework of the international agreement but also, in certain cases, to adopt additional EC-wide binding implementing measures. Examples include:

> Council Regulation (EEC) No 2837/72 of 19 December 1972 on the safeguard measures provided for in the Agreement between the European Economic Community and the Republic of Austria[13];
>
> Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements[14];
>
> Council Regulation (EC) No 594/2008 of 16 June 2008 on certain procedures for applying the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, and for applying the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part.[15]

Implementing Measures Taken in Individual Cases

There were two types of specific individualized measures the EC was able to take in connection with international agreements concluded in the framework of its commercial policy.

First, on the basis of public international law, the EC could take individualized measures vis-à-vis one or more sovereign contracting parties. In particular, EC institutions could define specific positions that the EC would take with respect to the implementation of a particular agreement. The Commission's power to adopt such measures was based on Art. 300 EC Treaty. In particular, pursuant to Art. 300 (2) (2) EC Treaty, the Commission required the Council's assent if the proposed implementing measures entailed "establishing the positions [which are] to be adopted on behalf of the Community in a body set up by an agreement, when that body is called upon to adopt decisions having legal effects."

Thus, to the extent the Commission's actions did not result in binding commitments, the Commission had the authority to act on its own. Nevertheless, the relevant working groups of the Council were generally consulted (and often their informal consent was sought) prior to any final Commission decisions.

Second, the EC had the power to adopt binding "internal" measures in individual cases that could affect the rights of private citizens. As such they are part of the autonomous commercial policy, discussed in greater detail in Part 2.b below.

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[13] O.J. 1972 L 300/94.

[14] O.J. 2007 L 348/1.

[15] O.J. 2008 L 169/1.

Implementing Autonomous Commercial Policy

When matters were not already governed by international agreements, Art. 133 EC Treaty vested the Community with the power to pursue an autonomous commercial policy. This power extended to implementing rights and obligations under international agreements when implementing measures would directly affect the rights of EC citizens. In principle, it was possible for the Community to employ contractual and autonomous measures simultaneously. In so doing, however, autonomous measures could not be inconsistent with existing commitments established in commercial policy agreements.[16] Moreover, autonomous measures adopted to implement agreements had to be interpreted in a manner consistent with the letter and purpose of any such agreement.[17] As a result, the functional scope of autonomous commercial policy measures was often limited by obligations established in international agreements.

Implementing Regulations

The legal basis for such autonomous measures was Art. 133 (2) EC Treaty, which established: "The Commission shall submit proposals to the Council for implementing the common commercial policy." This brief, cursory language was generally accepted as a sufficient legal basis for both the adoption of general and abstract "basic regulations," and for adopting concrete measures in individual cases.

The existing basic commercial policy regulations were adopted on this basis and deal with a range of typical situations, including:

Imports (Regulation No 260/2009)[18];
Exports (Regulation No 1061/2009)[19];
Protection against dumped imports (Regulation No 1225/2009)[20];
Protection against subsidized imports (Regulation No 597/2009)[21];

[16] ECJ, Case C-207/91, *Eurem Pharm v. BGA*, [1993] E.C.R., I 3723, paras. 23 et seq.; and CFI, Case T-367/03, *Yedas Tarim v. Council et all*., [2006] E.C.R., II 873, para. 38. Concerning the justiciability of statutory violations, the ECJ consistently holds that WTO infringements usually don't render EU legal acts unlawful.

[17] ECJ, C-69/89, *Nakajima v. Council*, [1991] E.C.R., I-2069, para. 29 et seq.; ECJ, Case 113/77, *NTN Toyo Bearing v. Council*, [1979] E.C.R., 1185, para. 21; ECJ, C-93/02 P, *Biret v. Council*, [2003] E.C.R., I-10497 paras. 32 et seq.

[18] Council Regulation (EC) No 260/2009 of February 26, 2009, on the common rules for imports, O.J. 2009 L 84/1.

[19] Council Regulation (EC) No 1061/2009 of October 19, 2009, establishing common rules for exports, O.J. 2009 L 291/1.

[20] Council Regulation (EC) No 1225/2009 of November 30, 2009, on protection against dumped imports from countries not members of the European Community, O.J. 2009 L 343/51.

[21] Council Regulation (EC) No 597/2009 of June 11, 2009, on protection against subsidized imports from countries not members of the European Community, O.J. 2009 L 188/93.

Community procedures in the field of the common commercial policy to ensure the Community's rights under international trade rules as established by the World Trade Organization (Trade Barriers Regulation No 3286/94).[22]

These basic commercial policy regulations govern—sometimes in great detail—the substantive conditions of, and the procedures for adopting autonomous commercial policy measures. Certain measures could be adopted directly by the Commission, while others had to be adopted by the Council based on the Commission's proposal. In either situation, the Council was involved in the administrative procedures leading to the adoption of such measures through its various working committees. (*e.g.*, the "133"-Committee, the Anti-Dumping Committee).

The so-called Comitology-Decision of 1999 did not apply to trade policy measures,[23] and a range of measures were adopted by simple majority vote (or were "deemed to be adopted" if the Commission proposed a measure and the Council did not expressly reject the proposal). This applied particularly in the context of anti-dumping and countervailing duty procedures.

Individual measures, often in the form of regulations, were adopted based on these underlying basic regulations. Such individual measures had to comply with the basic regulations, and, within the applicable scope of such basic regulations, could not be based directly on Art. 133 EC Treaty.[24]

Measures Taken on an "Ad Hoc" Basis

There have also been a number of cases in which EC institutions have adopted "ad hoc" measures based directly on the authority provided by Art. 133 (2) EC Treaty.

The most important cases involving "ad hoc" measures concern the implementation of World Trade Organization ("WTO") Dispute Settlement Body ("DSB") decisions. The WTO dispute settlement procedure does not result in directly enforceable decisions. Indeed, as is generally true in public international law, there is no mechanism to directly enforce a decision against the "losing" party. Nevertheless, the WTO's dispute settlement procedure authorizes the "winning" WTO member to withdraw relevant preferential tariff arrangements under the

[22] Council Regulation (EC) No 3286/94 of 22 December 1994 establishing Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, O.J. 1994 L 349/71, with later amendments.

[23] Recital 12 of Council Decision (1999/468/EC) of June 28, 1999, establishing procedures for use of the implementing powers conferred on the Commission, O.J. 1999 L 184/23, in the version of Council Decision of July 17, 2006, amending Decision 1999/468/EC, establishing procedures for the use of the implementing powers conferred on the Commission (2006/512/EC), O.J. 2006 L 200/11: "the specific committee procedures created for the implementation of the common commercial policy and the competition rules laid down by the Treaties that are not currently based upon Decision 87/373/EEC are not in any way affected by this Decision."

[24] ECJ, Case 113/77, *NTN Toyo Bearing Co. v. Council*, [1979] E.C.R., 1185.

GATT. To take advantage of this authorization within the European Community, a specific regulation is required to enact the change in tariff rates and preferences in an individual case.

One example of such an "ad hoc" measure is the EC's reaction to the United States' "Byrd Amendment" (officially named the "Continued Dumping and Subsidy Offset Act (CDSOA)").[25] The Amendment provided that anti-dumping duties collected by the U.S. would be placed in the control of domestic U.S. industry actors. Subsequently, the EC initiated a dispute settlement procedure concerning the Amendment's WTO compliance. On January 27, 2003, the DSB issued findings and ordered the United States to cease the practice.[26] When the United States did not voluntarily cease the practice, the Community requested an authorization from the WTO to suspend its tariff concessions. The DSB authorized the suspension on November 24, 2004.[27] Then, relying on Art. 133 (2) EC Treaty, the Council adopted Regulation 673/2005,[28] which introduced additional duties on certain U.S. imports.

Thus, Art. 133 (2) EC Treaty can be relied upon to adopt "ad hoc" measures in individual cases. Nonetheless, this method has certain limitations. The most striking example in this context is the Court of Justice's judgment in the *Toyo Bearing* case.[29] In *Toyo Bearing*, the Council had imposed a provisional anti-dumping duty, which deviated from the provisions of the then-applicable basic anti-dumping regulation. According to the regulation, such a measure could not be adopted after accepting undertakings. But the measure in question had also been based directly on Art. 133 (2) EC Treaty. The ECJ annulled it. While not contesting the principle that individual measures can be adopted on the basis of Art. 133 EC Treaty (formerly Art. 113 EEC Treaty) the Court emphasized that the Council could not derogate from the basic regulation which was applicable in a specific case:

> The argument that regulation No. 1778/77 constitutes a measure *sui generis* based directly on Article 113 of the Treaty and not subject to the provisions of Regulation No. 459/68 [*the then-existing basic regulation*] disregards the fact that the whole proceeding in question was carried out within the context of the provisions laid down by that regulation. The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies. (paragraph 21)

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[25] 9 U.S.C.A. § 1675c. (Repealed on February 1, 2010).

[26] WTO Panel, WT/DS217/R, WT/DS234/R, *United States — Continued Dumping and Subsidy Offset Act of 2000* and WTO Appellate Body, WT/DS217/AB/R, WT/DS234/AB/R, *United States — Continued Dumping and Subsidy Offset Act of 2000*.

[27] *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/ARB/EEC of 24 and 26 November 2004, see minutes of Meeting of the DSB, WT/DSB/M/178 of January 17, 2005, paras. 80, 83.

[28] Council Regulation (EC) No 673/2005 of April 25, 2005, establishing additional customs duties on imports of certain products originating in the United States of America, O.J. 2005 L 110/1.

[29] ECJ, Case 113/77, *NTN Toyo Bearing Co. v. Council* (*Kugellager*), [1979] E.C.R., 1185.

A later attempt to levy special "sui generis" duties also failed. Prior to Austria's accession to the EC and the European Economic Area ("EEA"), the Commission investigated whether Opel Austria had received improper State aid for the construction of a new transmission factory. The Commission intended to revoke tariff concessions (in other words, it intended to impose special duties on the transmissions) "at the last minute" through a special "sui generis" regulation.[30] The regulation mentioned as its legal basis only Art. 133 EC Treaty. The Court of First Instance annulled the regulation,[31] noting, in a side remark, that the regulation was based on both Art. 133 and on a regulation implementing the free trade agreement.[32] While the Court did not raise any objection in principle, it nevertheless annulled the regulation because, in substance, it was incompatible with the EEA, pursuant to which duties of any kind, even "sui generis," were impermissible.[33]

Conclusion

Even before the Treaty of Lisbon came into effect, the common commercial policy was largely enacted through implementing legislation. Commercial policy agreements were often accompanied by implementing regulations which conferred power to adopt additional implementing measures. As far as the EU's autonomous commercial policy was concerned, there were (and are) five important general basic regulations that govern the majority of autonomous measures adopted in individual cases. Even pre-Lisbon, it was not permissible to derogate from these five regulations. Neither could such derogations be justified by reference to the legislative powers available directly under the EC Treaty. The procedure for adopting individual measures varied significantly from the procedures otherwise applied when adopting implementing legislation, which were laid down in the 1999 Comitology-Decision.

However, a number of case-by-case measures to implement autonomous commercial policy were not based on basic regulations, but adopted directly upon the authority of the EC Treaty. The most important examples were measures issued to implement WTO decisions, permitting the EU to withdraw tariff concessions from other WTO members for failure to comply with decisions taken by the DSB. However, case-by-case measures derogating from the existing basic regulations were not permissible.

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[30] Council Regulation (EC) No. 3697/93 of December 20, 1993, withdrawing tariff concessions in accordance with Article 23 (2) and Article 27 (3) (a) of the Free Trade Agreement between the Community and Austria (General Motors Austria), O.J. 1993 L 343/1.

[31] CFI, Case T-115/94, *Opel Austria v. Council*, [1997] E.C.R., II-39.

[32] O.J. 1972 L 300/94.

[33] In fact, the judgement's reasoning is slightly more complicated. In order to explain the unlawfulness of the regulation at the time of its issuance on December 20, 1993, the ECFI referred to the effects of the EEA's ratification (at the beginning of December 1993) prior to its entry into force (January 1, 1994).

Implementing the Common Commercial Policy After the Treaty of Lisbon

Pursuant to Art. 1 (3) (3) TEU, the European Union is the legal successor to the European Communities. It replaces the EC as party to international agreements and as a member in any international organizations. Moreover, all previous internal laws, acts, and rules of the EC remain in force. In principle, however, third-parties—countries and other entities subject to public international law—are not bound by the legal effects of the succession established by this provision. From a third-party perspective, the provision is merely part of an agreement between unrelated third parties. Other sovereigns must recognize the EU and its legal capacity to act in public international law as they formerly did for the EC. They must also recognize that the existing agreements remain in force vis-à-vis the EU. So far, the EC/EU's counterparties have not raised any objections against the act of legal succession and the continued application of the EC's international agreements. Since recognition can occur through acquiescence, it can safely be assumed today that the EU has been recognized as the new actor in international law and the legal successor to the EC.

Implementing the Common Commercial Policy Through Agreements

As a result of the EU's succession to the EC's legal obligations and international status, standing international agreements, and any related implementing legislation, remain valid and continue to provide the basis for the EU's commercial policy under the Treaty of Lisbon.

Since December 1, 2009, the legal framework for the continued development of international relations, and for the EU's treaty network, has changed. The EU now acts on the basis of Art. 207 (3) (4) and Art. 218 TFEU. This new legal framework increases the Union's power to enter into international agreements to implement its commercial policy. Now, the external powers of the EU are aligned with the scope of the WTO's competencies. Consequently, difficulties arising from ECJ Opinion 1/94,[34] addressing accession to the WTO, and the resulting need for "mixed agreements" are for the most part resolved.[35] Furthermore, this new legal framework strengthens the role of the European Parliament, which must now be informed about negotiations leading to the finalization of commercial policy agreements, and

[34] EJC, Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, [1994] E.C.R., I-5267.

[35] See Müller-Ibold, preliminary remarks, Art. 206-207, in: Lenz/Borchardt (eds.), *EU Treaties, Commentary*, (6th ed, 2012), para. 11 et seq. (with further references), see also Cremona, The Draft Constitutional Treaty: External Relations and External Action, CMLR 40 (2003) 6, page 1347 (1350).

which must also give its consent for the conclusion and ratification of the majority of such agreements (Art. 218 (6) (v) TFEU).[36]

The European Union can continue to adopt legislation to prescribe its internal procedure for implementing agreements—in particular with regard to positions to be taken in special committees established by an agreement. The Union may also adopt legislation concerning the internal implementation of such agreements. Such legislation continues to deal with two issues.

On the one hand these regulations establish the EU's internal procedure to be taken concerning the other contracting party in special committees established by international agreements. Therefore, the EU institutions must respect both Art. 218 (9) and Art. 207 (3) TFEU. Because such positions will modify international agreements, they must be considered part of the procedure for the conclusion or modification of an international agreement. On the other hand, and to the extent that the European Union regulates the conditions and procedures for adopting legal acts within the EU, acts adopted in this context must be based on Art. 207 (2). This is the case because, in principle, such regulations represent "measures defining the framework for implementing the common commercial policy."

Compared to the pre-Lisbon understanding, Art. 207 TFEU more clearly distinguishes the competencies necessary to conclude or modify agreements on the one hand (Art. 207 (3) to (5)), from the legal basis necessary for adopting internal implementing measures for international agreements on the other hand (Art. 207 (2)).

Autonomous Commercial Policy After the Treaty of Lisbon

Autonomous commercial policy is also based on the principle of continuity from the EC to the EU. The existing basic regulations remain in force as "framework regulations." Commercial policy measures in individual cases (e.g. anti-dumping regulations for certain products from specific countries) continue for the time period for which they were originally adopted.

However, the Treaty of Lisbon also brings about important changes, two of which are of central importance. First, Art. 207 (2) TFEU applies new wording to provide the legal authority for autonomous measures. Second, the Treaty establishes a new provision for the Commission's implementing powers in Art. 291 TFEU.

Art. 207 (2) TFEU reads:

> The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

This wording indicates that, at least in principle, the autonomous commercial policy must be implemented in two successive parts: general framework regulations must be adopted (by both the European Council and the Parliament) and *only then* can individual

[36] Art. 207 (4) only addresses the nature of the majority required for votes by the Council.

measures be taken pursuant thereto. This new structure corresponds to the existing basic regulations. However, to the extent measures were adopted in some individual cases directly on the basis of the EC Treaty (for example, to implement decisions of the WTO's DSB as discussed above), the new wording creates a potential gap.

The second important modification follows from Art. 291 TFEU. This new provision in the Treaty governs the transfer of implementing powers to the Commission. In the future, implementing measures are intended to be adopted within a uniform procedural framework subject to the exercise of control functions by Member States and the legislative procedures applied to the Commission's activities.

Implementation Through Framework Regulations

As previously discussed, the important existing basic regulations remain in force. In particular this applies to: Regulation 260/2009, establishing the common rules for imports: Regulation 1061/2009, establishing the common rules for exports; Regulation 1225/2009, establishing protection against dumped imports; Regulation 597/2009, establishing protection against subsidized imports; and Regulation 3286/94, establishing protection against trade barriers in third countries.

These regulations (except for Regulation 3286/94) were updated immediately before the Treaty of Lisbon entered into force. This was done so that any procedural changes made necessary as a result of the Lisbon Treaty could be considered without the time–pressure that might otherwise have resulted from the need to modify the substantive rules set out in the regulations, in particular because there was considerable uncertainty on what the post Lisbon procedures would look like.[37]

The need to modify the previous basic regulations results, first, from Art. 291 TFEU.[38] According to Art. 291, it is generally the right and responsibility of individual Member States to adopt implementing measures unless there is a need for identical implementing measures throughout the Union. However, it is well accepted that implementing measures for subject-matters falling within the exclusive competence of the Union *must* be uniform. Commercial policy is one such subject-matter. Consequently, in accordance with Art. 291 (2), it is the European Commission that usually has the power to adopt implementing measures in the field of the commercial policy.

[37] The basic regulations must be expected to be adapted soon to the terms of the Comitology Regulation by the two "omnibus" regulations discussed below.

[38] Usually, the individual measures will be implementing acts within the meaning of Art. 291. A typical case is the adoption of anti-dumping regulations. That measure does not change existing legal obligations or commitments, and therefore it cannot be classified as a delegated legislation within the meaning of Art. 290. This could be different, for example, concerning a regulation to withdraw tariff concessions after having prevailed in a WTO dispute settlement procedure. In such a case, delegated legislation within the meaning of Art. 290 TFEU could be applied (because existing legal obligations or commitments under customs law would be modified. Ultimately, the question may depend on the technical method of execution: if the "withdrawal of tariff concessions" is technically achieved through the introduction of a new, additional duty, the measure may be classified (assuming that a corresponding framework regulation exists) as the adoption of an implementing act.

This competence can only be exercised by the Council in rare circumstances (Art. 291 (2) TFEU). The existing basic regulations are typically inconsistent with that structure, because it is generally the Council which adopts implementing measures under the existing rules (at least for definitive measures).

In addition and second, Art. 291 (3) TFEU provides that "the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers."

The existing basic regulations do not comply with the Art. 291 (3) requirement either. They do not provide for a standardized procedure that accounts for legislative procedure, voting, and majority requirements in the committees of the Council. The existing regulations differ from each other as well as from the procedures established for other subject-matters by the 1999 Comitology-Decision.[39] The mechanisms of control established for policy measures so far, will thus have to be replaced by a more uniform structure. A core intention behind Art. 291 (3) is to ensure that Member States exercise their control though a more uniform "comitology" structure.

The European Commission, Council and Parliament have agreed on the comitology structure to be used after Lisbon, and have also agreed about the provisions relevant to commercial policy measures.[40] The new Comitology Regulation entered into force on March 1, 2011, and was based on a Commission proposal from March 2010.[41] The new Regulation provides procedures similar to those in place under the former Comitology-Decision of 1999, but provides for only two types of procedures an "advisory" procedure, which mirrors the existing advisory procedure, and a new "examination" procedure, which replaces the existing management and regulatory procedures.

To adopt preliminary measures in anti-dumping and countervailing-duty procedures, the comitology structure establishes a specific consultation procedure.[42] The Commission adopting this form of preliminary measures is considered adopting an urgent measure, thus the Commission is only required to consult the responsible committee

[39] Council Decision (1999/468/EC) of June 28, 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 1999 L 184/23, in the version of Council Decision (2006/512/EC) of July 17, 2006, amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 2006 L 200/11.

[40] Regulation (EU) No. 182/2011 of the European Parliament and of the Council of February 16, 2011, 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, with further details on the legislative history are the EP website: http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2010/0051.

[41] European Commission, "Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers," COM/2010/83 final - COD 2010/51.

[42] Art. 8 (5) of the Comitology Regulation.

(in particularly urgent cases, the Commission only needs to inform the responsible committee retroactively). To this end (as with past practice) the Commission submits its draft of the proposed measures to the committee. In principle, the Comitology Regulation foresees particular examination procedures for commercial policy measures (Art. 2 (2) (b) (iv)). However, the term "consultation" in Art. 8 (5) indicates that the committee in question is only consulted concerning preliminary measures and only returns a non-binding opinion. While the Commission is expected to give due consideration to the committee's opinion, it is not legally bound to follow it. Thus, the Commission can adopt measures notwithstanding an adverse opinion from the committee.

In order to adopt definitive measures concerning dumping, countervailing duties and safeguards, an examination procedure must be followed. According to Art. 5 of the Comitology Regulation, the draft measure is first submitted to the examination committee. The Commission officially chairs the committee, but it is not entitled to a vote. If the committee votes in favour of the draft by a qualified majority, the Commission will adopt the draft. If, by contrast, the committee votes by a qualified majority against the draft, the Commission cannot adopt it. Nevertheless, the Commission may, after consultations, present the original draft or a modified version to an appeal committee, which is tasked with reviewing the decision of the original examination committee (Art. 6).

Cases in which no qualified majority—either for or against the proposed measure—can be achieved within the committee are of even greater significance. In such a case the Commission is legally entitled to adopt the proposal. However, this entitlement does not extend to specific measures; in particular it does note extend to the adoption of definitive safeguard measures. Adopting a measure is also prohibited if the examination committee votes against the proposal by a simple majority. In these situations, the Commission may also elect to refer the matter to the appeal committee for reconsideration.

The same procedural standards apply for the appeal committee. If a vote (by a qualified majority) returns in favour of a proposed measure, the Commission can adopt the draft. However, if the vote is negative, the Commission cannot adopt the proposal. If no majority can be secured, the draft can be approved by the Commission (Art. 6). Nevertheless, and particularly in the commercial policy field, there are several exceptions. For example, Multilateral Safeguard measures can only be adopted if a qualified majority of the appeal committee votes in favour. Moreover, for a transitional period of 18 months after the Treaty's entry into force (until August 31, 2012), the appeal committee will vote on definitive anti-dumping or countervailing measures by simple majority—a procedure which corresponds to the voting requirements in previous basic regulations. In addition, the appeal committee's procedure must ensure that the deadlines established by the framework regulations are applied and enforced (Art. 5 (5) (2)).

Taken together, the Treaty of Lisbon and the Comitology Regulation[43] require significant changes to the procedures for adopting delegated and implementing acts,

[43] Regulation (EU) No. 182/2011 of the European Parliament and of the Council of February 16, 2011, 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.

particularly those concerning trade policy measures. To bring about the required changes in trade policy procedures, the Commission has adopted two proposals, commonly referred to as Omnibus proposal I and II respectively.

The Omnibus I proposal[44] mainly deals with the procedures for adopting implementing acts in trade cases and proposes modification of the pre-existing legislative powers into powers for adopting implementing measures (and, in rare cases, delegated acts). Implementing powers are necessary when the measure to be adopted is provided for by the basic regulations, whereas delegated powers are necessary when the measure will supplement or amend the basic regulation itself. The Omnibus II proposal[45] deals more with other basic regulations and relates more specifically to delegated powers, and the possible revocation of delegated powers in individual cases by the Council or Parliament.

Implementation Through Individual Measures

For a long time, commercial policy measures for individual cases have mainly been adopted by applying the basic regulations. This multi-level structure—adopting a policy measure based on an underlying basic regulation—reflects the intended legislative framework under Art. 207 (2) TFEU. Once the legislative procedures established in the previous set of basic regulations are updated to accurately reflect the provisions of both Art. 291 TFEU and the Comitology Regulation, these regulations will be fully compatible with the Treaty of Lisbon's requirements.

For subject matters within the framework regulations, however, the TFEU will not permit individual measures to be adopted based directly upon the Treaty itself. The *Toyo Bearing* precedent will continue to apply because its reasoning also corresponds to the logic underlying the Lisbon Treaty. The TFEU continues to prohibit discrimination within the Union, which reflects the reasoning applied by the ECJ to rule out such measures. If anything, the Charter of Fundamental Rights has increased the importance of the non-discrimination provisions in the Treaty.

For subject matters outside the scope of framework regulations, however, the question arises whether individual measures can continue to be adopted under Art. 207 (2), as was possible under Art. 133 EC Treaty. As a textual matter, Art. 207 (2) only provides for adopting "measures defining the framework for implementing the common commercial policy." Taken together, the article's wording, and the well-established principle that the EU can only act within the powers specifically conferred upon it, point to the interpretation that this procedure for adopting individual measures

[44] *Omnibus I:* Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures – COM (2011) 82 final, March 7, 2011, 2011/0039 (COD).

[45] *Omnibus II:* Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the granting of delegated powers for the adoption of certain measures – COM (2011) 349 final, June 15, 2011, 2011/0153 (COD).

is no longer applicable.[46] However, such an interpretation would cause significant difficulties. Art. 3 (1) (e) TFEU establishes that the common commercial policy falls within the exclusive competence of the EU. Thus, if Art. 207 (2) TFEU is understood to mean that the EU institutions cannot adopt individual trade defense measures outside of framework regulations, neither the Union (as lacking a legal basis) nor the Member States (as lacking competence) would be able to take trade defense measures in the absence of a corresponding framework regulation.

This resulting gap was not intended by the wording modifications made to Art. 207 (2). The objective behind this new provision was to expand the European Parliament's legislative powers to include the common commercial policy framework, while simultaneously withholding this power from administrative implementation in individual cases.

Against this background, it would appear that the aforementioned gap can be avoided by reference to the implied powers doctrine.[47] The ECJ has consistently held that the competencies bestowed on the Community by the Treaties also empower the Community to adopt such measures that are necessary to reasonably and effectively apply the expressly enumerated powers. In its cases, the ECJ has used different formulas to express this concept. As early as 1957, in one of its earliest judgments, it said:

> The Court considers that without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied.[48]

[46] For more information on the principle of limited conferred powers, particularly in the context of delimiting powers in the commercial policy space, see Advocate General Kokott's Opinion delivered on March 26, 2009, Case C-13/07, *Commission v. Council*, para. 113. The principle of limited conferred powers is less important concerning the question of which Community institution is competent to adopt certain measures (horizontal demarcation of competence), but rather it is relevant to question whether or not the Community is competent at all: "However, this consideration relates to legal measures in respect of which the Community's competence as such is beyond doubt and where it is necessary only to clarify which of several existing areas of Community competence is to be used (horizontal demarcation of competence). If, on the other hand, the Community is competent only in respect of certain components of a proposed act, while other components come within the competence of the Member States, (vertical demarcation of competence) the Community cannot simply declare that it is competent for the entire act by way of a main-purpose test. Otherwise it would undermine the principle of limited conferred powers (first paragraph of Article 5 EC; see also the second subparagraph of Article 7(1) EC)."

[47] In the same sense: Hahn, AEUV Art. 207, in: Callies/Ruffert (eds.), *Kommentar EUV/AEUV*, 2011, 4th ed., paras. 90 et seq.; similar: Weiß, Art. 207, in : Grabnitz/Hilf/Nettesheim (eds.), *Das Recht der Europäischen Union*, paras. 115, 116; of the contrary view: Herrmann, Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration*, EuR Beiheft 1, 2010, 193 (196).

[48] ECJ, Case 8/55, *FédéCouncilion Charbonnière de Belgique v. High Authority*, [1956] E.C.R., 297 (311).

Similarly, in 1987, it said:

> [W]here an article of the EEC Treaty . . . confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task.[49]

Even the Court of Justice's Opinion No. 2/94[50] emphasized this point:

> The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.

Recognizing implied powers as a tool to close the aforementioned "gap" leads to appropriate results. Because the need for commercial policy measures cannot always be foreseen and determined in advance, the ability to adopt measures in individual cases, and those outside the scope of pre-existing framework regulations, is indispensible. Therefore, the TFEU should be interpreted as granting European institutions "the powers which are indispensable in order to carry out that task." Moreover, acknowledging implied powers is consistent with the purpose of the new wording applied by Art. 207 (2). As discussed above, the purpose was to keep the European Parliament out of complex, technical administrative procedures in individual cases—to keep it out of the complexities of case and fact specific dumping calculations. This result was intended for two reasons. First, "technical" procedures and calculations should not be politicized. Second, because the Parliament lacks the administrative infrastructure necessary to participate in such complex procedures. In contrast, in individual cases for which no framework regulations exist, the questions and challenges will not normally revolve around complex administrative procedures, but rather on the political assessments of whether certain individual measures are appropriate and in the interests of the Union. This latter type of decision is properly allotted to the Parliament.

If there is a need to take action in individual cases that fall within the scope of a framework regulation, Art. 207 (2) TFEU does not provide a sufficient legal basis for action. Once such a framework regulation exists, "the powers which are indispensable in order to carry out that task" no longer permit the adoption of individual measures directly on the basis of Art. 207 (2) TFEU.

Even so, and as discussed above, the procedures and requirements for exercising rights under international agreements were not always spelled out in accompanying regulations before the Treaty of Lisbon entered into force. In particular, such rules are missing with regard to the WTO agreement, and specifically with regard to the procedures to be followed for implementing DSB findings that authorize the EU to withdraw tariff concessions. This situation cannot be remedied overnight and special transition periods were not provided for when the TFEU entered into force.

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[49] ECJ, Case 281/85, *Germany v. Commission*, [1987] E.C.R., 3203.

[50] ECJ, Opinion 2/94, *Accession of the Community to the European Convention for the protection of Human Rights and Fundamental Freedoms*, [1996] E.C.R., I-1759.

Therefore, the ability to adopt individual measures directly on the authority of Art. 207 (2) TFEU is, at least for a certain transitional period, indispensible. This ability should be permissible, at least through application of the implied powers doctrine.

On this basis, the following conclusions can be drawn regarding the adoption of measures in individual cases[51]:

Individual measures, such as the binding implementation of measures within the EU that are permissible under international law, like measures in reaction to breaches of international law by third countries, can continue to be adopted based on Art. 207 (2) TFEU. However, such measures, typically enacted in the form of a regulation, must be adopted through the normal legislative procedure—with the full participation of the European Parliament.

Individual measures that are likely to reoccur with certain regularity (e.g., measures implementing a WTO DSB authorization for the withdrawal of tariff concessions) ought to be based on framework regulations after a certain transition period passes.

To achieve this, the Commission should propose a framework regulation that both authorizes and establishes procedures for suspending tariff concessions, in the event such a suspension is authorized by the WTO DSB. Such a framework regulation could be adopted either as a stand-alone regulation or as an amendment to the existing Trade Barriers Regulation.

The Commission should also consider the need for other framework regulations—for example, a regulation supporting measures taken in connection with OECD decisions on export credits or the trade in dual-use goods or services. The institutions might even consider adopting a general framework regulation granting the Commission the power to adopt trade policy measures in "unforeseen" cases. But it remains to be seen whether the Council, and in particular the European Parliament, would be willing to grant such far reaching powers to the Commission.

Once the two "omnibus" regulations adapting the existing framework regulations are agreed upon, the institutions will have to address these issues. It will be interesting to monitor the developments.

Conclusion

The common commercial policy after Lisbon continues where the EC's commercial policy stood before Lisbon. The new Art. 207 (2) TFEU puts great emphasis on the Union's need to create strict substantive and procedural standards to regulate the conditions under which the EU can adopt commercial policy measures in advance, through framework regulations. Art. 207 (2) underscores more clearly than before, that the implementation of the common commercial policy requires in most cases secondary legislation that is adopted before the individual case arises.

[51] As far as can be seen, the European Commission accepts this, or a similar, approach (according to my interpretation; I am not aware of any official position).

Viewed together, it is clear that Art. 207 and Art. 291 TFEU require further harmonization of their respective administrative and legislative procedures. The new Comitology Regulation has already led to a more standardized approach, although some exceptions, particularly during transition periods, continue to characterize the commercial policy adoption and implantation procedures.

Nevertheless, Art. 207 (2)'s focus on the need to adopt framework regulations creates a certain gap in the EU's power to adopt individual trade policy measures when framework regulations have not yet been made available. In such situations, however, this gap can be bridged by relying on the implied powers doctrine.

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Changes in the Common Commercial Policy of the European Union After the Entry into Force of the Treaty of Lisbon: A Practitioner's Perspective

Colin M. Brown

Introduction

The entry into force of the Treaty of Lisbon radically altered the landscape of the common commercial policy of the European Union (EU). The changes have set in place a significant evolution of that policy. It is submitted that this evolution will take time to materialise. Some of the potential manifestations of that evolution may not even be identifiable at the time of writing (Summer 2012). This contribution seeks to provide a specific and personal perspective on the first three years after the entry into force of the Treaty of Lisbon. Inevitably, it might focus on some issues to the detriment of others, and may lack the objectivity of a more neutral analyst, at a further distance from the goings-on in Brussels (and now, from time-to-time, Strasbourg). It is hoped, nevertheless, that this contribution offers an insight that may be of interest to those charged professionally with objective analysis.

The core changes brought about by the Treaty of Lisbon are as follows:

- The extension of the scope of the EU's competence for the common commercial policy to include foreign direct investment;
- The role of the Parliament in adopting legislation on the basis of the ordinary legislative procedure and the requirement that its consent be obtained for all international agreements in the field of the common commercial policy;
- The impetus given particularly by the Parliament to changes in the framework for the adoption of secondary legislation in the field of the common commercial policy (the new regime for implementing and delegated acts);

The views expressed in this contribution are personal and should not be attributed to the European Commission. This contribution is up to date as of August 2012.

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- Because of the required use of the ordinary legislative procedure combined with the new regime for implementing and delegated acts, the end of the possibility for the Council to adopt ad hoc decisions (e.g. on suspension of concessions in the case of WTO dispute settlement)[1];
- The change to the voting rules in the Council such that qualified majority is generally required subject to limited exceptions; and,
- The removal of the dislocation between the ability to adopt international agreements and to adopt legislation in the field of services and commercial aspects of intellectual property (previously the Council considered that the European Communities could not adopt legislation in these fields—and could only adopt international agreements).

It is not the purpose of this contribution to analyse in detail the text of Article 207, establishing the common commercial policy. This contribution rather examines how some of those changes have played out in practice. In so doing, it focuses on three areas. First, it examines the impact of the full involvement of the Parliament, by taking three examples; the provisional application of FTAs, the role of the Parliament in the implementation of FTAs and the discussions around the scope of Council decisions concluding international agreements. Second, it examines the issue of the scope of competence, looking at how these issues have been managed (or avoided—depending on one's perspective) in the EU-Korea FTA,[2] WTO accessions and the debates on investment. Third, the contribution will examine the application of the new regime for delegated and implementing acts to the common commercial policy.

The Enhanced Role of the European Parliament

Introduction

The increase in importance of the Parliament is one of the most obvious manifestations of the changes brought about by the Treaty of Lisbon. It was a change long advocated by the European Commission, in particular in the previous Intergovernmental Conferences which have revised the EU Treaties. However, what was perhaps little appreciated at the time, and is not obvious from a simple reading of the Treaty, is the

[1] See, as an example, Council Regulation (EC) No. 673/2005 of 25 April 2005 establishing additional customs duties on imports of certain products originating in the United States of America (OJ L 110, 30.4.2005 p.1).

[2] 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 L. 127 14.5.2011 p. 1 *et seq*, hereinafter the "EU-Korea FTA"). For an overview of EU-Korea relations, and in particular the EU-Korea FTA, see Harrison (ed.) *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations,* forthcoming 2013. Chapter 2, written by Justyna Lasik and the current author, provides an overview of the political and institutional context in the EU of the EU-Korea FTA.

manner in which the Parliament has sought to establish a more general institutional balance, which ensures that a full respect for its prerogatives can be established. Three examples of this are the timing of provisional application, the role of the Parliament in the implementation of FTAs, and the debate on the appropriate content of Council decisions on signature and conclusion of international agreements. In all three of these circumstances, it is submitted, the Parliament has ensured the establishment of an appropriate institutional balance where the text of the relevant treaty articles has been at best ambiguous.

Timing of Provisional Application

Article 218 of the TFEU sets out the framework for the ratification procedure for agreements negotiated by the EU. It states:

> 5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.
> 6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.
> Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
> (a) after obtaining the consent of the European Parliament in the following cases:
> [. . ..]
> (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
> The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

Since the ordinary legislative procedure is used for the adoption of legislation in the field of the Common Commercial Policy, the Parliament's consent for trade agreements is now required pursuant to Article 218(6)(a)(v). The EU-Korea FTA was the first trade agreement, after the entry into force of the Treaty of Lisbon, requiring consent.[3]

Article 218(5) of the TFEU permits the European Union to provisionally apply agreements, on the basis of a Council decision and does not require it to wait for the Parliament to give its consent. Relatively early after the entry into force of the Treaty of Lisbon the Parliament raised the question of whether the EU-Korea FTA would be provisionally applied before it voted on the Agreement. The Parliament was concerned that if the Agreement was provisionally applied it would be more difficult for the Parliament to exercise its right to refuse consent since the Agreement would already be

[3] It was likely that the Parliament's consent would have been required even had the Treaty of Lisbon not entered into force. Article 300 of the Treaty establishing the European Community provided that the consent (the term used is "assent") was required for "agreements establishing a specific institutional framework by organising cooperation procedures". It is likely that the powers granted to the bodies established by the EU–Korea FTA would have meant that the FTA would have qualified under that heading, for the consent of the Parliament.

in place and above all economic operators would have structured their operations to take advantage of the new situation. In this light the Commission stated, in the Explanatory Memorandum accompanying the proposals for the Council decisions on signature and conclusion[4]:

> As Member States of the European Union will also be party to this Agreement because of certain commitments in the Protocol on Cultural Co-operation, it needs to be ratified by them according to their internal procedures. This will take a considerable period of time. In order to ensure prompt application of the Agreement pending full ratification by the Member States, the Commission proposes to provisionally apply it. In light of the significance of the Agreement, the Commission considers that the Council should send the notifications referred to in Articles 15.10(5)(a) and (b) only after a certain lapse of time so as to allow the European Parliament to express its views on the FTA. The Commission is ready to work with the Council and the EP so that the Agreement can be provisionally applied in 2010. (emphasis added)

Additionally, Karel De Gucht, the EU Trade Commissioner, in his comments before the European Parliament's on 6 September 2010 emphasised the Commission's commitment to seek the consent of the European Parliament before the provisional application of the FTA[5]:

> I cannot speak for the Council. I can say what the Commission's position is, and we will insist with the Council that it would only do this [i.e. approve provisional application of the FTA] once the safeguard regulation is adopted and Parliament has given its consent to the FTA. That is our clear position. Parliament should ask in the trilogue for the Council itself to engage on this and say that it will not do this before the final vote in Parliament.

However, these statements were not binding on the Council, which could, of course, have decided to provisionally apply the Agreement before the European Parliament had given its consent. Indeed, it is the practice of the Council to seize the Parliament of an agreement, in order for it to give its consent only *after* the Council has authorised the signature of the agreement.

In the end, the Council took the view that the Agreement could not be provisionally applied before the safeguard regulation implementing the Agreement was in place. This also meant that the Agreement would not be provisionally applied before the Parliament gave its consent, since the safeguard regulation was subject to the ordinary legislative procedure and hence required the agreement of Parliament. This gave the Parliament the means to ensure that the Agreement was not provisionally applied before it had given its consent, and, in this case, reached agreement on the safeguard regulation. As a consequence, Article 3(2) of Council Decision of 16 September 2010

[4] Commission Proposal for a Council Decision authorising the signature and provisional application of the FreeTrade Agreement between the European Union and its Member States and the Republic of Korea, Document COM(2010)136 final, 9 April 2010, p. 4.

[5] The full text of the Commissioner's comments are available at http://www.europarl.europa.eu.

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 (2011/265/EU)[6] provided:

> In order to determine the date of provisional application the Council shall fix the date by which the notification referred to in Article 15.10.5 of the Agreement is to be sent to Korea. That notification shall include references to those provisions which cannot be provisionally applied.
>
> 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.

As part of the discussions leading to the adoption of the Council Decision on Signature, it was agreed that provisional application would start on 1 July 2011, provided that the Safeguard Regulation was in place at that time.[7]

The Role of the European Parliament in the Implementation of the EU-Korea FTA

The EU-Korea FTA also tested, at least in the field of the EU's Common Commercial Policy, precisely how the European Parliament's consent process would interact with the wider ratification process. As can be seen from Article 218(6) of the TFEU, the Parliament's role in the ratification process is limited to giving or refusing its consent to the agreement in question. The agreement cannot be amended by Parliament. This raises the question of if, and how, the Parliament can use its power to give consent to the Agreement to influence, for example, the later implementation of the Agreement.

This issue was put to the test, at least for the common commercial policy, in the process for approval of the EU-Korea FTA. In so doing, it is likely that a pattern has been established for the future management of international agreements. In the context of the EU-Korea FTA, numerous discussions took place between representatives of the European Parliament and the European Commission during the ratification process. This resulted in a Commission statement, which was recorded in the Parliamentary Resolution on the EU-Korea FTA, and in a Joint Declaration of the Parliament and the Commission on the EU-Korea FTA. These documents became Annexes 1 and 2 to the Safeguard Regulation.[8]

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[6] Council Decision 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 (2011/265/EU) OJ L127 14.5.2011 p.1.

[7] See the Notice concerning the 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 L168 28.6.2011 p.1.

[8] Safeguard Regulation, pp. 26–7.

In the Commission statement, the Commission outlines a number of actions that it will take and adopts interpretations of a number of provisions, both of the EU-Korea FTA and of the Safeguard Regulation. This statement could arguably be considered broadly comparable to Statements of Administrative Action in the US system.[9]

The Joint Declaration is, arguably, quite far reaching. In it, the Commission commits to respond to the adoption, by the European Parliament, of a resolution calling for a safeguard investigation (normally, the Parliament would have no such role in issues relating to the implementation of Union law) and to report, at the request of the responsible committee, on Korea's implementation of the non-tariff barrier and sustainable development commitments contained in the EU-Korea FTA. Effectively, the Parliament is making for itself a place in the system for implementing the EU-Korea FTA, something which it is not, as a legislative body, called upon to do.[10] Through the Statement and the Declaration, the Parliament has succeeded in using the leverage generated from the consent requirement to create a system, whereby it can ensure a certain oversight of the future implementation of the EU-Korea FTA. In so doing, a precedent for future FTAs has, undoubtedly, been created.

The Content of Council Decisions Concluding International Agreements

An issue which has come up in 2012 and which is also illustrative of the gradual establishment of an institutional balance between the Council, the Parliament and the Commission is the question of the content of Council Decisions. Put simply, to what extent can a Council Decision on the signature or conclusion of an agreement also include detailed rules which deal with, for example, the implementation of an agreement. The question arose concerning a number of such decisions, but perhaps the two most illustrative are the decisions for the EU-Columbia/Peru FTA and an agreement on exports of wood to the Russian Federation which formed part of the package for Russian WTO accession.[11]

As an example of such clauses, the Council Decision on Signature, and the proposed Decision on Conclusion for the EU-Columbia/Peru FTA provides for the following:

[9] As an example, see the US Statement of Administrative Action on the WTO Agreement, H.Doc. 103-316 (1994), p. 659.

[10] The Council does not, as an institution, have a role either. The implementation of EU law is entrusted either to the member States, or to the Commission under the control of the Member States. See Article 291 TFEU.

[11] Council Decision of 14 December 2011 on the signing, on behalf of the Union, and provisional application of the Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the administration of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union and the Protocol between the European Union and the Government of the Russian Federation on technical modalities pursuant to that Agreement (2012/105/EU) OJ L 57 29.2.2012 p. 1.

> Article 5
> The applicable provision for the purposes of adopting the necessary implementing rules for the application of the rules contained in Appendix 2A and Appendix 5 of Annex II concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Co-operation, and Appendix 1 of Annex I concerning the Elimination of Customs Duties of the Agreement is Article 247a of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [footnotes omitted].[12]

The Decision on the signature of the Agreement on exports of wood to Russia contains the following Article 4:

> Article 4
> The Commission shall adopt detailed rules on the method of allocation of quota authorisations pursuant to paragraph 2 of Article 5 of the Protocol, and any other provisions necessary for the management by the Union of the quantities of the tariff-rate quotas allocated to exports to the Union. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 5.[13]

The legal debate on the use of these provisions centres on a comparison between Articles 207 and 218 and Articles 290 and 291 of the Treaty on the Functioning of the European Union.

As noted above, Article 218 talks about decisions being adopted by the Council on signature and conclusion. It is silent as to the content of those decisions, other than that they must include the agreement of the Council to authorise the signature and/or conclusion of the agreements in questions.

Article 290(1) TFEU makes clear that delegated acts can only be used in legislative acts. It states:

> A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. (emphasis added)

By contrast, Article 291(2) includes no such limitations. It provides:

> Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. (emphasis added)

Article 291(2) refers to "those acts" and could be understood as implying that implementing powers can be granted to the Commission in an act other than a legislative act. From the Parliament's perspective, however, this implies that issues of implementation could be resolved without its involvement. This, it could be considered, jars with Article 207(2) which provides that:

[12] It should be noted that a similar provision is found in Article 7 of the Council Decision on the signature of the EU-Korea FTA.

[13] See also recitals 7 and 8 and Article 5 thereof. A Commission Implementing Regulation was subsequently adopted. See Commission Implementing Regulation (EU) No 498/2012 of 12 June 2012 on the allocation of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union OJ L 152 13.6.2012 p. 29.

> The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

This apparent lack of clarity has been resolved in favour of ensuring that all matters of implementation be decided by the Parliament and Council operating on the basis of the ordinary legislative procedure. This has led to the Council agreeing in principle to revise the Decision on signature of the EU-Columbia/Peru FTA and to changing the Decision on conclusion of the EU-Russia agreement on exports of wood. In the case of the EU-Columbia/Peru FTA the relevant elements are to be transferred to the safeguard regulation accompanying the FTA and in the case of the EU-Russia Agreement this will be achieved via a proposal from the Commission for a new piece of legislation implementing the agreement.[14]

Conclusion

The examples of the timing of provisional application, of the role of the Parliament in the issue of implementation and of the debate on the content of Council decisions are illustrative of a form of institutional "settling" as the three institutions seek to establish an institutional balance. The balance takes as its basis the new role of the Parliament in decision making under the common commercial policy as provided for in the Treaty of Lisbon. However, it is clear that the Parliament has sought to establish beyond its bare legal powers a position which respects more generally the institutional balance between the different institutions. It is of note that this balance has been established without provoking a power struggle between the three institutions.

The Scope of the EU's Exclusive Competence for the Common Commercial Policy

Introduction

As noted in the introduction above, a second significant change brought about by the Treaty of Lisbon concerns the scope of the EU's competence for the Common Commercial Policy. Arguably, one of the most important elements of the changes brought about by the Treaty is an increase in clarity as compared to the pre-existing provisions on the common commercial policy. Perhaps the modern day successors of Sisyphus have had at least some success.[15]

[14] At the time of writing reference not available.

[15] For a discussion of the shortcomings of the pre-existing text and comparisons to Antiquity see, Herrmann, "Common Commercial Policy and Nice: Sisyphus would have done a better job" CML Rev 39 (2002) 1, p. 7.

However, Article 207 still leaves some issues open. Those which have in particular generated discussion are transport services and investment protection.[16] As regards transport services, the key, but very difficult question, is the determination of the extent to which the Union has acquired competence through the exercise of the competence in the construction of the internal market such that Article 3(2) TFEU is of application. Again, three examples are available of how the institutions have dealt with this issue. The first is in the provisional application of FTAs, where again the EU-Korea FTA provided the setting for an approach to be developed. The second is the approach taken to WTO accessions and the third is the question of the approach to be taken to investment protection. In all three cases, the EU institutions (primarily the Council and the Commission) have avoided battling the issue out in order to reach a final position (e.g. by seeking a ruling from the Court of Justice of the European Union), and have contented themselves with finding a practical solution in the specific context.

The EU-Korea FTA

When making its proposal for the signature and conclusion of the EU-Korea FTA, the European Commission did not claim exclusive competence for the European Union. Had the agreement fallen in the exclusive competence of the EU, it would only require ratification in the EU system (that is, on the basis of the Council decision on signature, the Parliament's consent and the Council decision upon conclusion). Given that the Commission did not claim exclusive competence, this meant that the FTA also has to be ratified by the 27 Member States of the European Union. The Council only adopts the decision on conclusion, hence, completing the ratification process in the EU, once all Member States have completed their individual ratification procedures. This can take a number of years.

However, the Commission argued that the Member State competence covered a limited number of areas. In the explanatory memorandum to the Commission's proposal, the Commission refers to 'certain commitments in the Protocol on Cultural Co-operation',[17] as falling under Member States' competence. The question that was then posed was, given the Agreement would be provisionally applied before the Member State ratification process was advanced, what would be the extent of provisional application, assuming that it was defined? This then turned on which matters fell under either the exclusive competence of the EU, or at least under the shared competence of the EU. If a matter falls under the shared competence of the EU, then, according to Article 2(2) TFEU:

[16] For transport services, see ECJ, Opinion 1/08, General Agreement on Trade in Services (GATS) – Schedules of specific commitments – Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union, [2009] E.C.R. I, 11129.

[17] Commission Proposal for a Council Decision authorising the signature and provisional application of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea, p. 4.

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

The EU-Korea FTA requires the identification of which parts of the Agreement will not be provisionally applied and, hence, by definition, those which will be provisionally applied. Article 15.10(b) of the EU-Korea FTA provides:

> In the event that certain provisions of this Agreement cannot be provisionally applied, the Party which cannot undertake such provisional application shall notify the other Party of the provisions which cannot be provisionally applied. Notwithstanding subparagraph (a), provided the other Party has completed the necessary procedures and does not object to provisional application within 10 days of the notification that certain provisions cannot be provisionally applied, the provisions of this Agreement which have not been notified shall be provisionally applied the first day of the month following the notification.

This is the first trade agreement, in the recent practice of the EU, which requires an identification of those provisions which should *not* be provisionally applied.

Article 4(2) TFEU lists those areas which are subject to shared competence. It is clear that to the extent that the provisions of the FTA were not covered by exclusive competence of the European Union then they would be covered by the EU's shared competence. The result, looking at Article 2(2) of the TFEU, is that the Union could potentially act in all areas, with the exception of those specifically reserved for the Member States. In the EU-Korea FTA, the only provisions which fell into that category were certain limited provisions of the Protocol on Cultural Co-operation. As a consequence, the Union was in a position to provisionally apply virtually all of the EU-Korea FTA, either as a matter of exclusive or shared competence. The only provisions which were not provisionally applied were the provisions of the Protocol on Cultural Co-operation and certain provisions on the criminal enforcement of intellectual property rights, given their perceived sensitivity for Member States. Consequently, Article 3(2) of the Council Decision on Signature reads:

1. The Agreement shall be applied on a provisional basis by the Union as provided for in Article 15.10.5 of the Agreement, pending the completion of the procedures for its conclusion. The following provisions shall not be provisionally applied:
   - Articles 10.54–10.61 (criminal enforcement of intellectual property rights),
   - Articles 4(3), 5(2), 6(1), 6(2), 6(4), 6(5), 8, 9 and 10 of the Protocol on cultural cooperation.

In order to provide that the extent of provisional application did not have a precedential effect, the Council Decision on Signature also included a recital, stating that the scope of provisional application should not be understood as affecting the division of competence between the Union and the Member States:

> (9) The provisional application foreseen in this Decision does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties . . .

A similar pattern emerged for the EU-Columbia/Peru FTA. As regards this agreement, the Commission proposed that the agreement be regarded as an EU exclusive agreement. This would have implied that provisional application would not have been necessary. However, the Council decided to reject this approach and insisted on ratification by national parliaments. This led to a need for provisional application of the agreement. However, in the debate on which elements of the agreement should be subject to provisional application it was decided that in particular transport services, i.e. an area which had triggered the view of the Council that the agreement should be subject to national ratification, should be subject to provisional application.[18]

WTO Accessions

A similar pattern can be detected regarding the approach to WTO accessions. Since accessions to the WTO are decisions of the WTO Ministerial Conference or of the WTO General Council the position of the EU needs to be decided via a Council decision on the basis of a Commission proposal. The relevant article is Article 218(9) TFEU. Three accessions have taken place since the entry into force of the Treaty of Lisbon, that of Vanuatu, Samoa and the Russian Federation. In all cases, the Commission has proposed a single decision for the Union. However, in each of the cases, the Member States have themselves adopted a Decision of the Member States in the Council for those areas of activity of the WTO (which have not been identified) considered to fall under their competences. This was done in addition to the Council decision approving accession as regards those areas under Union competence.[19] The Decision of the Member States is drafted as below:

> Decision by the Representatives of the Governments of the Member States meeting within the Council:
> The position to be taken by the Member States within the General Council of the WTO on the accession of the Republic of Vanuatu is to approve the accession.

The Commission reacted to this decision by making a statement arguing that it was not necessary to adopt the decision of the Member States meeting within the Council. The Commission statement reads as follows:

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[18] The relevant decisions have yet to be published in the *Official Journal of European Union* at the time of preparation of this contribution.

[19] Council Decision of 13 May 2011 establishing the position to be taken by the European Union within the General Council of the World Trade Organization on the accession of the Republic of Vanuatu to the World Trade Organization (2011/287/EU), OJ L 132, 19.5.2011, p. 14, Council Decision of 14 December 2011 establishing the position to be taken by the European Union within the Ministerial Conference of the World Trade Organization on the accession of Samoa to the WTO (2012/18/EU) OJ L 6, 10.1.2012, p. 7 and Council Decision of 14 December 2011 establishing the position to be taken by the European Union within the relevant instances of the World Trade Organization on the accession of the Russian Federation to the WTO (2012/17/EU) OJ L 6, 10.1.2012, p. 6.

> The Commission welcomes the adoption of the Council Decision establishing the EU position in favour of the accession of Vanuatu to the WTO.
>
> The Commission notes that the Council has amended the Commission's proposal for an EU Decision to refer to Article 207 of the Treaty on the Functioning of the European Union in general rather than Article 207(4) first subparagraph, as had been proposed by the Commission. The Commission does not consider that this amendment is legally correct, since it fails to identify precisely which voting rules should apply to the adoption of the decision.
>
> The Commission also notes it is proposed that a Decision of the Representatives of the Governments of the Member States meeting within the Council be adopted by common accord as regards the position of the Member States in the WTO. The Commission notes that it would have been possible to adopt an EU decision which would have rendered such a separate decision unnecessary.[20]

These decisions and statements represent a freezing of the issue of the competence of the Union for the matters covered by the WTO. Since they have not led to problems as a matter of practice, the state of play is tolerated by the different institutions.

The Scope of the Competence for Investment

The inclusion of the reference to "foreign direct investment" in Article 207 has of course significant policy ramifications. These ramifications are being elaborated in the first EU agreements including investment protection and in the legislative work on investment. As regards competence, again a stand-off has developed between the Commission, Parliament and the Member States as regards competence for investment.

There can be little doubt that Member States hold to the view that there is some form of Member State competence for investment. This is set out, for instance, in the Council Conclusions on the Future EU Investment Policy where it is stated that the Council:

> 7. ACKNOWLEDG[ES] the importance of a comprehensive approach to shaping the future EU international investment policy that does not discriminate between different types of investors and their investments, SUPPORTS the definition of a broad scope for the new EU policy in this field as suggested by the Commission, to be further elaborated in full respect of the respective competences of the Union and its Member States as defined by the Treaties.[21]

However, when it has come to adopting text conjointly on the basis of a Commission proposal with the European Parliament, it has proven necessary to once again find language which leaves the issue open to be decided in the future. Hence the Regulation on the Transitional arrangements for Member States' existing bilateral investment treaties includes a recital and an article which are intended to make clear that the regulation does not have an affect on the division of competence between the Member States and the Union. The recital reads as follows:

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[20] The Decision of the Member States and the Statement of the Commission re Vanuatu is available at http://register.consilium.europa.eu/pdf/en/11/st08/st08715.en11.pdf. The similar document for Samoa is available at http://register.consilium.europa.eu/pdf/en/11/st16/st16786-re02.en11.pdf.

[21] Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.

> This Regulation does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaty.

Moreover, Article 1 of the Regulation makes clear that it does not have an impact on the scope of EU and Member State competence under the treaties. It states

> Without prejudice to the division of competences established by the Treaty, this Regulation addresses the status of the bilateral investment agreements of the Member States under the law of the Union, and establishes the terms, conditions and the procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.

In the most recent proposal on the matter of investment, the Commission sets out in some detail its views on the matter of competence. It states:

> The Commission takes the view that the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both foreign direct investment and portfolio investment. Article 207 of the Treaty on the Functioning of the European Union ("TFEU") provides the exclusive competence for foreign direct investment.
>
> The Union's competence for portfolio investment stems, in the Commission's view, from Article 63 TFEU. That article provides that the movement of capital between Member States of the Union and third countries is to be free of restrictions. Article 3(2) TFEU provides for the exclusive competence of the Union whenever rules included in an international agreement "may affect common rules or alter their scope". In the Commission's view, the Union must have exclusive competence also over matters of portfolio investment since the rules being envisaged, which would apply indistinctly to portfolio investment, may affect the common rules on capital movement set down in Article 63 of the Treaty.
>
> Furthermore, the Commission takes the view that the Union's competence covers all the standards provided for in investment protection texts, including expropriation. First, the European Court of Justice has consistently held that the Union's competence for the common commercial policy includes obligations applying post entry (i.e. after a good has been imported or a service supplier has established) even where Member States retain the possibility to adopt internal rules. Thus, it is well-established that the Union's competence in the field of trade in goods is not limited to border measures, such as tariffs or import quotas, but covers also post-importation matters, such as the granting of national treatment and most favoured nation treatment in respect of taxes and other internal laws and regulations, or the abolition of unnecessary obstacles to trade arising from technical regulations and standards.
>
> Likewise, it is generally agreed that the Union's competence with regard to 'trade in services' is not confined to issues of market access, but includes also matters such as national treatment and most-favoured nation treatment in respect of internal laws and regulations, as well as certain obligations with regard to the administration and the content of domestic regulation.
>
> Following this logic, the Union's competence for foreign direct investment and capital movements must also cover the standards applying post-establishment, including national and most-favoured nation treatment, fair and equitable treatment and protection against expropriation without compensation.
>
> It should further be noted that Article 345 TFEU provides only that the Treaties shall not affect the system of property ownership prevailing in the Member States. Treaties providing for investment protection do not affect the system of property ownership – rather they require that expropriation be subject to certain conditions, including, inter alia, the payment of compensation. Hence, the specific rule in Article 345 is not such as to imply that the Union does not have competence for the rules on expropriation included in agreements providing for investment protection. Finally, it is also established that the competence to establish and

> administer dispute settlement provisions runs together with the underlying competence for the subject matter of the rules.[22]

It is to be noted that while the Explanatory Memorandum to the proposal contains a very clear statement on the Commission's position as to the allocation of competence the text of the proposal regulation is itself silent. It does not make reference, for instance, to Article 2(1) TFEU which is the relevant provision should it be decided to empower the Member States to act in areas of exclusive EU competence (which is precisely what the proposal has as its effect).

All of this goes to the point that the Commission has not sought to settle the question of competence in its latest proposal. The pragmatic approach of not forcing a confrontation on the issue is continued.

Conclusion

The analysis in this section has shown that pragmatism has prevailed in discussions on the allocation of competence since the entry into force of the Treaty of Lisbon. As regards international agreements, it has been possible to provide for provisional application of essentially all areas of economic and commercial interest. In so doing, it has been possible to leave the issue of the division of competence to one side. As regards WTO accessions, the Member States have insisted on approving the accession on their own behalf, in addition to approving the accession in the Council on behalf of the EU. Again, this has not provoked practical problems. Finally, in the area of investment, a pragmatic approach has been applied, and has been proposed, which permits the establishment of an EU investment policy without a direct confrontation on the matter.

The Application of the New Regime for Delegated and Implementing Acts

Introduction

Another significant change flowing from the entry into the force of the Treaty of Lisbon has been the application of the new regime for delegated and implementing acts, governed by Articles 290 and 291 TFEU. Trade policy was, unlike all other policy areas, not subject to the specific rules of Council Decision 1999/468/EC of

[22] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party COM (2012) 335 final, 21 June 2012.

28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.[23] Recital 12 thereof stated:

> the specific committee procedures created for the implementation of the common commercial policy and the competition rules laid down by the Treaties that are not currently based upon Decision 87/373/EEC are not in any way affected by this Decision

In trade policy, a multitude of specific procedures were and remain in place for the adoption of implementing acts. Many regulations, particularly in the field of trade defence, contained specific procedures, which varied from one regulation to another. Some regulations used the 1999 Comitology Decision, while some others, such as the GSP regulation, used both the procedures of the 1999 Comitology Decision and specific sui generis procedures.

Common Commercial Policy in the New Comitology Regulation

On 9 March 2010 the Commission adopted a proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.[24] The main objective of this proposal is to provide that the control of the Commission's exercise of its implementing powers is conducted consistently with Article 291 TFEU through the repeal and replacement of the 1999 Comitology decision. The Commission's proposal will bring the exercise of control over the Commission's implementing acts in those areas where the procedures laid down in Council Decision 1999/48/EC apply in line with the requirements of Article 291 whereby it is the Member States and not the legislators that exercise such control.

The Commissioner for Trade, Karel De Gucht, in his confirmatory hearings before the Parliament in late 2009, had promised to bring trade policy under the new comitology regulation (later to be Regulation 182/2011).[25] In the Explanatory Memorandum to the proposal of 9 March 2010, the Commission stated that:

> Article[s] 10 and 11 [dealing with automatic alignment] do not apply to the specific procedures that are not subject to the Council Decision 1999/468/EC, in particular those created for the implementation of the common commercial policy. Consequently, those specific procedures will continue to apply until the basic acts will have been adapted in the light of the system of implementing powers created by Article 291 of the Treaty and the rules and general principles for the exercise of the Commission's implementing powers as set out in this proposal.

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[23] OJ L 184, 17.7.1999, p. 23 (hereinafter the 1999 comitology decision).

[24] Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers COM(2010) 83 final 9.3.2010.

[25] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ L 55 28.2.2011 p. 13 (hereinafter the "comitology regulation").

This made clear that the existing sui generis procedures would not be automatically affected by the new comitology regulation. However, in the legislative text, the intent of the Commission to apply the new comitology regulation to the common commercial policy was made explicit. In particular, the reference to the common commercial policy was removed from the successor of recital 12 (i.e. recital 15):

> (15) The Commission's powers, as laid down by the Treaty, concerning the implementation of the competition rules, are not affected by this Regulation,

Furthermore, Article 2, which sets out the principles for the application of the relevant procedures, provides that the examination procedure should, in principle, apply for the application of the common commercial policy. This made clear that the Commission's intention was full application of the comitology rules to the common commercial policy.

However, this proved particularly controversial with Member States. A significant number of them were concerned by the main practical effect of the Commission's proposal—changing the voting rule, in order to reject anti-dumping measures from requiring a simple majority of Member States to a qualified majority of Member States (the rule of qualified majority being the standard rule, applying to all other areas of EU decision-making procedures).

This led to a stalemate in the Council. That stalemate in turn threatened overall progress on the comitology regulation (seen as one of the key pieces of legislation needing to be put in place after the entry into force of the Treaty of Lisbon). Finally, it fell not to the institutional experts, responsible for the comitology regulation, but rather to the senior trade officials[26] to work out a compromise for the Council position. The compromise led to qualified majority voting being required to reject anti-dumping and countervailing duties, subject to a number of other conditions. First, multilateral safeguard measures could only be imposed if a qualified majority favoured the proposal for safeguard measures.[27] Second, qualified majority would apply to reject such measures after a transitional period of 18 months (i.e. September 2012).[28] Third, a special system (copied from the existing basic anti-dumping regulation) was put in place for provisional anti-dumping and anti-subsidy measures.[29] Fourth, a specific system was put in place for dealing with the situation where a simple majority of Member States voted against a definitive measure. This system was loosely inspired by the Ioannina Compromise of 1994 (which required that if a certain threshold of Member States just short of a qualified majority wished to object to a measure, it

[26] In fact the senior official for the Commission was David O'Sullivan, then Director General of the Directorate General for Trade, but who, in his previous role as Secretary General of the Commission had overseen earlier comitology reforms.

[27] This is, in all EU policy-making, the only exception to the qualified majority requirement to reject draft Commission implementing measures.

[28] The transitional period would only be valid to the extent that the Trade Omnibus I proposal was adopted and had entered into force before 1 September 2012.

[29] See Article 8(5) of the Comitology Regulation.

would be further reconsidered). This condition manifested itself in Article 5(5) of the Comitology Regulation:

> By way of derogation from paragraph 4, the following procedure shall apply for the adoption of draft definitive anti- dumping or countervailing measures, where no opinion is delivered by the committee and a simple majority of its component members opposes the draft implementing act.
>
> The Commission shall conduct consultations with the Member States. 14 days at the earliest and 1 month at the latest after the committee meeting, the Commission shall inform the committee members of the results of those consultations and submit a draft implementing act to the appeal committee. By way of derogation from Article 3(7), the appeal committee shall meet 14 days at the earliest and 1 month at the latest after the submission of the draft implementing act. The appeal committee shall deliver its opinion in accordance with Article 6. The time limits laid down in this paragraph shall be without prejudice to the need to respect the deadlines laid down in the relevant basic acts.

A final condition was the Commission making a declaration on future work on the trade defence instruments (the so-called Modernisation exercise). That declaration was attached to the Comitology regulation and reads as follows:

> The Commission notes that it has recently launched a study which will provide a complete and objective review of all aspects of the EU's trade defence policy and practice, including an evaluation of the performance, methods, utilisation and effectiveness of the present TDI scheme in achieving its trade policy objectives, an evaluation of the effectiveness of the existing and potential policy decisions of the European Union (e.g., the Union interest test, the lesser duty rule, the duty collection system) in comparison with the policy decisions made by certain trading partners and an examination of the basic anti-dumping and anti-subsidy regulations in light of the administrative practice of the EU institutions, the judgments of the Court of Justice of the European Union and the recommendations and rulings of the WTO Dispute Settlement Body.
>
> The Commission intends, in the light of the results of the study and of developments in the Doha Development Agenda negotiations to explore whether and how to further update and modernize the EU's trade defence instruments.
>
> The Commission also recalls the recent initiatives it has taken to improve the transparency of the operation of trade defence instruments (such as the appointment of a Hearing Officer) and its work with Member States to clarify key elements of trade defence practice. The Commission attaches substantial importance to this work, and will seek to identify, in consultation with the Member States, other initiatives which could be taken in this respect.[30]

The Parliament ultimately accepted these elements of the Council position, after some hesitation, and this passed into law, becoming effective on 1 March 2011. Having succeeded in adopting the Comitology Regulation, attention then had to turn to putting it into application.

The Korea Safeguard Regulation

At the same time as the debate on the comitology regulation was ongoing (i.e., in the second half of 2010) the Commission's proposal for the EU-Korea Safeguard

[30] Statement by the Commission, OJ L 55 28.2.2011 p. 19.

Regulation was going through the legislative process.[31] The most controversial issue during the legislative procedure for the Korea Safeguard Regulation was neither the substantive standards, nor the possibility, introduced by the Parliament, to permit the industry to lodge a complaint, but, rather the decision-making scheme.

In the Commission proposal for the Safeguard Regulation, the Commission proposed that the 1999 Comitology Decision would apply (which would be automatically converted to the new system, set out in Regulation 182/2011—see Article 13, thereof). Those Member States, which did not want the comitology regime to apply to trade defence measures at all, were consequently opposed to the Korea Safeguard Regulation being adopted, with the references to the 1999 Comitology Decision. This was the case even if they did not necessarily oppose the use of qualified majority to block draft Commission safeguard measures in the specific context. At the same time, those who favoured the use of the comitology regime did not accept that the regulation be adopted without a reference to the comitology regulation.

As noted, in November 2010 an arrangement on the comitology issue emerged, with the result that it was accepted that the new Comitology Regulation would apply to trade defence instruments. This arrangement became known at the same time as the discussions between Parliament and the Council on the Korea Safeguard Regulation was coming to a head. In fact, the final negotiations on the Korea Safeguard Regulation took place the day after Parliament voted in plenary to approve the new Comitology Regulation. This permitted the negotiators of Parliament and the Council to include references to the new Comitology Regulation in the Korea Safeguard Regulation. Consequently, this made it the first regulation in any EU policy, never mind the Common Commercial Policy, to have its decision-making procedures based on the new Comitology Regulation.

Trade Omnibus I and II

While the Korea Safeguard regulation pointed the way to the approach for new regulations, this left open the question of what should happen as regards pre-existing regulations. In order to make the new regime for implementing and delegated acts apply, it was necessary to take legislative action. This explains the Commission's Trade Omnibus I[32] and Trade Omnibus II[33] proposals.

[31] Regulation (EU) No 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea OJ L 145 31.5.2011 p. 19.

[32] Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures. COM(2011) 82 final 7.3.2011 ("Trade Omnibus I").

[33] Proposal for a Regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the granting of delegated powers for the adoption of certain measures. COM(2011) 349 final, 15.6.2011 ("Trade Omnibus II").

As previously noted, Article 13 of the Comitology Regulation provides for the automatic alignment of all procedures formerly based on the 1999 comitology decision onto the new Comitology Regulation. This meant that all of the procedures in trade legislation which were based on the 1999 comitology regulation have been automatically updated and converted into advisory or examination procedures under the new Comitology Regulation. However, the automatic alignment does not permit an analysis of whether the powers in question should remain as implementing acts, or should be converted into delegated acts. This was a matter of significant concern to the Parliament (which obviously has greater powers in delegated acts than in implementing acts). As a consequence, the Commission made a declaration attached to the comitology regulation specifically addressing this situation. That declaration amounts to a political commitment of the Commission to review and revise those acts:

> The Commission will proceed to an examination of all legislative acts in force which were not adapted to the regulatory procedure with scrutiny before the entry into force of the Lisbon Treaty, in order to assess if those instruments need to be adapted to the regime of delegated acts introduced by Article 290 of the Treaty on the Functioning of the European Union. The Commission will make the appropriate proposals as soon as possible and no later than at the dates mentioned in the indicative calendar annexed to this declaration.[34]

This commitment essentially concerns all areas which were not subject to co-decision before the entry into force of the Treaty of Lisbon, since it is only in those areas that there was no introduction of the regulatory procedure with scrutiny.[35] Included in the indicative calendar referred to in the declaration were 14 regulations forming part of the common commercial policy. 10 of these regulations were subsequently included in the Commission's Trade Omnibus II proposal since it was only in 10 of the 14 regulations that the Commission considered that delegated acts should be introduced.[36] It is mostly the textiles and steel regulations which are concerned.

At the same time, the automatic alignment provided for in Article 13 of the comitology regulation does not operate, however, for a significant number of basic acts in the field of the common commercial policy. These basic acts were not previously subject to the procedures laid down in Council Decision 1999/468/EC of 28 June 1999. They provide for either the control by the Council of the Commission's implementing acts or for the adoption of implementing acts by the Council. The Trade Omnibus I proposal consequently addresses twenty four basic acts in the field of the common commercial policy not previously subject to Council Decision 1999/468/EC. It aligns them on the comitology regulation. This regulation preceded Omnibus II, because it stems from the promise which Commissioner De Gucht made before Parliament at his confirmatory hearings in late 2009 rather than from the commitment made in the Declaration annexed to the Comitology Regulation (which dates from late 2010).

[34] Statement by the Commission, OJ L 55 28.2.2011 p. 19.

[35] The regulatory procedure with scrutiny is a procedure under the 1999 comitology decision which gives the Parliament the power to veto to draft implementing acts under certain circumstances.

[36] See pages 4–8 of the Explanatory Memorandum of the Trade Omnibus II proposal for an analysis of the 14 regulations.

As a consequence, the Commission had prepared the Omnibus I proposal first, while the debate on the horizontal Comitology Regulation was ongoing.[37]

The proposal covers 24 acts in total, including all trade defence instruments, the Regulation establishing the EU's Generalised System of Preferences, the Economic Partnership Agreement Market Access Regulation and the Trade Barriers Regulation. A number of adjustments related to the new comitology regime are also made, in particular, to take into account the specific procedures established in Article 5(5) of the comitology regulation.

At the time of writing both proposals were still in the legislative procedure. It remains possible that a political agreement on both proposals can be reached in 2012.

Conclusion

The above analysis demonstrates that the major political decisions on the introduction of the new regime for implementing and delegated acts into the common commercial policy were already adopted in 2010 in the horizontal comitology regulation and the EU-Korea Safeguard Regulation. There has since been significant work on putting this into practice by adapting the relevant legislation. The next major step will be the use of these procedures in specific cases.

Conclusion

This contribution has been intended to provide an overview from the author's perspective of the implementation of the main elements of change flowing from the entry into force of the Treaty of Lisbon in the field of the common commercial policy. It does not purport to be exhaustive. However, it is submitted that three tentative conclusions about the new framework for the common commercial policy can be stressed. The first is that the institutional balance which is in the course of being established is a finely balanced one, which takes account both of the legal framework established by the Treaty and of a broader sense of balance between the different institutions. Second, while the Treaty of Lisbon has the great virtue of bringing significant additional clarity to the division of competence between the Union and the Member States, it is not such as to remove all questions which may be posed. The result has been an assertion by the Commission of the competences of the Union and by the Member States of their own competences, which has, however, been managed in a pragmatic manner with no recourse as of yet, to the Court of Justice of the European Union. Finally, the introduction of the new regime for implementing and delegated acts to the field of the

[37] It can be noted that Trade Omnibus I was adopted by the Commission only 7 days after the publication and 19 days after the adoption of the comitology regulation. Indeed, it leaves blank the references to the comitology regulation.

common commercial policy is well under way. While work remains to be done towards the adoption of the Omnibus I and II proposals many of the major political decisions have been taken. It is quite possible that the introduction of the comitology regime to trade defence measures may well be one of the most significant changes to that regime since its inception.

Part V
Investment Policy as a Part of the CCP

The Autonomy of the European Legal Order

EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-Related Agreements

Steffen Hindelang

Introduction

Currently—as the European Union (EU) composes itself to negotiate investment chapters providing for investor-State arbitration in free trade agreements with Canada, Singapore, and India[1] and as it proposes a regulation establishing a framework for managing financial responsibility linked to investor-State dispute settlement[2]—we can witness an intensifying public and non-public debate on the vision, aims, actors

This contribution is an abridged and updated version of Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union "nach Lissabon"*, 2011, pp. 157–184. Lines of argument—summarized and shortened in the present version—are fully developed in the German one. For his research support the author wishes to thank Mr. Sebastian Schreiber, stud. iur., Freie Universität Berlin.

[1] There is no official EU document publicly available which reproduces the text of the negotiating directives for the EU-Canada, India, and Singapore trade and investment agreements granted to the Commission by the Council of the EU on 12.9.2011 (cf. Agenda of the General Affairs Council Meeting, 3109th meeting on 12.9.2011, List of "A" Items, Doc. No. 13954/11). The purported text of the negotiating directives has been made public by a NGO, cf. Seattle to Brussels Network, Text of the Mandates, available at http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html.

[2] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, Brussels, 21.6.2012, COM(2012) 335 final.

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M. Bungenberg and C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, European Yearbook of International Economic Law,
DOI 10.1007/978-3-642-34255-4_11,

and means of the emerging Common European Investment Policy.[3] Surprisingly, the conditions and limits stipulated by the Treaties upon which the European Union is founded, i.e. the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU),[4] have received only selective attention. In this respect, the issue of distribution of competences between the Member States and the Union in the area of foreign investment—including the possibility of providing for investor-State arbitration in future EU investment-related agreements[5]—has more widely been discussed.[6] However, when it comes to the establishment[7] of dispute resolution bodies in international agreements concluded by the EU[8] the *concept of the autonomy of EU*

[3] For a view of an EU Member State cf., e.g., Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Thilo Hoppe, Kerstin Andreae, Dr. Gerhard Schick, weiterer Abgeordneter und der Fraktion BÜNDNIS 90 / DIE GRÜNEN, Drucksache 17/7473, available at http://dipbt.bundestag.de/dip21/btd/17/074/1707473.pdf; for the position of a business association cf., e.g., Federation of Germany Industry, Bilateral investment treaties: German industry's position on the transfer of competencies to the European Union, position paper, No. D 0352, available at http://www.bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Positionspapier_BITs_EN.pdf; for an account of the EU investment policy by a civil society campaigning organization cf., e.g. Seattle to Brussels Network, EU Investment Policy, available at http://www.s2bnetwork.org/themes/eu-investment-policy.html.

[4] Collectively referred to in this paper also as "EU Treaties".

[5] In this respect, the case law of the European Court of Justice – cf. ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para 40 – provides a rather straight forward answer: The EU's competence for dispute settlement activities follows the competence for the substance of the matter. Thus, to the degree the Union can conclude international agreements on material standards of treatment of foreign investments to the same extent it vests the competence to subject itself to dispute resolution mechanisms. Cf. on the issue of EU competences in respect of the material standards usually contained in an investment agreement Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU-Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union "nach Lissabon"*, p. 157, pp. 159–164 with further references.

[6] Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU-Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union "nach Lissabon"*, p. 157, pp. 159–164; Hindelang/Maydell, The EU's Common Investment Policy – Connecting the Dots – Origins, Trends, and Perspectives, in: Bungenberg/Griebel/Hindelang (eds.), *International Investment Law and EU Law, Special Issue to the European Yearbook of International Economic Law*, 2011, p. 1; Bungenberg, Die Kompetenzverteilung zwischen EU und Mitgliedstaaten "nach Lissabon", in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, p. 81, (pp. 88 et seqq); de Luca, New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty: Investment Liberalization vs. Investment Protection?, in: Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010–2011*, p. 165; Reinisch, The Devision of Powers between the EU and its Member States "after Lisbon", in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, p. 99 (pp. 100 et seqq); Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 2009.

[7] For the purpose of this paper establishment shall include the possibility of empowering an already existing dispute resolution body.

[8] From a public international law perspective, it is beyond dispute that the European Union can be disputing party in an international dispute resolution procedure. This follows in particular from the Union's ability to conclude international agreements with other subjects of public international

law has proven to be the crucial touchstone. The role of this concept, mainly developed in a series of opinions of the Court of Justice of the European Union (CJEU),[9] in limiting the Union's "leeway" in subjecting itself to the current model of investor-State arbitration has so far not sufficiently been explored.

In the following, the broad strands and main aspects of the judicial concept of the autonomy of EU law—a concept still very much in flux, as the CJEU's recent Opinion 1/09 on a proposed European and Community Patent Court has just proved,[10] shall be outlined. Depending on the reading and predicted further evolution it can prove to be a significant hindrance to any attempt to incorporate today's model of investor-State arbitration in future EU investment-related agreements. If the CJEU further cultivates its scepticism towards international dispute resolution bodies, this could herald a major shift in the way investment disputes are settled in the future.

The Development of the Concept of the Autonomy of EU Law

The concept of the autonomy of EU law has initially been developed by the Court of Justice to describe the relationship of EU and national law of the Member States. EU law has been depicted as an *autonomous* source of law distinct from the legal orders of the Member States.[11] The concept has been used to justify the two fundamental characteristics of EU law, i.e. its primacy and direct effect.[12] However, over time, the concept of the autonomy of EU law turned into a comprehensive concept of self-assertion of the EU not just vis-à-vis its Member States[13] but it has also been used to limit effects on EU law flowing from public international law. The autonomy from both, national and international legal orders is guarded by the Court of Justice, cf. Art. 19 (1) sentence 2 TEU, which vests the mandatory, binding and final jurisdiction on the interpretation and application of EU law.

law, cf. Art. 47 TEU, Art. 216 TFEU; see also ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 40. In accordance with general public international law, the Union has on principle free choice of means in respect of settling its disputes. Cf. Tomuschat, Art. 281 EGV, in: von der Groeben/Schwarze (eds.), *EUV/EGV*, 2004, para. 18.

[9] ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 35; ECJ, Opinion 1/00, *European Common Aviation Area*, [2002] ECR, I-3493, para. 11-12; ECJ, C-459/03, *Mox Plant*, [2006] ECR, I-4635, para. 123.

[10] CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 77 et seqq.

[11] ECJ, Case 26/62, *van Gend en Loos*, [1963] ECR Special Edition, 3; ECJ, Case 106/77, *Simmenthal*, [1978] ECR, I-629.

[12] ECJ, Case 6/64, *Costa/ENEL*, [1964] ECR Special Edition, 614; note also von Danwitz, *Verwaltungsrechtliches System und europäische Integration*, 1996, p. 101.

[13] Von Danwitz, Verwaltungsrechtliches System und europäische Integration, 1996, p. 101.

In four opinions,[14] delivered on the basis of Art. 218 (11) TFEU, the Court set out its basic understanding of the concept of the autonomy of EU law and drew the Union's constitutional boundaries on the conferral of jurisdiction on courts and tribunals by the way of concluding international agreements. In particular, two kinds of treaty arrangements were deemed not to be reconcilable with the concept: dispute settlement bodies may not encroach on autonomous interpretation of the EU legal order and they may neither interfere with the allocation of competences between the Union and its Member States not with the separation of powers between the different institutions of the EU.

The Preservation of Autonomy of EU Law in Respect of Its Interpretation

One strand of the concept of the autonomy of EU law relates to situations in which the interpretation of an EU agreement by a court or tribunal, established on the basis of the said agreement, unfolds certain binding effects on the construction of EU primary or secondary law.[15] According to the CJEU, the conferral of such jurisdiction in an international agreement to which the EU is a party is not reconcilable with the concept of autonomy in particular and EU primary law in general.

From the perspective of EU law there is no problem with conferring jurisdiction on a court or tribunal established by an international agreement which interprets in a binding fashion the said international agreement.[16] What the Court perceives, however, as critical is the situation in which decisions of such courts or tribunals produce "spillover effects" affecting the construction of other parts of EU law.[17] Such effects encroach on the CJEU's jurisdictional monopoly on the conclusive interpretation of EU law.

[14] Those opinions of the Court related to the European Economic Area, to the European Common Aviation Area and - very recently - to the proposed European and Community Patent Court: ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079; ECJ, Opinion 1/92, *European Economic Area II*, [1992] ECR, I-282; ECJ, Opinion 1/00, *European Common Aviation Area*, [2002] ECR, I-3493; CJEU, Opinion 1/09, *Creation of a unified patent litigation system*, n.y.p., especially para. 77 et seqq. Note also ECJ, C-459/03, *Mox Plant*, [2006] ECR, I-4635; CJEU, Case C-196/09, *Paul Miles and Others v. Écoles européennes*, [2011] ECR, n.y.p.

[15] In this paper secondary law alludes to the law set autonomously – in contrast to such formed contractually with third countries or international organisations – by the EU.

[16] ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 39.

[17] I.e. autonomous – non-contractual – EU law.

"Spillover effects" emerge—according to the Court—if an EU agreement is drafted in a way that the following two conditions are fulfilled:

- The agreement aims to extend part of the *acquis communautaire* to non-EU countries by replicating rules and provisions in the agreement which are also found in EU law, and
- The agreement, furthermore, intends to secure the uniform application of its provisions throughout its territorial scope. This is effected by means of interpreting the provisions contained in the agreement in the light of the relevant rulings of the Court of Justice on the provisions in EU law replicated in the agreement and vice versa, i.e. the provisions of EU law in the light of the rulings of the court or tribunal established on the basis of the agreement. The court or tribunal established by the agreement is, however, not bound to follow *strictly* the rulings of the CJEU but can—to a certain extent—deviate. An interpretation of the said court or tribunal of the agreement's provisions deviating from the CJEU's readings of similarly-worded provisions in EU law can feed back to the interpretation of (the similarly-worded) provisions in EU law if the CJEU does not want to frustrate the aim of uniform application of the agreement by deviant interpretation of similarly-worded EU provisions.[18]

The Preservation of the Autonomy of EU Law in Respect of the Allocation of Competences to the Union and the Separation of Powers Between Its Institutions

The second situation where a conflict with the concept of the autonomy of EU law can arise deals with EU agreements which allow for rulings of courts and tribunals, established by the said agreement, which distort the allocation of competences between the Union and its Member States *or* interfere with the separation of powers between the different institutions of the Union.

Distortions of the allocation of competences *between the Union and its Member States* can appear in particular in case of so-called mixed agreements, i.e. agreements concluded between the EU and the Member States on one side and one or several third countries on the other. If a court or tribunal established on the basis of such an agreement pronounces, for example, on the question of the appropriate respondent on the side of the EU and the Member States, by choosing one of them it indirectly rules on the allocation of competences between Member States and the Union enshrined in the EU Treaties. The CJEU, however, perceives

[18] ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 41-46.

such a ruling as an interference with its monopoly to ultimately decide—also when it comes to the execution of an international agreement—on the allocation of competences between the Union and the Member States.[19]

In respect of possible interferences with the separation of *powers between the institutions of the EU* by establishing a court or tribunal by means of an international agreement, the CJEU's jurisdictional monopoly is (again) at the center of interest. Only if the agreement does *not* challenge the CJEU's monopoly of controlling the legality of the (other) EU institutions[20]—irrespective of whether they act upon empowerment contained in the agreement or in EU law—it is reconcilable with the concept of the autonomy of EU law.[21]

Furthermore, an international agreement may not change *the nature of the function of an EU institution*. While an international agreement can confer on the CJEU "jurisdiction to interpret the provisions of such an agreement for the purposes of its application *in non-member countries*",[22] however, such jurisdiction must, for example, be *compulsory* in order not to change the nature of the function of the CJEU.[23]

[19] Note also ECJ, Ruling 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, [1978] ECR, I-2151, para. 35: "It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene".; ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 31-36; ECJ, C-459/03, *Mox Plant*, [2006] ECR, I-4635, para. 135: "It is for the Court, should the need arise, to identify the elements of the dispute which relate to provisions of the international agreement in question which fall outside its jurisdiction".

[20] Embodied in particular in Art. 263 and 267 TFEU.

[21] For the avoidance of misunderstanding, international agreements are binding on the EU according to the general principle of "pacta sunt servanda". This is "reaffirmed" in Art. 216 (2) TFEU. With entry into force of an international agreement it forms part of the EU legal order, cf. ECJ, Case 181/73, *Haegeman*, [1974] ECR, I-449, para. 5. Secondary acts taken on the basis of the agreement including decisions of courts or tribunals are – provided that they conform to EU primary law (cf. arg. Art. 218 XI TFEU; ECJ, C-402/05 P and 415/05 P, *Kadi*, [2008] ECR, I-6351, 5. guiding principle on review of an administrative act) – binding on the institutions of the EU, cf. ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 39. This however, does not mean that they are – automatically – also directly applicable in the sense that they form a standard of review for lower-ranking secondary EU law or measures of the Member States, cf., e.g. ECJ, C-377/02, *van Parys*, [2005] ECR, I-1465.

[22] [Emphasis added] ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 59. An issue to be distinguished relates to the question of whether an agreement (to which non-Member States are party) can provide for preliminary reference to the CJEU by a court or tribunal established on the basis of the said agreement for *questions relating to the interpretation and application of EU law within the ambit of the EU*. This would probably be perceived as an inadmissible attempt to change the EU Treaties – providing only for preliminary reference to the CJEU by Member State courts, cf. Art. 267 TFEU – by concluding an international agreement.

[23] ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 54 et seqq.

Investor-State Arbitration and the Autonomy of EU Law

Turning to the current model of investor-State-arbitration one wonders whether future EU agreements referring to this model can stand close scrutiny in the light of the concept of the autonomy of EU law. A standard arbitration clause in an investment agreement confers the power upon a tribunal to rule over a dispute between the host State and the investor in a binding fashion. It can order reparation. An appeal against an arbitral award is often not permissible.[24] The enforcement takes place—with the exception of ICSID arbitral awards[25]—in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

At first sight one might be inclined to conclude that there is *no* apparent conflict with the concept of the autonomy of EU law:

- Investment tribunals have no legal mandate to rule on questions of EU law, their jurisdiction is usually limited to decide a given case on the basis of the given investment agreement and such rules of public international law which may be applicable.
- While there will probably be no replication of provisions of EU law in future EU investment-related agreements, certain material standards of treatment of foreign investment commonly contained in investment agreements—such as non-discrimination, protection of legitimate expectations, and others—can also be found in EU law.[26] Investment tribunals might strike a different balance between the protection of foreign investment and the common good than the CJEU in respect of regulatory measures interfering with the operation of a foreign investment. The CJEU, viewed from a strictly legal perspective, would not be obliged to adapt its interpretation of EU law to the view held by a court or tribunal in respect of the said agreement. The two perceptions, one could be tempted to conclude, would simply co-exist.

[24] Of course, as regards annulment and set aside proceedings, the nature of an ICSID-arbitral award is different from that of other arbitral awards rendered under the auspices of one of the commercial arbitration institutions. The annulment process in respect of the former arbitral awards is – at least on paper – narrower than the process in respect of awards rendered under the auspices of one of the commercial arbitration institutions. For a more detailed discussion see Dugan, et al., *Investor-State Arbitration*, 2008, p. 627; Burgstaller/Rosenberg, Challenging International Arbitral Awards: To ICSID or not to ICSID?, Arbitration International 27 (2011) 1, p. 91.

[25] They are binding and can be enforced in all Member States of the ICSID Convention as a final domestic judgement (Art. 53 and Art. 54 ICSID Convention).

[26] See on this Hindelang, Member State BITs - There's Still (Some) Life in the Old Dog Yet - Incompatibility of Existing Member State BITs with EU Law and Possible Remedies, in: Sauvant (ed.), *Yearbook on International Investment Law and Policy 2010-2011*, p. 221; Hindelang, Contracting out – Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? – The Case of Intra-EU Investment Arbitration, LIEI 39 (2012) 2, p. 179.

Hence, while certain legal concepts—such as the protection of legitimate expectations or the principle of non-discrimination—will be found in EU law and in future EU investment-related agreements, the latter will probably not contain any significant replication of similarly-worded provisions found in EU law. Furthermore, presumably one will not find *formal or explicit* legal mechanisms of the sort explained above which were to oblige the CJEU to adapt its interpretation of EU law to that of a court or tribunal established on the basis of an agreement.

Investor-State Arbitration and Autonomous Interpretation of EU Law

Although a *formal* reading of the concept of the autonomy of EU law could lead to the conclusion that the autonomous interpretation of EU law is not threatened by including in future EU investment-related agreements currently used models of investor-State arbitration clauses, this should not block the view on the *factual* effects on EU law which a possible differing legal appreciation of measures interfering with foreign investment by an investment tribunal and the CJEU might have.

Consider by way of example: an investment tribunal established on the basis of an EU investment-related agreement rules that the reclaim of State aid granted by a Member State[27] violated material standards contained in the aforesaid agreement and awarded damages in the amount of the State aid or even higher. The very same State aid, however, was declared contrary to EU law and—the CJEU striking a different balance between legality and legitimate expectations of an investor[28]—the Member State was asked to reclaim it from the investor.

If the EU were to comply with the award it would place the investor in the same position which existed before the reclaim of the State aid. And even more important: on a *factual* basis, the compliance with the award of the investment tribunal would amount to a selective non-application of EU State aid law with the consequence that

[27] Member States are not party to this agreement. The act of the Member State would be attributable to the EU. Cf. on the question of attribution Hoffmeister, Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organisations?, EJIL 21 (2010) 3, p. 723; Paasivirta/Kuijper, Does one Size fit all?: The European Community and the Responsibility of International Organisations, NYIL 36 (2005), p. 169.

[28] Cf., e.g. ECJ, C-24/95, *Alcan*, [1997] ECR, I-1591, especially guiding principle 2: "In that connection, although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, nevertheless, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the illegality of the decision to grant aid to such a degree that its revocation appears to be a breach of good faith".

competition on the EU Internal Market could severely be distorted.[29] In contrast to e.g. WTO dispute settlement body rulings, in such a situation there is no option to comply with a ruling and to perform the duties on the level of public international law but to keep the factual effects of this ruling outside the internal EU legal order.

Furthermore, while in a WTO context the number of potential claimants is rather limited, in investor-State arbitration the EU could face a multitude of claims in respect of a certain regulatory or administrative measure with potential damages awards of billions of Euros. The possibilities of finding a solution by resorting to the "diplomatic option", again in contrast to the WTO context, are also very limited.

From the aforesaid one can draw that—while there is no legal mechanism which binds the CJEU to the interpretation of a court or tribunal established by an international agreement on a factual level—the EU might have no choice other than to adapt the interpretation of EU law to the ruling of the aforesaid court or tribunal if it does not want to face several more investment arbitrations and a "patchwork rug" of factual disapplication of EU State aid law.

Viewed against the background of those significant potential spillover effects it cannot be ruled out that the CJEU might be inclined to broaden its concept of the autonomy of EU law in the sense that allowing for dispute resolution mechanisms in EU agreements which can lead to considerable *factual* effects on the EU legal order would also violate the concept.

Investor-State Arbitration and the Allocation of Competences Between the Union and the Member States and the Separation of Powers Between the Institutions of the Union

Incorporating investor-State arbitration clauses in future EU investment-related agreements could, under certain conditions, also lead to a distortion of the allocation of competences between the Union and the Member States and/or to an interference with the separation of powers between the Union's institutions.

When it comes to the powers of the EU institutions, first and foremost the CJEU's judicial monopoly in reviewing the legality of acts and measures of other EU institutions[30] should be considered.

If the Court were to adopt a very broad reading of its monopoly, it could, for example, (mis-)perceive a court's or tribunal's appreciation of an EU Commission competition law measure towards a foreign investor as a review of legality in the light

[29] Indeed, this could prompt attempts to make sure that State aid granted by Member States which for whatever reason cannot be paid out due to EU law restrictions, can be implemented via the back-door of investment arbitration.

[30] Such function is performed by the way of annulment and preliminary reference procedure. Cf. Frenz, *Handbuch Europarecht*, volume 5, 2010, para. 2725-2726, para. 3223 et seqq, especially para. 3228.

of EU law.[31] Despite the fact that the tribunal would appreciate questions of EU law merely as facts, the CJEU could nevertheless come to the conclusion that it is

> the Court's exclusive task of reviewing the legality of acts of the Community institutions, whether the latter are acting under the Treaty or under another international instrument, conferred on it by inter alia Articles 230 EC and 234 EC.[32]

Furthermore, if the EU were to conclude future investment-related agreements as so-called mixed agreements, a tribunal's pronouncement for example on the appropriate respondent among the EU and its Member States, could be viewed as a statement on the division of competences between the Member States and the Union. Whether in such a situation a declaration on the allocation of competences by the EU and its Member States—found e.g. in respect of the Energy Charter Treaty[33]—suffices has so far not conclusively been resolved.

If the CJEU were indeed to adopt such a broad reading of its judicial monopoly and the concept of the autonomy of EU law respectively, the jurisdiction of a court or tribunal established on the basis of an EU agreement would have to be restricted considerably. Attempting to overcome possible reservations on the side of the CJEU by providing in future EU agreements for mandatory preliminary reference to the Court of Justice on questions of EU law would not be feasible though. On the one hand, this would amount to a partial loss of impartiality of investor-State arbitration as a court of one disputing party would conclusively decide certain dispute-related questions. On the other—viewed from the perspective of EU law—it is doubtful whether such jurisdiction could be transferred upon the CJEU without altering the EU Treaties. The TFEU currently provides only for a preliminary reference of courts of the Member States on questions of the application and interpretation of EU law within the Member States.[34]

In order to accommodate the concerns of the CJEU and to avoid any spillover effects on the European legal order one could also think of simply excluding the

[31] The appreciation of an EU measure in the light of an EU agreement could be perceived as a review of legality covered by the CJEU's monopoly as an EU agreement – from the perspective of the CJEU – forms an integral part of the EU legal order. Also conceivable is that the CJEU would (mis-)interpret the appreciation of a tribunal in the context e.g. of the review of the fair and equitable treatment standard of whether an EU secondary law act is in compliance with EU primary law – for the tribunal a matter of fact, not law – as encroaching on its judicial monopoly.

[32] ECJ, Opinion 1/00, *European Common Aviation Area*, [2002] ECR, I-3493, para. 24.

[33] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26. (3) (b) (ii) of the Energy Charter Treaty, OJ L 336, 23.12.1994, p. 115.

[34] Cf. Art. 267 TFEU; the situation is different in respect of the interpretation of provisions of an agreement for the application in a third country: "Admittedly, there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application *in non-member countries*". [Emphasis added] Cf. ECJ, Opinion 1/91, *European Economic Area I*, [1991] ECR, I-6079, para. 59.

possibility of investor-State arbitration against the EU conducted in courts and tribunals with a locus arbitri outside the EU. However, since such demand would almost certainly prompt similar requests by the other State party to the investment-related agreement, this seems no workable solution either, at least as long as one perceives impartial adjudication of investment disputes as a benefit.

Concluding Remarks

While the EU Commission embarks on negotiations with third countries, mandated by the Council to provide for investor-State arbitration in the investment-related agreements to be concluded, warning signals sent by the Court of Justice—just recently again in its Opinion 1/09 on the proposed European and Community Patent Court[35]—should not too carelessly be discounted. While it is difficult to predict whether the Court would perceive a clause in a future EU agreement resembling the current model of investor-State arbitration as ultimately incompatible with the concept of the autonomy of EU law, the barriers to overcome are certainly not set low.[36] In any event, those barriers are capable of significantly altering the contemporary modus operandi used to settle disputes between foreign investors and their host States. It is not just that the CJEU appears to perceive itself by and large as the ultimate authority competent to interpret EU law and to oversee the legality of acts of EU institutions which evokes distant memories of "Calvo-inspired" concepts. Most recently in Opinion 1/09 the Court of Justice provided us with another taste of its attitude when it underlined the importance of the judicial dialogue, laid out in Art. 267 TFEU, between national courts of the Member States and the CJEU for the "protection of the Community character of the law created by the Treaties".[37] The fact that it would not tolerate the deactivation of this dialogue[38] and any circumvention of the mechanisms established for its protection—i.e. the possibility of initiating

[35] CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p.

[36] Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, in: Bungenberg/Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union "nach Lissabon"*, 2011, pp. 157–184; see also Burgstaller, Investor-State Arbitration in EU International Investment Agreements with Third States, LIEI 39 (2012) 2, p. 207.

[37] CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 83.

[38] It held that the Member States "cannot confer the jurisdiction to resolve ... disputes on a court created by an international agreement which would deprive ... [national] courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU". Cf. CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 80.

infringement proceedings as well as action for damages against the Member State of the non-referring court[39]—should make one think of whether we might see a revival of the "exhaustion of local remedies rule" and what this would mean to investor-State arbitration.

[39] Cf. CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 86-88; stated in such absolute terms, one could wonder whether the Court of Justice of the European Union wanted to exclude *any* possibility to confer jurisdiction on other courts or tribunals outside the world of Member State courts and itself which might come in touch with questions linking to EU law only very remotely.

However, such radical reading as well as the transferability of the reasoning one-on-one on investment tribunals established on the basis of future EU investment-related agreements is not compelling: while the proposed European and Community Patent Court was entitled and obliged by agreement to apply EU law in its exclusive sphere of jurisdiction, investment tribunals established on the basis of future EU investment-related agreements will – absent any explicit stipulation to the contrary – take EU law in into account as facts only.

The CJEU's statements should, furthermore, be viewed in conjunction with two other principles discussed by the Court in its Opinion which are (also) put in place to preserve the very nature or autonomy of EU law: i.e., first, that "a Member State is obliged to make good damages caused to individuals as a result of breaches of EU law by its judicial bodies" [CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 86] and, second, that the violation of EU law by a national court can result in infringement proceedings on the basis of Art. 258 et seqq. TFEU. In the case before the Court, however, both mechanisms were "deactivated". The proposed European and Community Patent Court was supposed to form a body of an international organisation, i.e. an entity formally distinct from the Member States and the EU. Infringements of EU law by the proposed European and Community Patent Court hence could neither result in a claim for damages nor in infringement proceedings against Member States as not the Member States or a court of the Member States but an international organisation would violate EU law. Such situation was perceived by the CJEU as impermissible; cf. CJEU, Opinion 1/09, *European and Community Patent Court*, [2011] ECR, n.y.p., para. 86-88.

Turning to the issue of investment tribunals – for the sake of the argument considered regardless of the fact that such tribunals will presumably not apply EU law as law and dependent of whether the Member States will be parties to future EU investment-related agreements – this paper suggests that the situation discussed in Opinion 1/09 is different from the one investment tribunals are placed in. Investment-related agreements will not establish an international organisation distinct from the parties to the investment-related agreement and investment tribunals are not organs of such an organisation. Hence, attribution of the conduct of an investment tribunal to the parties of the investment-related agreement remains on principle possible.

Designing an International Investor-to-State Arbitration System After Opinion 1/09

Nikolaos Lavranos

Introduction

Almost two years into the Lisbon Treaty, it has by now become general knowledge that the EU has obtained explicit exclusive external competence in the area of Foreign Direct Investment (FDI) (Article 207 (1) TFEU). This transfer of competence from the Member States to the EU has created a host of major problems and raised many complex legal, institutional, economic and political questions, which will keep many of us busy for a long time.

Suffice it to mention the still unresolved fate of existing extra-EU and intra-EU Bilateral Investment Treaties (BITs) of the Member States, the lack of definition of what FDI actually encompasses, and more generally, the lack of a clear delineation of the distribution of competences between the EU and its Member States with regard to FDI.[1] More fundamentally, it remains to be seen how the European Parliament (EP) is going to use its new co-legislative powers concerning FDI in order to introduce non-trade concerns into this policy field. This list could of course be extended much further, but this contribution will leave these issues aside. Instead, I will merely try to answer the simple but very relevant question of whether, and if so, to what extent an international investor-to-state arbitration system under the auspices of the ECJ is at all possible.

The views expressed in this contribution are of the author alone and cannot in any way be attributed to the Dutch Ministry of Economic Affairs, Agriculture and Innovation. The usual disclaimer applies.

[1] See generally: Lavranos, Member States' BITs: Lost in Transition?, Hague Yearbook of International Law (24), p. 281.

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Since the Treaties do not contain an outright—positive or negative—answer, one must turn to the jurisprudence of the ECJ. So far, the ECJ has not explicitly and directly addressed this question either. However, the ECJ has in the past issued several related Opinions and rendered many relevant judgments, which—taken together—should provide for a sufficient basis in order to answer the question to an extent that goes beyond mere speculation.

In the first place, the ECJ has made its views known as to the conditions and limitations of establishing and using international arbitration dispute settlement systems for resolving disputes between EU Member States.[2]

In the second place, and most recently in *Opinion 1/09*,[3] the ECJ has quite clearly explained the limits for establishing an international court system for resolving disputes between private parties.

Thus, whereas the ECJ has not yet directly addressed the for our purposes relevant configuration of investor-to-(Member)state dispute settlement system within the European legal order, the approaches taken so far by the ECJ concerning Member State-to-Member State dispute resolution and dispute resolution between private parties, provide clear indications of how the ECJ would determine the question of allowing an investor-to-state arbitration dispute settlement system within the European legal order.

In other words, by using the detour of relying in analogy on the existing ECJ jurisprudence, an attempt is made to extrapolate the position the ECJ is likely to take for the configuration of investor-to-state arbitration.

The starting point of the subsequent analysis will thus be *Opinion 1/09*, enriched by other relevant Opinions and judgments such as *Opinion 1/91*[4] and *MOX plant*.[5] The working hypothesis for this contribution is that the EU is competent to conclude—together with the Member States—comprehensive FTAs that include investment chapters as well as stand-alone EU BITs as mixed agreements.

Furthermore, it is assumed that such FTAs and EU BITs will contain fully-fledged international investor-to-state arbitration rules or systems that are comparable to what is currently the best practice of the Member States' BITs.[6]

The analysis will proceed by first shortly recalling the main reasons for including investor-to-state arbitration systems in practically all BITs. After having thus

[2] ECJ, Case C-459/03, *Commission v Ireland* [2006] ECR I-4635; see further Ramano, *Commission of the European Communities v. Ireland.* Case C-459/03. Judgment, American Journal of International Law 101 (2007) 1, p. 171 (Case note on MOX Plant).

[3] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p.

[4] ECJ, *Opinion 1/91, EEA Agreement*, [1991] ECR I-6079.

[5] ECJ, Case C-459/03, *Commission v Ireland,* [2006] ECR I-4635.

[6] See an interesting comparative analysis by the Swedish National Board of Trade entitled "Securing High Investment Protection for EU Investors", published in May 2011, available at: http://www.kommers.se/Documents/dokumentarkiv/publikationer/2011/rapporter/report-securing-high-investment- protection.pdf.

established the rationale and functioning of such systems in international (investment) law, the analysis will turn towards the situation within the EU, in particular as determined by the jurisprudence of the ECJ. Finally, some concluding remarks will wrap up this contribution.

Key Elements of Investor-to-State Arbitration Systems

Right from the early beginnings—starting with the 1959 BIT between Germany and Pakistan—every decent BIT contains rules or references to investor-to-state arbitration systems (as well as state-to-state dispute settlement, which will not be discussed in this contribution). This is a reflection of the logic that the substantive rules and rights contained in the BITs need to be backed up by effective and directly accessible dispute settlement rules. This need was further amplified by the fact that in most FDI-importing countries the level of good governance, independent judicial system, rule of law and the protection of fundamental rights, including in particular private property rights, was and still is below the standards that are usually found in the EU Member States or the US. In other words, investors needed—and still need—extra protection for their investments that can be effectuated independently from the national judicial system of the "host state". Accordingly, international arbitration systems have been developed that enable investors to directly bring a claim for compensation against the host state for alleged violations of the rights granted to investors by the respective BIT.

This elevation of the dispute has the double advantage of de-politicising the dispute by taking it out of the direct influence of the "host state". In addition, the dispute is kept out of the hands of potentially corrupt local judges, thereby significantly reducing the possibility of the host state to influence or even predetermine the outcome of the dispute.

Thus, the first important key element is the elevation of a dispute from the national "host state" setting to the international level.

The second key element is to opt for ad hoc international arbitration as opposed to permanent courts. The obvious reason for this is that it provides for much more flexibility and tailor-made solutions for investor-to-state disputes. Firstly, both the investor as well as the state can select "their" arbitrator, thereby giving both parties to a dispute the possibility of selecting the best arbitrator. Secondly, since the procedure is ad hoc, the rules of procedure are very flexible and can be modified according to the needs and wishes of the parties to the dispute. Consequently, parties are often free to choose the seat of the ad hoc arbitral tribunal. Also, the parties can determine the level of confidentiality as well as the possibility of amicus curiae involvement.

In practice, most BITs offer a full "menu" of various, slightly different, arbitration systems from which the investor can choose. Typically, the menu includes arbitration rules established by the International Centre for Settlement of Investment Disputes (ICSID),[7] UN Commission on International Trade Law (UNCITRAL)[8] and any other ad hoc international arbitration. Additionally, the arbitration rules of the International Chamber of Commerce (ICC)[9] and the Stockholm Chamber of Commerce (SCC)[10] are regularly included as well. This broad choice of arbitration systems enables the investor to make a number of carefully weighted decisions. For example, a non-exhaustive sample analysis[11] of investment disputes involving Dutch BITs suggests that going for ICSID means a higher award but the proceedings take longer, while going for UNCITRAL seems to suggest lower awards but quicker conclusion of the proceedings.[12] Moreover, ICSID awards allow for direct enforcement of the awards, whereas UNCITRAL provides for an annulment procedure before national courts on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).[13] In short, all these considerations, in particular in terms of costs and time, are important elements or milestones that enable the investor to select the arbitration system that serves his needs best.

A third key element of international arbitration systems is that the awards are typically based on the provisions of the BIT, rules and principles of international law and sometimes national law. In this way, the dispute is solved on the basis of commonly accepted rules, principles and concepts of international investment law. In addition, the extensive jurisprudence of international investment awards as well as the writings of learned investment experts, who often serve as arbitrators themselves, provide a solid foundation for resolving a dispute without depending on the provisions of national law alone, which are often manipulated by the host state in order to pretend that a certain measure, which has affected the investor was taken in accordance with the law and for general application. Avoiding these kind of interferences by the host state is another reassurance for the investor that a dispute will eventually be resolved on the basis of the rule of law and justice.

[7] The ICSID rules are available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home.

[8] The UNCITRAL rules are available at: http://www.uncitral.org/uncitral/en/uncitral_texts.html.

[9] The ICC rules are available at: http://www.iccwbo.org/court/arbitration/id4424/index.html.

[10] The SCC rules are available at: http://www.sccinstitute.com/?id=23718.

[11] On file with the author.

[12] However, a very extensive empirical analysis by Susan Franck has found no significant differences between ICSID and UNCITRAL proceedings, The ICSID Effect? Considering Potential Variations in Arbitration Awards, Virginia Journal of International Law 51 (2011) 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1842164.

[13] The text of the New York Convention is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

Finally, a fourth key element is that the current international arbitration systems allow—in principle—for a one-stop, final and binding award, which prevents the loosing host state from using endless appeal or review procedures as a means of avoiding paying an award. However, the UNCITRAL rules provide for an annulment procedure on certain specific grounds before a national court.[14] Besides, the

[14] Article 34 of the UNCITRAL Model Law 1985 (as amended in 2006) reads as follows:
Art. 34 Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

The text of the UNCITRAL Model Law is available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

ICSID rules provide for an annulment procedure on very limited grounds before an ICSID Annulment Tribunal.[15]

In sum, international investor-to-state arbitration rules provide for extremely important and useful enforcement tools that enable any investor that falls within the scope of a BIT to protect its investments effectively against measures that negatively have affected his investments. Often, already the threat of initiating an arbitration procedure can have a disciplining effect on the host state and can induce settling the dispute before the arbitration procedure actually commences.

All these key elements have over the years proven their value. Indeed, the fact that around 400 known investor-to-state arbitration proceedings so far have been initiated, is a powerful and convincing reminder of the importance of this essential building block of each and every decent BIT.[16]

The following question is thus whether, and if so, to what extent these key elements can be imported into the European legal order, now that the EU has started

[15] Article 52 of the ICSID rules reads as follows:
Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons.

None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

[16] See for the most recent statistics: Latest developments in investor-to-state dispute settlement, IIA issue note 1, March 2011, available at: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf.

to negotiate investment chapters that are to be included in the FTAs with India, Canada and Singapore.[17] Since more EU FTAs with investment chapters and even stand-alone EU BITs are envisaged in the future (China and Russia are explicitly mentioned by the EC),[18] the attitude of the ECJ towards international investor-to-state arbitration becomes ever more important.

The ECJ's Attitude Towards International Courts and Arbitral Tribunals

In order to understand the ECJ's attitude towards international courts generally, and towards international ad hoc investor-to-state arbitral tribunals more specifically, it is necessary to first understand the underlying fundamental relationship between international law and European law as determined by the long-standing jurisprudence of the ECJ.[19]

The Relationship Between International Law and European Law

Since a full analysis of the relationship between the international legal order and the European legal order would go beyond the scope of this contribution, I will confine myself to recalling some of the essential concepts, which the ECJ has developed over time.

The first fundamental conceptual element to consider is the fact that the ECJ decided right from the very beginning that the European legal order is a *sui generis*, new type of legal order, which is to be clearly distinguished from the "ordinary" international legal order.[20] One of the consequences of this *sui generis* nature of the European legal order is the possibility for the ECJ to create a special hierarchy of norms within the European legal order. In this hierarchy, primary EU Treaty law is the "supreme law of the land", which overrides any other source of law, including international law and the constitutional law of the EU Member States. As will be explained below in more detail, this hierarchical element is particularly important and relevant for answering the main question of this contribution.

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[17] See: EC Communication on the future European Investment policy, COM (2010) 343 final, 7 July 2010, available at: http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

[18] See: EC Communication on the future European Investment policy, COM (2010) 343 final, 7 July 2010, available at: http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

[19] See generally: Craig & De Búrca, *EU Law*, 2011 (5th ed.), pp. 338 et seqq. de Witte, Direct effect, Primacy and the nature of the Legal order, in: Craig & De Búrca, *The Evolution of EU law*, 2011 (2nd ed.), pp. 323 et seqq. Lavranos, *Decisions of International Organizations in the European and Domestic Legal orders of selected EU Member States*, 2004.

[20] ECJ, Case 26/62, *Van Gend & Loos,* [1963] ECR 95; ECJ, Case 6/64, *Costa v. ENEL,* [1964] ECR 1141.

The second fundamental conceptual element is the constitutional and functional tool of the preliminary ruling procedure. In view of the fact that European law is going to be interpreted and applied by thousands of national courts of the Member States, the ECJ had to give a special meaning to the preliminary ruling procedure in order to ensure the uniform and consistent interpretation and application of European law throughout the EU.[21]

First, the ECJ designated all national courts as being also, and indeed primarily, "European" courts, thus having the task—in cooperation with the ECJ and CFI—to ensure the *effet utile* of European law.[22]

Second, in order to make sure that the national courts take this task seriously, the ECJ imposed a general obligation on all national courts to request preliminary rulings every time they consider it necessary for rendering a judgment.[23] The ECJ further imposed on the highest courts of the Member States the obligation to always request a preliminary ruling from the ECJ.[24] However, as is well known some of the highest courts of the Member States remain reluctant to request a preliminary ruling from the ECJ, most notably the German Constitutional Court has so far never asked the ECJ for a clarification.

Third, the ECJ prohibits national courts from invalidating or setting aside European law measures in case they consider them to be invalid or inconsistent with higher norms. As this right falls exclusively into the competence of the ECJ, national courts may only temporarily set aside European law but must at the same time request a preliminary ruling from the ECJ for a definite decision.[25]

In this way, the ECJ not only fortified the primacy of European law in the legal order of the Member States but at the same time placed itself at the apex of the pyramid of all courts within the EU by reserving for itself the role of being the final, ultimate authoritative institution for the interpretation and application of all European law.

The third fundamental conceptual element is the extremely wide extent of control of the external relations activities of the Member States and the EU exercised by the ECJ. Put simply, while accepting that the Member States are still to some extent sovereign subjects of public international law and thus able to enter freely into an international agreement in order to regulate a certain subject, the ECJ has on several occasions severely restricted the freedom of the Member States by rejecting the content of international agreements as being incompatible with the Treaties or the very nature of the European legal order.[26]

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[21] See: Craig & De Búrca, *EU Law*, 2011 (5th ed.), pp. 442 et seqq.

[22] Craig & De Búrca, *EU Law*, 2011 (5th ed.), pp. 442 et seq., where they discuss the extensive ECJ jurisprudence on this point.

[23] Craig & De Búrca, *EU Law*, 2011 (5th ed.), pp. 442 et seqq.

[24] Craig & De Búrca, *EU Law*, 2011 (5th ed.), pp. 442 et seqq.

[25] See eg.: ECJ, Case 314/85, *Foto-Frost,* [1987] ECR 4199; ECJ, Case C-68/95, *T.Port*, [1996] ECR I-6065.

[26] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p.; ECJ, Opinion 1/91, *EEA Agreement*, [1991] ECR I-6079; ECJ, Opinion 2/94, *Accession by the EC to the ECHR,* [1996] ECR I-1759.

To sum up, it is of fundamental importance to remember that—according to the ECJ—the European legal order is a separate legal order that is to be clearly distinguished from "the ordinary" international legal order. As a consequence, the ECJ has promoted itself—with the tacit approval of the Member States—not only as the ultimate guardian of the Treaties but also as the ultimate gatekeeper which decides whether, and if so, to what extent and under which conditions and limitations, international law may enter the European legal order.

This task of ensuring that the law is observed (Art. 19(1) TEU (ex Art. 220 EC)) is equally imposed on all national courts of the Member States combined with the obligation to request a preliminary ruling from the ECJ whenever it is necessary.

This is the framework in which a possible investor-to-state arbitration dispute settlement system will have to be integrated.

The Attitude of the ECJ Towards International Courts and Tribunals

It is with these parameters in mind that the ECJ has in recent times developed its attitude towards international courts and tribunals. The evolution of this attitude can be best traced back by differentiating the various situations that were dealt with by the ECJ so far.[27]

The EFTA Court

The first case that involved the creation—by virtue of an international agreement between the EU Member States and the EFTA Member States—of an international court outside the matrix of ECJ-national courts was the EFTA court.

Establishing the EFTA and subsequently the EEA mirroring the rules of Community law required for the effective enforcement of the EFTA/EEA rules this court was created to resemble the ECJ.

However, the first attempt was rejected by the ECJ for exactly the reasons that are so pertinent to our discussion. While the ECJ acknowledged that the Member States are free to agree on an international agreement that includes the creation of an international court, the ECJ at the same time emphasized that there are certain limits to that due to the *sui generis* nature of the European legal order and the special position of the ECJ in preserving and protecting that *sui generis* nature.[28]

Whereas the ECJ went so far as to explicitly accept that it would even feel bound by decisions of a court established by an international agreement of the Member States,[29] it concluded that in so far as the EEA agreement conditions the future

[27] See generally: Lavranos, *Jurisdictional Competition*, 2009.

[28] ECJ, Opinion 1/91, *EEA Agreement*, [1991] ECR I-6079.

[29] ECJ, Opinion 1/91, *EEA Agreement*, [1991] ECR I-6079, paras. 39-40.

interpretation of the Community rules on the free movement of goods, persons, services, and capital and on competition, the machinery of courts provided for in the EEA agreement would be in conflict with Article 19 TEU (ex Article 220 EC) and, more generally, with the *very foundations of the Community*.

In other words, the EFTA court could not be put in a position to interpret and apply Community rules *in fine*. This remains the exclusive task of the ECJ. As a consequence, Member States had to modify the EEA by decoupling the EFTA court clearly from the ECJ. In short, the EFTA court's task remains limited to the interpretation of the EEA rules following closely the ECJ jurisprudence.[30]

As a result, the EFTA and ECJ system remained strictly separated parallel systems that would not affect in any way the *sui generis* nature of the EU nor the exclusive and ultimate jurisdiction of the ECJ.

The European Court of Human Rights (ECrtHR)

Another example in which the relationship between the ECJ and another international court has been of particular importance is the European Court of Human Rights (ECrtHR). To cut a long story short, the ECJ rejected the proposal of an accession of the EC to the European Convention of Human Rights (ECHR) because of a lack of a sufficient legal basis in the Treaties at that time.[31] This, of course, is not a very convincing argument in view of the fact that the ECJ had been applying and interpreting the ECHR for decades, culminating in the claim that European law and Member States' law could not be considered to be valid, if they would be in contradiction with the ECHR.[32]

Similarly, the ECrtHR has been taking relevant ECJ jurisprudence into account considering the fact that all EU Member States are also Contracting Parties to the ECHR. Indeed, with its *Matthews* judgment[33] it seemed that the ECrtHR would even directly review the compatibility of EU law measures with the ECHR, thereby placing itself above the ECJ. However, with its *Bosphorus* judgment,[34] the ECrtHR neatly kept out of the turf of the ECJ by applying the *Solange*-method.[35] This *Solange*-method, which has been copied from the German Constitutional Court's

[30] The revised EEA treaty was accepted by the ECJ in Opinion 2/91, *EEA Agreement II,* [1992] ECR I-2821.

[31] ECJ, Opinion 2/94, *Accession of the EC to the ECHR,* [1996] ECR I-1759, paras. 35-36.

[32] See eg: Joined cases ECJ, C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351, para. 284, with reference to its longstanding jurisprudence.

[33] ECrtHR, *Matthews v. UK*, application no. 24833/94, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=matthews&sessionid=80834874&skin=hudoc-en.

[34] ECrtHR, *Bosphorus v. Ireland*, application no. 45036/98, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=bosphorus&sessionid=80835005&skin=hudoc-en.

[35] The word "solange" means in German "as long as".

jurisprudence on the *Maastricht Treaty*,[36] implies that as long as the ECJ stays within the limits of the ECHR, which is to be generally presumed, the ECrtHR would not exercise its jurisdiction vis-à-vis EU law measures or measures of the Member States implementing EU law obligations.[37] Thus, both the EU law and ECHR law systems remained at least formally speaking strictly separated, thereby preserving separate supreme courts to adjudicate *in fine* for their respective systems.

But with the entry into force of the Lisbon Treaty the fear of the ECJ of being submitted to the ECrtHR has heightened again, since the possibility of accession of the EU to the ECHR is explicitly provided for in Article 6 (2) TEU, while at the same time Protocol 8 to the Lisbon Treaty expressly states that the accession of the EU to the ECHR has to preserve the specific characteristics of the European legal order. Currently, the details of EU accession are being worked out.[38]

Whatever the final result will be, it is clear that the *sui generis* nature of the European legal order and the role of the ECJ as the ultimate adjudicator of EU law acts must be preserved in order to be acceptable to the ECJ. So, again the ECJ succeeded in keeping another international court out from its backyard, although with considerably more effort compared to the EFTA court. After all, even for the ECJ it is difficult to argue against strengthening the uniform enforcement of fundamental rights as contained in the ECHR. The main strategy of the ECJ in this case has been to opt for dialogue and cooperation with the ECrtHR, thereby showing that a possible submission of the ECJ to the ECrtHR is unnecessary and superfluous (i.e. the application of the *Solange*-method).[39]

The WTO Appellate Body

In contrast to the ECrtHR, the ECJ had right from the beginning much less difficulties in keeping the WTO Appellate Body at distance from its final authority and monopoly of interpreting, applying, and if, necessary invalidating European law measures.

Based on its consistent and up until today continued rejection of any direct effect of GATT or WTO law in the European legal order, the ECJ had little difficulty in extending this rejection towards final and binding WTO Appellate Body reports.

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[36] German Constitutional Court judgment on the *Maastricht Treaty, BVerfGE 89, 155*, available at: http://www.servat.unibe.ch/dfr/bv089155.html.

[37] See Lavranos, Das Solange-Prinizip im Verhältnis von EGMR und EuGH, Europarecht 41 (2006) 1, p. 79.

[38] See further: Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the EU to the ECHR, CDDH(2011)009, 14 October 2011, available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/CDDH_2011_009_en.pdf. See further: Jacqué, The Accession of the EU to the ECHR, Common Market Law Review 48 (2011) 4, p. 995; Lock, Walking on a tightrope: The draft ECHR Accession Agreement and the autonomy of the EU legal order, Common Market Law Review 48 (2011) 4, p. 1025.

[39] Lavranos, Das Solange-Prinizip im Verhältnis von EGMR und EuGH, Europarecht 41 (2006) 1, p. 79.

Even though the EU is a member of the WTO and thus legally bound to fully implement adopted Appellate Body reports, the ECJ has repeatedly refused to invalidate EU law measures that were judged by the Appellate Body as being inconsistent with WTO law.[40] It is in particular with regard to the WTO Appellate Body that the ECJ has shown its gatekeeper function by deciding as it considers fit to keep the gate closed or open it a little bit when WTO law waits at the gate to enter into the European legal order.[41] However, in more recent times, one can identify a silent modification of the ECJ's position by implementing WTO Appellate Body decisions without explicitly saying so. This has been termed "muted dialogue".[42]

However, despite this silent readiness of the ECJ to invalidate EU law measures that were judged by the WTO Appellate Body as being inconsistent with WTO law, it is equally clear that the ECJ continues to consider itself to be the ultimate gatekeeper. Again, the ECJ manages to preserve the *sui generis* nature of EU law and its untouchable position, even if being repeatedly invited by national courts and Advocate Generals to change its position. In other words, no one else tells the ECJ when a European law measure is to be invalidated. That is and remains the exclusive task of the ECJ alone.

State-to-State International Arbitration

In more recent times, the ECJ had to deal explicitly with the use of state-to-state international arbitration between Member States for resolving a dispute, which was also related to EU law issues.

The now famous *MOX plant*[43] case revolved around a dispute between Ireland and the UK concerning the level of radioactive emissions of the Sellafield plant. The dispute involved principally two international environmental agreements, namely, the UN Law of the Sea Convention (UNCLOS) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR). However, due to the fact that the dispute was between two EU Member States and the fact that EU environmental legislation was potentially involved too, the European legal order and thus the ECJ came into play as well.[44]

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[40] See for a detailed analysis: Lavranos, Die Rechtswirkung von WTO panel reports im Europäischen Gemeinschaftsrecht sowie im deutschen Verfassungsrecht, Europarecht 34 (1999) 3, p. 289; Lavranos, Die EG darf WTO-Recht weiterhin ignorieren, Europäisches Wirtschafts-und Steuerrecht 15 (2004) 7, p. 293.

[41] See in particular: Snyder, The gatekeepers: The European courts and WTO law, Common Market Law Review 40 (2003) 2, p. 313.

[42] See: Bronckers, From 'Direct effect' to 'muted dialogue': Recent developments in the ECJ's case law on the WTO and beyond, Journal of International Economic Law 11 (2008) 4, p. 885.

[43] ECJ, Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635.

[44] See extensively: Lavranos, The epilogue in the MOX plant dispute: An end without findings, European Energy and Environmental Law Review 18 (2009) 3, p. 180; Lavranos, The MOX plant-judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?, European Environmental Law Review 15 (2006) 10, p. 291.

Whereas the international ad hoc arbitral tribunals set up under the UNCLOS and OSPAR treaties had commenced their work, the European Commission initiated infringement proceedings against Ireland on the basis of the UNCLOS dispute being brought before an international arbitral tribunal despite the fact that Art. 344 TFEU (ex Article 292 EC) requires Member States to bring any dispute between them, which may involve EU law, exclusively before the ECJ.[45]

The ECJ seized this opportunity to make very clear that Member States are prevented from letting a dispute that potentially involves EU law aspects be resolved by an international arbitral tribunal. Instead, Member States are obliged to bring the case before the ECJ. Only after the ECJ has determined that no EU law issues—and thus no infringement of the exclusive jurisdiction of the ECJ—are indeed involved, could they proceed before an international arbitral tribunal.[46]

In this way, the ECJ significantly curbed the freedom of the Member States to use dispute settlement systems of their choice, even though the Member States are allowed to use them by virtue of the fact that they have signed and ratified the respective international instruments.

Hence, the mere fact that an ad hoc international arbitral tribunal may potentially interpret and apply EU law provisions or international treaty obligations, which have become integral part of the European legal order, is sufficient to trigger the fundamental argument of the *sui generis* nature of EU law and the exclusive jurisdiction of the ECJ. As a consequence, EU Member States are prevented from using international arbitration, unless checked and approved before by the ECJ.

In sum, the *MOX plant* judgment is illustrative of the ECJ's reluctance towards international arbitral tribunals. Or to put it more bluntly: the ECJ made clear that Member States cannot circumvent the ECJ by using international arbitral tribunals.

Interim Conclusions

The preceding review of the ECJ's attitude towards the potential involvement of international courts and tribunals with EU law or EU law related aspects reveals that the ECJ is predominantly concerned with protecting the *sui generis* nature of the European legal order and its exclusive jurisdiction against any potential interference by international courts and tribunals.

From the point of view of the ECJ, this is a very understandable attitude. However, it sits very uneasily with the increasingly intensifying proliferation of international courts and tribunals in international law generally.[47] This attitude also ignores the increasing interaction between international law and European law.

[45] It still remains unclear why the EC did not include the OSPAR proceedings in its infringement claim against Ireland.

[46] ECJ, Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, paras. 123 et seq.

[47] See in particular: Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, NYU Journal of International Law 31 (1999) 4, p. 709.

Indeed, considering the fact that EU law continues to expand, including into the area of FDI, even more rather than less interaction between international law and European law can be expected.

The question thus arises: how realistic and useful is it to protect the European legal order from the international legal order in the way the ECJ has been doing?[48] Wouldn't it be more appropriate if the ECJ would change its attitude by opening up towards other international courts and tribunals? A true dialogue and more trust in these international courts and tribunals by the ECJ would make it easier for the ECJ to stop emphasizing the *sui generis* nature of the European legal order and enable it to bring the European legal order down to the same level of the other branches of international law.

Opinion 1/09

Opinion 1/09 provided the ECJ with an excellent opportunity to revisit the above described attitude towards international courts and tribunals. Unfortunately, as will be discussed in more detail below, the ECJ failed to use this opportunity to give international courts and tribunals a more appropriate place within the European legal order.

In the concrete case, the aim of the Member States was to finally establish a European-wide patent court system that would bring together the existing European Patent Convention and European Patent Office system—to which the EU as a non-state could not accede—and the parallel system for patents established by various EU law measures.

Bearing in mind the importance of the preliminary ruling system and the wish of the ECJ to control the uniformity and consistency of EU law, the Member States were careful to include in the international patent agreement that the to-be-established Patent Court (PC) would have been explicitly bound to follow the ECJ jurisprudence and would even be able to request preliminary rulings from the ECJ, if it considered it necessary for rendering a decision.

Put in simplified terms: the PC was transformed for the purposes of EU law aspects from an international court into a "national" court within the meaning of Art. 267 TFEU (ex Art. 234 EC). In this way, many—though not all Member States—argued that the *sui generis* nature of the European legal order and the exclusive jurisdiction of the ECJ would be fully respected.

The ECJ started off its analysis by acknowledging that existing Treaty provisions such as Arts. 262 and 344 TFEU do not prevent the Member States from creating a new court structure for settling disputes between private parties relating to patents.[49]

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[48] See further: Lavranos, Protecting European Law from International Law, European Foreign Affairs Review 15 (2010) 1, p. 265.

[49] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., paras. 61-63.

However, this is immediately followed by a reminder of the ECJ that this new court structure must be assessed as to whether it is compatible with the "fundamental elements of the legal order and judicial system of the EU".[50] Moreover, the ECJ adds further weight to this point by reiterating the *sui generis* character of the European legal order.[51]

The ECJ then moved on by emphasizing that the ECJ and national courts of the Member States are the guardians of the European legal order,[52] and—by reference to *Opinion 1/91*—that it is for the ECJ "to ensure respect for the autonomy of the European legal order".[53] But as if that is not enough, the ECJ continues to remind the Member States of their obligation to ensure that EU law is fully and properly applied and that it is for the ECJ and the national courts of the Member States to ensure the full application of EU law and the judicial protection of individual's rights under that law.[54] Moreover, the ECJ reminds the Member States that the judicial system of the EU is "a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions".[55]

After having set out the framework conditions which the PC must meet, the ECJ emphasized that the PC is "outside the institutional and judicial framework of the EU" and that it is not part of the judicial system provided for in Art. 19 (1) TEU".[56] Also, the ECJ remarked that the PC has a "distinct legal personality under international law".[57]

The ECJ went on to note that the PC is to be vested with exclusive jurisdiction for a significant number of actions relating to patents, which as consequence means than the national courts of the Member States would lose their jurisdiction for these actions and only retain jurisdiction for the proceedings that do not fall within the jurisdiction of the PC.[58]

At the same time, the ECJ acknowledged that the PC in performing its task has the duty to interpret and apply EU law and to ensure that EU law is fully and properly applied.[59] Besides, the ECJ recalled that, in line with *Opinion 1/91*, an international agreement setting up an international court may be established by the Member States.[60] While such a newly-established court may be conferred upon new powers, Member States are allowed to do so only as far as "it does not change the essential character of the ECJ as conceived in the EU and FEU Treaties".[61]

[50] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 64.
[51] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 65.
[52] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 66.
[53] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 67.
[54] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., paras. 68-69.
[55] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 70.
[56] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 71.
[57] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 71.
[58] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 72.
[59] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 73.
[60] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 74.
[61] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 75.

Moreover, whereas the ECJ accepts that such an agreement may affect its own powers, but only to the extent that the "indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European legal order".[62]

The ECJ in particular focussed on the following issues:

> 79. As regards the draft agreement submitted for the Court's consideration, it must be observed that the PC:
> – takes the place of national courts and tribunals, in the field of its exclusive jurisdiction described in Article 15 of that draft agreement,
> – deprives, therefore, those courts and tribunals of the power to request preliminary rulings from the Court in that field,
> – becomes, in the field of its exclusive jurisdiction, the sole court able to communicate with the Court by means of a reference for a preliminary ruling concerning the interpretation and application of European Union law and
> – has the duty, within that jurisdiction, in accordance with Article 14a of that draft agreement, to interpret and apply European Union law.

First, the ECJ prohibits Member States from conferring on an international court such as the PC the jurisdiction to resolve disputes that normally the national courts of the Member States would resolve, including the possibility of requesting preliminary rulings from the ECJ.[63]

Second, the ECJ recalls again the essential function of the preliminary ruling system for the "preservation of the Community character of the law established by the Treaties, [which] aims to ensure that in all circumstances, that law has the same effect in all Member States".[64] Thus, it is the task of the national courts to ensure the full effect of all EU law, which *inter alia* can be ensured by requesting preliminary rulings from the ECJ as a guidance. As a consequence, the ECJ concluded:

> 85. It follows from the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are *indispensable* to the preservation of the *very nature of the law established by the Treaties*.[65] [emphasis added]

Finally, the ECJ points out to the fact that the PC is "outside" the EU judicial system and therefore any misinterpretation or misapplication of EU law cannot be corrected by the ECJ.[66]

Thus, for all these reasons it is unsurprising that the ECJ concluded that the envisaged international patent court system is incompatible with the EU Treaties. Indeed, considering the general attitude of the ECJ towards international courts and tribunals as described above, the rejection of the proposed PC-system was to be expected. Indeed, in its reasoning the ECJ brought together all the specific Community law characteristics into play in order to significantly limit the possibility of

[62] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 76.

[63] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., paras. 80-81.

[64] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 83.

[65] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., para. 85.

[66] ECJ, Opinion 1/09, *Patent Court*, [2011] ECR, n.y.p., paras. 87-89.

Member States establishing an international court (or for that matter arbitration) system that—even only remotely or potentially—may be out of the full control of the ECJ. In other words, the ECJ wishes to communicate exclusively with properly established national courts of the Member States when it comes to the interpretation and application of EU law or international law that is integral part of the European legal order.[67]

In short, *Opinion* 1/09, while not dealing with the position of investor-to-state arbitral tribunals, illustrates the narrow margins, which the ECJ leaves for allowing "foreign" international courts and tribunals to operate within the European legal order.

International Investor-to-State Arbitration System Within the European Legal Order

Having thus identified several parameters of the ECJ's relevant jurisprudence, it is now possible to test these parameters with the requirements for an effective and efficient investor-to-state arbitration system within the European legal order, which is at least as good as the currently existing ones in the Member States' BITs.

Arbitration Independent from Host State

The first key element identified above was the requirement to elevate a dispute from the domestic judicial system, which is prone to be influenced by the host state, to the international level.

Assuming for example that the FTA between the EU and Canada is signed and ratified with an investment chapter, a Canadian investor brings a dispute against the EU/Member States alleging a violation of the FTA investment chapter. The question then arises before which court or tribunal should the case be brought? Elevating the dispute from the EU and Member State level necessarily excludes EU and Member States' courts. Consequently, one must turn to international courts and arbitral tribunals.

ICSID of course comes to mind first. However, ICSID is currently not open to the EU. The European Commission has repeatedly claimed that accession of the EU to ICSID is a high priority. This would require a modification of the ICSID convention, arguably with the consent of all 144 ICSID members. That would seem to require considerable time before accession of the EU to ICSID would

[67] See generally: Baratta, National Courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ, Legal Issues of Economic Integration 38 (2011) 4, p. 297; Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitiek: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU-Abkommen, in: Bungenberg / Herrmann (eds.), *Die gemeinsame Handelspolitiek der EU nach Lissabon*, 2010, pp. 157–184.

become a reality. Although, it seems that the EC and the ICSID secretariat are looking for simplified ways of amending the ICSID convention, such as a Protocol or a Memorandum of Understanding (MoU).

The second option that comes to mind is the use of UNCITRAL rules by an international ad hoc arbitral tribunal, which would be seated outside the EU/Member States. Since the alleged infringement of the FTA would presumably have been caused by a measure taken by the EU and/or domestic organs of the Member States, it would very likely involve the interpretation or application of EU law in one way or another.

However, this situation would—based on the ECJ's jurisprudence discussed above—be unacceptable to the ECJ, unless a mechanism is found that would ensure that the ECJ could fully control the decisions of such UNCITRAL arbitral tribunals.

One solution would be to give up the requirement of de-nationalising a dispute, for instance by assigning a special court in the Member or within the ECJ that would act as an investor-to-state arbitration court. Another solution would be to change the EU Treaties and the Statutes of the ECJ so as to explicitly allow international courts and arbitral tribunals to request a preliminary ruling from the ECJ. Of course, from the perspective of a Canadian investor, having the ECJ or a special court in a Member State adjudicating his claim against the EU/Member States, would neither look very neutral nor attractive to him.

So, all these options seem not very realistic in the short term.

The Flexibility of Arbitral Tribunals

The second element identified above relates to the flexibility of the rules of procedure, the possibility of selection of "own" arbitrators, the possibility of agreeing on confidentiality etc. The ECJ has clearly stated that *national* arbitral tribunals do not satisfy the conditions of a "domestic court" within the meaning of Article 267 TFEU (ex Article 234 EC) and therefore are not able to request a preliminary ruling.[68] While an investment arbitral tribunal could be established by law, either by an EU Regulation or national law and on a permanent basis, the other

[68] In case C-125/04 *Denuit&Cordenier v. Transorient* [2005] ECR I-923 the ECJ argued that: "12. In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and the case-law there cited, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34). 13. Under the Court's case-law, an arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 '*Nordsee*' *Deutsche Hochseefischerei* [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 34)".

elements such as compulsory jurisdiction, application of rules of law and independence may be difficult to resolve. However, another specific issue that is important in arbitration is the freedom to select one's own arbitrator. Presumably, the ECJ would not accept a totally free choice of arbitrators as is currently the case under ICSID, UNCITRAL etc. Perhaps a pre-selected list of arbitrators which meet minimum quality requirements in terms of independence and expertise in investment law would be acceptable to the ECJ. Nonetheless, considering the ECJ's jurisprudence, a change of Article 267 TFEU and the Statutes of the ECJ may be necessary in order to overcome any remaining resistance by the ECJ.

Indeed, even the EC and more strongly the EP have voiced their criticism against the current system of selecting arbitrators and their presumed conflicts of interests. Accordingly, there is a preference for copying NAFTA or WTO dispute settlement elements, such as pre-fixed rosters of arbitrators or an appeal mechanism. Such modifications would significantly change the current "free" and flexible system, thereby removing one of the key elements of investor-to-state arbitration systems as contained in Member States' BITs.

The External Relations Control of the ECJ

The third important element identified above is the very wide, almost unlimited control, of the external relations activities of the Member States. As explained above, the external relations of the Member States also encompass the (quasi) judicial enforcement mechanisms of international agreements, which the Member States and the EU have subscribed to. As a consequence, international courts and tribunals are increasingly—at least—potentially placed in a position to interpret and apply EU law rules or international law provisions that have become integral part of the European legal order. This is particularly the case when a dispute involves the EU and/or the Member States or European private parties.

For example, regarding WTO dispute settlement reports that have found EU measures to be inconsistent with WTO law, the ECJ has had great difficulties in effectuating and implementing these reports by invalidating the inconsistent measure. And even in cases in which the ECJ did so, it failed to explicitly refer as a reason to the respective Appellate Body report. This approach has been termed, already as mentioned, "muted dialogue",[69] but in fact this is nothing else than refusing to allow the Appellate Body to have a final say over EU law measures. Regarding the UNCLOS arbitral tribunal in the *MOX plant* case, the ECJ did not even care to get into the substantive issues, whereas it seized jurisdiction in this case thereby effectively preventing the UNCLOS arbitral tribunal from going into the merits.[70]

[69] Bronckers, From 'Direct effect' to 'muted dialogue': Recent developments in the ECJ's case law on the WTO and beyond, Journal of International Economic Law 11 (2008) 4, p. 885.

[70] See for a detailed analysis: Lavranos, The epilogue in the MOX plant case: An end without findings, European Energy and Environmental Law Review 18 (2009) 3, p. 180.

Similarly, as the resistance of the ECJ regarding the EFTA court and Patent Court has shown, the ECJ has been extremely cautious in allowing Member States to create international courts and tribunals to enforce certain international obligations, which somehow—even only potentially-may involve EU law issues.

Concluding Remarks

The preceding analysis has illustrated that only very limited room is left by the ECJ to the Member States and the European institutions for establishing a properly functioning independent investor-to-state arbitration system *within* the European legal order, which, however, is exactly what is needed for the future European investment policy.

It seems that on the basis of *Opinion 1/09*, an investor-to-state arbitration system is only possible in a significantly modified, "communitarized" form, which means that it has to be fully integrated into the preliminary ruling system. This also means that a permanent, prefixed list of appointed arbitrators is a requirement. Consequently, such a system would be hardly comparable with the current Member States' BIT systems. Thus, an investor-to-state arbitration system is only possible under the auspices of the ECJ with the precondition that the ECJ retains ultimate, full control over the interpretation and application of EU law. This conclusion is, of course, not surprising from the point of view of EU law. However, it is clearly a disappointing conclusion from the point of view of international investment law. Therefore, the international investment law community must get used to the fact that for the most important region for inward and outward FDI of the world, investment protection and the enforcement of awards will be substantially different compared to the current situation under the Member States' BITs.

Essentially, one can envisage several different scenarios. First, one could envisage the creation of a European Investment Court comparable to the EFTA court. Second, one could envisage the establishment of a special chamber within the ECJ. Third, one could establish a specialized investment court, similar to the European Civil Service Tribunal, which would fall under the control of the Court of First Instance (now called General Court) and the ECJ.

Another option that is pursued by several players, in particular the NGOs and the EP, but also the EC, is the adoption of a NAFTA model, or at least several elements of it, such as for example complete transparency, intervention by third parties (i.e. NGOs) by way of amicus curiae briefs, participation in disputes by non-disputing contracting parties as well as use of interpretative declarations.

Finally, one could conceive the establishment of national arbitration courts or tribunals, or special chambers attached to existing national courts.

All of these options must have one thing in common: they must be able—and ultimately required—to request a preliminary ruling from the ECJ if EU law measures are—even only potentially—at issue. In other words, the ECJ must be able to determine *in fine* the outcome of any investor-to-state arbitration proceeding. That, of course, is problematic to reconcile with the aspects of independence

and de-politicisation of an investor-to-state dispute from the point of view of non-European investors that bring cases against the EU and/or Member States.

The ultimate question thus arises: will these modifications also lead to a lowering of the investment protection level or less effective enforcement of arbitral awards? While it is too early to answer this question, at the very least, it is safe to conclude that the whole system will become much more complicated. This in turn will inevitably have a negative impact on the efficiency and effectiveness of resolving investor-to-state arbitration disputes as quickly and as cheaply as possible.

Moreover, taking into account the views of the EC and, more particularly of the EP, it seems very likely that a new—euphemistically described—"balance" between investor rights and public policy space will be imposed and guide or rather capture the future European investment policy. The current anti-arbitration campaign and the witch-hunt against arbitrators and their supposedly disgraceful awards is a first sign of what to expect.[71]

Of course, it remains to be seen how the first draft investment chapters of the FTAs with Canada, India and Singapore will look like. This will depend first and foremost on the expertise and negotiation skills of the EC and the guidance of the Member States as well as the reasonableness of the EP.

The ultimate question, however, will be whether the creation of a decent investor-to-state arbitration system *within* the current parameters of the Treaties and in particular the ECJ jurisprudence is at all possible. In my personal view, a modification of the Treaties will at the end be necessary in order to overcome the resistance of the ECJ as consistently illustrated in its jurisprudence. Only if that is achieved could it be possible to create a system that serves the investors and thus ensures that Europe remains the most attractive place of the world for inward and outward FDI, while at the same time respect the European legal order.

In view of the current economic and financial crisis and the rising importance of the BRIC investors, the EU cannot afford to mess this up. It's a once in a lifetime chance that the EU has to get right.

[71] An active player in this regard is the network of NGOs called "Seattle to Brussels", http://www.s2bnetwork.org/.

Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues

Davide Rovetta

According to Article 207 (1) of the so-called Lisbon Treaty the European Union ("the EU") has gained explicit exclusive competence with regard to Foreign Direct Investment ("FDI").[1] However, the very precise meaning of FDI and, as a consequence, the precise extension of such new EU competence remains unclear.[2] This already has the potential of creating the surreal situation in which scholars and commentators have to take a position and argue about something which is left undefined by the legislator itself.

Because of the usual complex EU dynamic and the peculiar relationship between the different EU institutions there is the risk that the precise coverage of the EU new FDI competence will remain unclear for a long time into the future. Distinguished scholars have argued that there is the real risk that the Commission and the Council may end up fighting on the issue with the matter ultimately being sent to the Court of Justice of the European Union.[3] As with many things in life, what from a theoretical point of view is considered as working very well might in practice be working in a much less efficient manner.

Such a surreal situation therefore makes one wonder whether it is positive that FDI has been transferred in the area of explicit EU competence by the Lisbon Treaty in the first place. It also calls into question the efficacy in the year 2012 of the rather dated and old EU governance system as applied to investment matters.

[1] EU, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ C 306/1.

[2] For an in-depth analysis of the legal meaning of the FDI concept see Burgstaller, The future of Bilateral Investment Treaties of EU Member States, in: Bungenberg/Griebel/Hindelang (eds.), *European Yearbook of International Economic Law / Special Issue, International Investment Law and EU Law,* 2011, pp. 62–63.

[3] Kuijper, Foreign direct investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy, From the Board, Legal Issues of Economic Integration 37 (2010) 4, p. 270.

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It is of course normal and common that a primary and quasi constitutional source of EU law such as the Lisbon Treaty does not define in detail precisely what is to be understood by FDI. What is less normal however is that the same Member States that contributed to the drafting of the Treaty as well as the EU institutions, such as the Commission, the Council, and the Parliament are incapable of coming to a common interpretation of such a basic concept and which is constitutional in nature under EU law. Bearing in mind the above, the present paper discusses selected procedural and jurisdictional issues related to investment arbitration in the EU after the Lisbon Treaty from a broader arbitration related perspective. While of course examining in-depth, where appropriate, the relevant sources of EU law and case law, the present work is framed without account being taken of the different legal basis under municipal (EU) law concerning intra- and extra-EU Bilateral Investment Treaties (BITs) and arbitrations.

The author argues that the municipal law differentiations between the BITs and future arbitrations under the new Common Commercial Policy FDI competence and the internal market intra-EU one is illogic and devoid of purpose. While of course justified under an EU law perspective, such a dichotomy is, however, incomprehensible from the perspective of arbitration and public international law.

As will be demonstrated below, many of the problems related to the dispute settlement mechanism and possible solutions to those problems at the intra and extra EU BITs levels overlap or are, at least, partially similar. Therefore while under EU municipal law intra-EU arbitration problems fall squarely outside the intended coverage of the present commentary on the Common Commercial Policy, the author nonetheless considers it appropriate to examine them also.

The Intra-EU Investment Arbitration Saga: Are They All Wrong?

It is well known to investment arbitration and EU law specialists, that currently there are various active arbitration proceedings concerning so-called intra-EU BITs. In practice this means that an EU investor of a given Member State e.g. a Dutch investor is suing an EU Member State e.g. the Slovak Republic, basing its claims on the relevant BIT between the Netherlands and the Slovak Republic. Such kind of intra-EU arbitration has taken and continues to take place under different arbitration rules and institutions, namely inter alia SCC, UNCITRAL as well as ICSID.[4] It is worth noting from an international public law perspective that under

[4] See Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration rules available at http://www.sccinstitute.com/skiljedomsregler-4.aspx; Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; United Nation Commission on International Trade law (UNCITRAL) arbitration rules available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html. See also International Chamber of Commerce (ICC) arbitration and ADR rules available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf, as well as the Permanent Court of Arbitration (PCA) system at http://www.pca-cpa.org/showpage.asp?pag_id=1028.

the latter set of rules, it is not possible to challenge the arbitration tribunal award under the relevant Courts of the EU Member States. This is because Article 52 of the ICSID Convention only provides the possibility of challenging an ICSID award in an annulment proceeding before an ICSID annulment Committee based on very limited grounds of annulment. This is made even clearer by Article 53 of the Convention which lays down that an ICSID award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the said Convention.

Until now, the situation described above has almost always been dealt with by scholars and by EU institutions as one related to the compatibility of such intra-EU BITs arbitrations with EU law only.[5] The European Commission has in the past decided to intervene as *amicus curiae* during some intra-EU arbitration, namely inter alia ICSID arbitration proceedings against Hungary (*AES v. Hungary* and *Electrabel v. Hungary*) in order to defend what it perceives to be the primacy of EU law over investment law and arbitration.

The Commission's reasoning in the above mentioned cases has been reported and commented by Christophe von Krause and Florian Quintard.[6] The two authors in their contribution also duly mentioned the Commission's intervention along the same lines in the *Eureko v. Slovak Republic* case and argued that "This development is one of several recent manifestations of the Commission's opposition to the application of BITs between Member States of the European Union". The European Commission's reasoning is also based on policy considerations related to equality of rights and the duties of all citizens of the EU which, in the Commission's views, would be jeopardized if some of them could benefit of more favourable substantive rights than others just because they belong to an EU Member State that has intra-EU BITs in place. It has therefore been reported that the European Commission has been pushing for the denouncement of all intra-EU BITs, but (thankfully in the view of the author) so far without success.[7]

Against the above background, there are various aspects of the intra-EU BIT arbitration saga that so far have been underestimated or not commented on at all. As anticipated above, while technically speaking under EU law they do not fall within the ambit of the Common Commercial Policy, it is none the less worth briefly examining them because they have an indirect link with some jurisdictional problems linked to the new EU FDI policy concerning BITs between EU Member States and third countries.

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[5] Podestà, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, The Law and Practice of International Courts and Tribunals 8 (2009) 2, p. 225; Lavranos, New developments in the Interaction between International Investment Law and EU law, The Law and Practice of International Courts and Tribunals 9 (2010) 3, p. 431.

[6] See: http://kluwerarbitrationblog.com/blog/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/.

[7] See Lavranos, New developments in the Interaction between International Investment Law and EU law, The Law and Practice of International Courts and Tribunals 9 (2010) 2, p. 431 (432); Wehland, Intra-EU Investment and arbitration: Is EC Law an obstacle, ICLQ 58 (2009) 2, p. 297.

Fiction vs Reality?

The basic unwritten and unspoken assumption of most analyses performed to date by EU lawyers and the European Commission concerning the intra-EU arbitration issue is that in real life EU law has primacy over the domestic law of the Member States. Also, another basic unspoken assumption is that all citizens of the European Union would have the same possibility of asserting their EU law rights before the various national Courts of the Member States and therefore they would be treated equally in the application of EU law. It should not matter whether one has the same claim before a Court in the United Kingdom, in Italy or in Slovakia: the assumption is that his–her rights under EU law should be protected in the same manner. In turn, the Supreme Courts of the Member States in the same manner, should be prepared, if necessary to refer a preliminary ruling to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

Of course if the above was true and accurate those arguing that intra-EU BITs would discriminate between EU citizens of the different Member States might have a fair point. One of course could still argue that such BITs would be *EU law plus* from a substantive rights point of view, but that would be a different story. The problem is, however, that the assumption of the equality of access to justice in all Member States is simply untrue and *prima facie* inaccurate.

It is well known to those practicing international trade law in different EU Member States that the Courts and Tribunals of the various EU Member States have different approaches, training, and policies as far as the application of EU law is concerned.

Suffice it to consider, for instance, an area of the Common Commercial Policy such as anti-dumping and anti-subsidies which has been EU competence for decades. A recent in-depth analysis of the judicial review applied by the EU judicature in such areas of law by both the centralized EU Courts (General Court and Court of Justice) and by the Courts of the Member States proves beyond reasonable doubt that something is not working as it should be.[8]

In short, the authors of that study found various instances in which the same principles and EU law Regulations and rules in the trade law field have been applied in the most disparate manner by the Courts of different Member States without the case being referred to the Court of Justice of the European Union. At the same time, the authors identified some procedural bars to reaching the Supreme Court present in some EU Member States which *de facto* render difficult the application of the provisions of Article 267 TFEU in certain Member States.

Against the above background, it is unclear what the European Commission has done so far, from an enforcement perspective, under the so-called infringement proceedings in the Common Commercial Policy field in order to guarantee **substantive equality of arms** between EU Citizens as far as judicial proceedings are concerned.

[8] Vermulst/Rovetta, Judicial Review of Anti-dumping Determinations in the EU, Global Trade Customs Journal 7 (2012) 5, p. 239.

Despite the absence of any in-depth analyses on that concept in other areas of EU law more linked to the internal market, such as EU customs law, there are signs according to which the situation would be the same. In such areas, however, the EU Commission has been more willing, at least in some isolated cases, to tackle EU Member States for the malfunctioning of their judicial systems.

On 24 November 2011 the European Commission announced that it had requested Italy to implement proper appeal procedures on requests for remission or reimbursement of customs duties. The reason was that Italy, in certain cases, did not allow a judicial review for negative decisions relating to requests for the remission or reimbursement of customs duty.[9] One of the main reasons that prompted the European Commission's intervention was the fact that the Italian Supreme Court had decided, in splendid isolation, on various issues of EU law in a manner at variance with the Court of Justice of the European Union and the courts of other Member States without feeling the need for making a preliminary reference to the Court of Justice itself.

If one takes the above into account, there are qualified indications covering different areas of EU law according to which the courts and tribunals of the different EU Member States would, at least in certain cases, be working differently from each other and causing **substantive discrimination** between EU citizens under EU law. Turning now to intra-EU and investment arbitration matters, the reality is that intra-EU investment arbitration is also relied upon by EU investors to offset any substantive difference of treatment offered by the different courts and tribunals of the EU Member States. Another reason for such an approach is, of course, also the potentially broader and more favourable substantive BIT rights coverage when compared to EU law.

The European Commission and EU law purists' analysis, which is perhaps correct on paper and from a formal point of view under EU law, however, is incorrect when seen from a broader perspective. If future scholarly works or studies performed by the European Commission should prove that the problems identified above are also present in the intra-EU arbitration arena then the non-discrimination theory put forward by the Commission would fall because it would have been based on an unspoken incorrect premise.

In fact intra-EU BITs and arbitration are to be seen as a welcome tool to overcome and offset substantive inequality between EU citizens as caused, at least in part, by the judiciary of the different Member States. Assuming *arguendo* that such a situation would still be judged in breach of EU law, the author argues that this would be a particularly efficient breach of EU law that should not be remedied but instead encouraged.[10]

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[9] See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1423&format=HTML&aged=0&language=EN&guiLanguage=en.

[10] See in general on the efficient breach theory in international law Posner/Sykes, Efficient breach of International Law: optimal remedies, "legalized non-compliance" and related issues, Stanford Law and Economic Olin Working Paper no. 409 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780463##.

Is the Way Out a Jurisdictional One?

Under EU law in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU) national courts have the possibility, or if they are the court of last instance the duty, of referring matters of EU law to the Court of Justice of the European Union.[11]

However, in 1982 with the landmark *Nordsee* case the Court of Justice clarified that arbitral tribunals established by agreement of the parties are not entitled to make a preliminary reference.[12] The Court of Justice clarified in *Nordsee* that an arbitral tribunal constituted pursuant to an arbitration agreement is purely private in nature because its authority derives only from party autonomy and therefore it is not a "court or tribunal of a Member State" within the meaning of current Article 267 TFEU.[13]

It is now well settled that an arbitration tribunal cannot make a preliminary reference where the parties to an agreement are neither legally nor actively obliged to have their dispute decided by arbitration, and where the authorities of the Member States in question are neither involved in the decision to use arbitration, nor required to intervene automatically in the proceedings before the arbitral tribunal.[14]

The Court of Justice in *Eco Swiss* reconfirmed the validity of the *Nordsee* doctrine and it also clarified that where questions of EU law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award. The Court of Justice also explained that only at this stage of the procedure is it for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court of Justice of the EU to obtain an interpretation or assessment of the validity of provisions of EU law which they may need to apply when reviewing an arbitral award.[15]

The correctness of such an approach by the Court of Justice concerning commercial arbitration has been criticized by certain scholars.[16] Advocate General Saggio, in his Opinion in the *Eco Swiss* case conceded that a possible alternative approach would, of course, be to allow arbitrators to make references for a preliminary ruling.[17]

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[11] See on the preliminary ruling mechanism Broberg/Fenger, *Preliminary References to the European Court of Justice*, 2009.

[12] ECJ, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG.*, [1982] ECR 1095.

[13] See for a detailed commentary concerning the implications of *Nordsee* for arbitration matters Stylopoulos, *Arbitrators Judges or Not? An EC approach*..., available at http://kluwerarbitrationblog.com/blog/2009/03/09/arbitrators-judges-or-not-an-ec-approach%E2%80%A6/.

[14] Broberg/Fenger, *Preliminary References to the European Court of Justice*, 2009, p. 80.

[15] ECJ, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I 3055, at 32–34.

[16] Prechal, 'Community Law and National Courts: The lessons from Van Schijndel', in Common Market Law Review 35 (1998) 3, p. 681.

[17] Opinion of Mr. Advocate General Saggio in ECJ, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I 3055 at 32 (with footnote 18).

It would seem that there are good reasons to argue that the Court of Justice approach is probably wrong. By preventing commercial arbitration tribunals from making preliminary rulings on the interpretation or validity of EU law the Court of Justice contributed to rendering the application of EU law less effective. For the latter to be properly applied one will have to wait for an interim or partial award to be issued and then challenge such an award, something that seems to be illogical and impractical. By contrast if arbitral Tribunals could immediately refer a given EU law matter to the Court of Justice, then EU law would be applied immediately in a very effective manner.

That being said on commercial arbitration, one wonders whether the above-mentioned case law of the Court is applicable to investment arbitration tribunals sitting within the EU territory and dealing with intra-EU BITs. Contrary to what happens with the vast majority of commercial arbitration Tribunals, they are not established by the will of the parties, namely the investor and the defending EU Member State. Instead their existence is foreseen in a BIT negotiated and concluded by two EU Member States which has the force of law of a fully fledged public international law Treaty both under EU law and the Vienna Convention on the Law of Treaties. In other words, contrary to what happens with commercial arbitration tribunals established by contract, investment arbitration tribunals derive their jurisdiction from the law, namely the relevant BIT which foresees specific dispute settlement provisions.

Of course then depending on the relevant BIT and the factual situation at issue arbitration might take place under different sets of rules or procedures such as UNCITRAL, ICSID, SCC, PCA, or even on an ad-hoc basis. Furthermore and as anticipated above, the relevant BIT is not a contract negotiated between the investor and the relevant Member States but has instead the force of law for both. It would therefore seem that there is no reason why the *Nordsee* principles should bar an intra-EU investment arbitration tribunal from referring an EU preliminary law question to the Court of Justice of the European Union under Article 267 of the TFEU.

If such a solution was adopted many of the current intra-EU BITs arbitration problems could be solved at an early stage instead of obliging the EU Commission to intervene before arbitral tribunals with third participants submissions. The same holds true concerning the relevant defending Member State's need to challenge an award before a domestic court to invoke EU law. This, at least in theory, would also solve the problem of the absence of judicial review of ICSID arbitration awards as far as intra-EU investment arbitrations are concerned.

Against the above background one has, however, to concede that the above proposed solution has one important shortcoming. It would, in fact, subject the investment arbitration tribunal jurisdiction and investment arbitration law to review by the Court of Justice and intra-EU investment arbitration law to EU law. It is however worth recalling that in any event EU law matters discussed in intra-EU ad-hoc, ICC, SCC or UNCITRAL arbitrations would probably reach the Court of Justice anyway when the arbitrators' awards is challenged before EU domestic Courts via preliminary ruling by those Courts. Therefore it seems practical and fair "anticipating the EU law problem" by empowering arbitral tribunals to make preliminary rulings to the Court of Justice if they feel it is appropriate.

By contrast concerning ICSID intra-EU arbitrations it would seem that the proposed solution, although attractive in theory, would in practice be inappropriate because it would run against Articles 52 and 53 of the ICSID Convention. The latter articles prohibit any non-ICSID form of review of a given arbitral award.

It is therefore proposed to consider that all intra-EU investment tribunals with the exclusion of those under ICSID would have the possibility of referring a preliminary ruling to the Court of Justice of the European Union. It has to be conceded though that this proposed approach is probably problematic from the point of view of both EU law and investment arbitration. At the same time, however, it is certainly better than the current chaos on intra-EU BITs that exists and, from a practical perspective, the fact that it does not perfectly match with classical EU or investment law is an encouraging starting point. As with many things in life, from time to time solutions which are problematic from a theoretical perspective may prove to work very well in practice.

Common Commercial Policy Selected Jurisdictional Issues Related to Investment Arbitration

The above discussion concerning jurisdictional related problems in intra-EU investment arbitrations may also serve as a useful context in order to examine the issue of investment arbitrations related to the new FDI EU competence. While in the EU a highly politicized debate between stakeholders, the European Commission, the European Parliament and the Member States is ongoing concerning the precise substantive coverage of the said new EU competence, the very important jurisdictional and dispute settlement issues are not debated in the same manner.

A useful starting point to better understand why such jurisdictional and dispute settlement matters are so important, probably much more important even than the substantive FDI coverage, is the contribution of Nikos Lavranos in the present volume to which reference is made here.[18] The author agrees with Lavranos' high profile legal analysis the conclusion of which should, however, worry the EU institutions. He, in the view of the author very correctly, argues that ". . . .only very limited room is left by the ECJ to Member States and the European Institutions for establishing a properly functioning independent investor to state arbitration system within the European legal order, which, however, is exactly what is needed for the future of European investment policy". However, the author thinks that what is needed is an investor-to-state arbitration system which, contrary to intra-EU arbitration matters, is not linked to the European legal order in the sense of not being subject to the Court of Justice jurisdiction.

[18] Lavranos, Is an international investor-to-state arbitration system under the auspices of the ECJ possible?, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973491.

The Real Decision Making Power Is in Luxembourg Not in Brussels: Policy Perspective Chaos?

While, as anticipated above, discussions on the substantive FDI coverage are currently ongoing in Brussels, in the quiet of the Kirchberg plateau in Luxembourg the Court of Justice of the European Union has probably already indirectly decided the fate of FDI arbitrations.[19]

Or to put it differently, the Court has *de facto* rendered impossible the establishment of an arbitration system which is independent from EU law and from its ultimate jurisdiction basing its reasoning on primary EU law. By doing so it has taken away from the Commission, the Parliament and the Member States any decision making power related to such an issue.

In Opinion 1/09, dealing with the issue of a unified patent litigation system the Court of Justice recalled that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.[20] The Court also recalled the well established principles that the essential characteristics of the European Union legal order are, in particular, its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[21] Past case law of the Court of Justice was of the view that the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.[22] The Court has also clarified in the past that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order.[23]

However, despite the above it then found in Opinion 1/09 that the envisaged agreement creating a unified patent litigation system was not compatible with the provisions of the founding EU Treaties. This was because the international court envisaged in the draft agreement at issue on patents was to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law,

[19] ECJ, Opinion 1/09, *European and Community Patent Court,* [2011] ECR, n.y.p.

[20] See also ECJ, Case 26/62, *van Gend & Loos*, [1963] ECR 1, 12 and ECJ, Case 6/64, *Costa*, [1964] ECR 585, 593.

[21] See ECJ, Opinion 1/91, [1991] ECR I-6079, paragraph 21.

[22] See ECJ, Opinion 1/91, [1991] ECR I 6079, paragraphs 40 and 70.

[23] See ECJ, Opinion 1/00, [2002] ECR I-3493, paragraphs 21, 23 and 26.

in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the TFEU concerning the internal market and competition law.[24] Likewise, such a newly established Patent Court might have been called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union.

It is worth recalling that in order to avoid any incompatibility with EU law the drafters of the unified patent litigation system had subjected it to the Court of Justice jurisdiction by allowing the possibility for the newly established patent Court to refer preliminary rulings to the Court of Justice. That however, in the view of the Court of Justice was not enough to render it compatible with EU law.

Bearing the above in mind, let us now examine what margin for manoeuver is left by EU law for the establishment of an independent investment arbitration system concerning the newly established FDI EU competence. It is well settled in investment arbitration matters that an investment tribunal can be called upon to examine and interpret a domestic law legislative act by the defending Member States. Now if the defendant is an EU Member State or in the future the EU itself one can imagine many situations in which a third country investor could argue that a given EU secondary (or even primary) law act, like a regulation or a directive, has impaired his investment rights as protected by the relevant BIT.

In such a situation the investment tribunal constituted to examine the case would inevitably have to perform an analysis and interpretation of the relevant EU law provisions at issue. However, from an EU domestic law perspective, this would be forbidden by the case law of the Court of Justice and in particular by the principles established in Opinion 1/09. It is true that in the area of trade law the EU action has been regularly scrutinized before WTO Dispute Settlement Panels and Appellate Body for many years now, but to counterbalance such "external scrutiny" and to protect the EU legal order and probably also itself the Court of Justice has generally denied direct effect to WTO law in the EU legal order.[25]

This would not be possible concerning investment arbitration matters whose unfavourable arbitral awards would inevitably have to be applied and complied with by the defendant Member State or, in the future, by the EU by paying compensation to the winning investor. Furthermore, after Opinion 1/09, even should a third country agree to negotiate a BIT or any other procedural rules which would foresee the possibility by the arbitral tribunal to refer a preliminary ruling to the Court of Justice, it would not be enough to make it compatible with EU law.

[24] ECJ, Opinion 1/09, *European and Community Patent Court,* [2011] ECR, n.y.p., para 78.

[25] See on the recent developments of the (lack of) direct effect doctrine Bronckers, From "direct effect" to "muted dialogue": recent developments in the European courts' case law on the WTO and beyond, Journal of International Economic Law 11 (2008) 4, p. 885.

As EU law currently stands after Opinion 1/09, the author fully shares Lavranos' conclusion that in order to overcome and supersede the resistance by the Court of Justice a modification of the EU founding treaties is necessary.[26]

What Kind of Investment Arbitration Mechanism for the Future?

What has been described above is worrying in the sense that while the Commission, the Parliament and the Member States are currently discussing huge and complex theoretical policy perspectives related to the new FDI competence in Brussels, the Court of Justice has already indirectly potentially decided what the EU will (not) do concerning the future investment arbitration mechanism for extra-EU BITs.

This is a perfect example of how, in fact, the EU system has tended to work in many areas in the last few years: many words and cultivated discussions in Brussels but hard facts in Luxembourg. As we have seen above, some authors including the present one are of the view that it is necessary to amend the EU Treaties in order to establish a proper investment arbitration mechanism for extra EU-BITs.

The next question that arises is what kind of amendment is needed? The answer to that question probably is that if one wants to establish a proper and well functioning investment arbitration mechanism the latter has to be divorced from any procedural and judicial link with EU law and, more importantly, with the Court of Justice of the EU.

As has been shown above, the establishment of such a link might be justified for intra-EU arbitrations but it is not at all logical for extra-EU ones. The reason for such a proposed choice is to continue the good old tradition of independent investment arbitration Tribunals linked neither with the investor nor the host State's Courts which on balance has worked well up to now.

It is probably better to pay the price of continuing to have fragmented but independent case law by arbitral tribunals rather than to have a monolithic one under the auspices and final control of the Court of Justice. This is because there is the risk, as seen in Opinion 1/09, that the latter would "pollute" investment arbitration with EU law concepts and goals thereby rendering investment tribunals dependent on the will of the Court of Justice.

The author does not see any reason why a third country should accept an "independent" arbitration system which would be subject, directly or indirectly, to the Court of Justice jurisdiction, i.e. to the jurisdiction of a domestic Court of the other contracting party.

The European Commission is currently reflecting upon what kind investment arbitration mechanism it would like to establish, but the author argues that following Opinion 1/09 it has very limited policy space on the issue. In the meantime, what should investment tribunals called upon to decide in extra-EU BITs arbitrations do if an EU law measure-issue is at stake during the arbitration?

[26] See Lavranos, Is an international investor-to-state arbitration system under the auspices of the ECJ possible?, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973491.

The answer to that question is very simple: such Tribunals should continue to act in an independent manner and simply ignore the EU domestic investment policy discussions and problems as they have done to date. Such Tribunals have a duty to the relevant BIT and to investment law, not to EU law and its institutions. Considering how things are going nowadays in the EU there is a good chance that while people in Brussels continue their interesting discussions for years, such tribunals may continue working quietly for a longtime to come.[27] That is of course, unless someone in Luxembourg wakes up one morning and decides that this would be forbidden by the EU Treaty for some mysterious reasons or by some unwritten legal principle of EU law.

Conclusion

The situation concerning the way investment arbitration works as a whole in the EU is worrying. This is because both at the internal market intra-EU BITs level as well as at the commercial policy extra-EU BITs level the clash between investment arbitration law and practice and EU law principles is creating serious, practical, problems.

The tendency of EU law and the Court of Justice to claim primacy over any other legal system does not help in finding a balanced solution to such problems. While for intra-EU BITs a partial solution might come in the form of a preliminary reference by non-ICSID arbitration tribunals to the Court of Justice of the EU, this is not possible or desirable for extra-EU FDI investment arbitrations. The debate going on at EU institutional level is concentrating mostly on many substantive FDI issues but up to now fails to take due account of the fact that, as things stand today, the EU is not in a condition to set up any proper investment arbitration system concerning its FDI competence.

The Court of Justice, with Opinion 1/09, has made clear to all that it is the ultimate policymaker of the Union and that it is the supreme and sole decision making power insofar as judicial matters are concerned. As things stand today in the aftermath of Opinion 1/09, even assuming for the sake of argument that the ICSID Convention could be modified to allow participation by international organizations, the EU would not be able to adhere to it.

One is therefore left with the strong doubt, and this is of course mere provocation by the author, that probably it would have been better to have left the FDI competence in the hands of the Member States instead of transferring it to EU level. Again, what in theory seems to be an optimal solution, in practice is proving to be a serious problem. The fault however is not with the Commission and the other EU Institutions. The fault lies with the drafters of the Lisbon Treaty, namely the

[27] Of course this would not be the case for those tribunals established in the context of EU's FTA investment chapters.

Member States. Of course in the long run the EU will find a proper solution to such problems and establish an efficient working system. However, in the year 2012 and in the current globalized world the long run is no longer an option. The world and emerging countries move very fast, and the EU will have to do the same or inevitably lose power and influence. The EU classical method of policymaking seems to be struggling with reality, at least insofar as investment arbitration law is concerned.

The New Competence of the European Union in the Area of Foreign Direct Investment (FDI): A Third Country Perspective

Andreas R. Ziegler

Introduction

Following the entry into force of the Treaty of Lisbon on 1 November 2009 the European Union (EU) has been able to extend its competence for the Common Commercial Policy (CCP) into the field of Foreign Direct Investment (FDI) (Art. 207 Paragraph 1 of the Treaty on the Functioning of the European Union (TFEU)). While this volume is generally dedicated to the many challenges and open questions relating to this new activity, the present Chapter shall focus on the consequences for third countries, in particular other OECD countries that compete with the European Union and its members for FDI inflows and investment opportunities worldwide. In particular, the view of European neighbours, i.e. members of the European Economic Area (EEA) and the European Free Trade Association (EFTA) shall be analysed more thoroughly. While they do share many of the regulations within the internal market, they are autonomous when it comes to their foreign economic policy although they certainly have a keen interest in obtaining at least similar concessions as the EU from their trading partners and in being attractive for foreign investment.[1] But also the perspective of major trading powers (USA, Japan, Canada etc.) and emerging economies like Brazil, China or India shall be discussed as they

[1] For a detailed analysis see Burgstaller, European Law and Investment Treaties, Journal of International Arbitration 26 (2009) 2, p. 181; Podestà, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, The Law and Practice of International Courts and Tribunals 8 (2009) 2, p. 225; Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, Europäische Zeitschrift für Wirtschaftsrecht 21 (2010) 6, p. 207 and Tietje, EU-Investitionsschutz und -förderung zwischen Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik, Europäische Zeitschrift für Wirtschaftsrecht 21 (2010) 17, p. 647.

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are competing within the framework of multilateral agreements like the WTO. This Chapter shall not provide a detailed analysis of the various theoretical questions as this seems not necessary in view of the excellent contributions to this book but rather complement them. The main focus is to have a look at possible scenarios in view of the future of the EU's FDI policy.

Political and Economic Signification of the Enhanced Competence

In view of the current importance of FDI flows—and therefore the legal regulations relating to them—for the global economy it seems only normal that the EU aimed to complete the existing competences relating to trade, although the common commercial policy now should rather be called the common foreign economic policy[2] in view of its comprehensiveness. Almost all recent bilateral trade agreements contain also investment-related rules, be it in the form of a comprehensive investment chapter or at least with regard to specific aspects, e.g. in the services chapter or relating to taxation.[3] One of the very early examples of this trend was certainly the inclusion of an investment chapter into the North American Free Trade Agreement (NAFTA) of 1992 between the United States, Canada and Mexico (Chapter 11). While this development was certainly due to the United States' intention to complete exiting trade (in goods) rules with services and investment provisions, now even states that had a cautious approach to investment rules do regularly include such rules in their agreements (see e.g. the China-ASEAN-Free Trade Agreement of 2009[4] or even the very recent Agreement between China and Taiwan[5]). Also the discussions undertaken within the OECD and the WTO made a common position by the EU desirable if the EU members want to speak with one voice in the future shaping of such principles and play a significant and credible role in these institutions.

The EU members had relatively early accepted rules that traditionally are part of FDI, in particular the rules contained in the original EC Treaty on the free flow of capital from third countries, as they continue to be part of the rules relating to the free flow of payments and capital of the TFEU.[6] Furthermore, the EU (or more correctly

[2] See Herrmann, Grundzüge des europäischen Außenwirtschaftsrechts, Zeitschrift für europarechtliche Studien 11 (2008) 1, p. 81.

[3] See also Bungenberg, Going global?, in: Herrmann/Terhechte (eds.), European Yearbook of International Economic Law, 2010 , p. 123.

[4] See the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations of 15 August 2009.

[5] The so-called Cross-Strait Investment Agreement signed on 9 August 2012.

[6] In particular, Art. 63 et seqq. TFEU (ex-Art. 56 et seqq. ECT). With regard to their significance for capital inflows from third States see: ECJ, Case C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht*, [2006] ECR I, 09521.

the EC at that time) had already in the past concluded several agreements with third States, in which specific aspects of FDI (supposedly covered by the existing treaty provision at that time) were addressed. A typical example is the early attempt to do something meaningful in the FTA with Mexico in 1997.[7] In this Agreement, in view of the very limited competence of the EU at the time, the FDI-related provision had to make a strong reference to the terms "movement of payments" and "movement of capitals" contained in the ECT in order to justify the inclusion of some (very limited) provisions relating to FDI. As a result only the admission and limitation of FDI could be addressed while the traditionally more important treatment of investors and investments (including the paramount question of expropriation) and rules relating to dispute settlement were outside the scope of the possible negotiations. Nevertheless, this approach was used in a number of earlier agreements and allowed to signal the willingness to address FDI flows in bilateral agreements despite the limitations due to the existing EU powers of the time.

At the same time, one should not forget the very active role that the EU Commission has played in recent years when FDI was discussed in international fora like the WTO or the OECD (or even earlier the Energy Charter Treaty), even if the existing competence at the time seemed problematic and made that the EU was rather speaking in the common interest of the Member States than as a real player in this field.[8] In this context it will be particularly interesting for the multilateral framework whether improved and strengthened legitimacy of the EU (and thus the European Commission) in FDI will lead to initiatives by the EU within these fora. Although the experience with the Multilateral Agreement on Investment (MAI) within the OECD and the discussion of investment flows as a so-called Singapore Issue within the WTO (in the late 1990s) were rather disappointing it is pretty certain that it is in the interest of many (if not all) states to multilateralise investment in the near future or at least to obtain specific FDI commitments in exchange of more traditional trade concessions.[9] The EU has already in the past played the role of a defender of these interests within the WTO and is certainly now more adequately entitled to do so even if the changed relationship between the weakened EU members and the ever more important BRIC States may have an influence on the EU's interest in addressing specific issues relating to FDI. On one hand, a multilateralisation of specific issues would make the complex situation among the EU Member States less relevant. At the same time it could be that the European Commission's eagerness to negotiate and address FDI in the past was maybe also due to its eagerness to obtain the competence it now has got—and thus there is less

[7] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, 8 December 1997, OJ L 276 of 28 October 2000, Art. 8 and 9.

[8] See below note 23 for the description of the EU-Mexico Agreement.

[9] See Ziegler, Multilateraler Investitionsschutz im Wirtschaftsrecht, in: Ehlers / Wolffgang (eds.), *Rechtsfragen internationaler Investitionen*, 2009, p. 63.

need now for such a proactive policy on the international level in view of the clarified situation at the EU level.

Existing BITs Between EU Member States

One of the unresolved problems relating to the new competence of the EU for FDI is certainly the existence of approximately 191 BITs between EU Member States.[10] A number of recent arbitral awards and declarations by EU Member States and the European Commission have made it clear that there are various solutions to their role with regard to FDI-related disputes between EU Member States and investors from another EU Member State. In principle, this is a typical problem as it has arisen in other areas where the EU has acquired a competence in an area previously regulated at the national level and through bilateral agreements. Famously, the bilateral air traffic agreements at an earlier period in time caused similar problems among the EU Member States.

It is interesting to recall that most BITs between EU Member States have been negotiated between Central and Easter European Transition Economies and the older EU Member States in the early 1990s. Typical examples of this development are also the BITs negotiated by Switzerland with ten States that now are all EU members.[11] These agreements constituted at that time important tools to develop the economic relations between the States within Europe—and thus an important factor preparing the accession of these countries to the EU.[12] The European Commission has continuously defended the position that after the accession of these countries these agreements should no longer be allowed to play a role regarding FDI flows and their treatment among EU members as they potentially lead to an infringement of EU rules (a position certainly understandable from a EU perspective) was not generally acceptable to investors and it seems even certain EU Member States (often in view of the importance of these agreements for their business community). Generally arbitrators have not accepted the European Commission's position and used these agreements as a basis for the settlement of disputes between EU Member

[10] See de Mestral, Is a model EU BIT possible — or even desirable? Columbia FDI (2010) 21, available at: http://www.vcc.columbia.edu/.

[11] Agreements with Hungary of 5 October 1988, with Poland of 8 November 1989, with the Slovak Republic and the Czech Republic (at the time still as Czechoslovakia) of 5 October 1990, with Romania of 25 October 1993, with Bulgaria of 28 October 1991, with Estonia of 21 December 1992, with Latvia of 22 December 1992, with Lithuania of 23 December 1992, with Slovenia of 9 November 1995. Malta had concluded an agreement with Switzerland as early as 1965, but this agreement was terminated by Malta in preparation for EU membership in 2005. The termination by Malta took effect on 23 February 2005, published in: Amtliche Sammlung des Bundesrechts der Schweiz (AS) 2005, 1163. Cyprus never had negotiated a BIT with Switzerland.

[12] This process is not yet entirely terminated; e.g. there exist BITs between Switzerland and Croatia (30 October 1996), Macedonia (26 September 1996), Montenegro and Serbia (originally as Serbia-Montenegro, 7 December 2005) and Turkey (3 March 1998).

States and investors from other EU Member States.[13] Notably the Czech Republic (due to several lost cases against it) but potentially also Italy, Malta and Slovenia seemed to share the European Commission's position while other EU Member States seemed rather to favour the continued use of these agreements[14]—a situation which makes of course a quick solution less likely.[15] Third States have not had reasons to comment on this problem in view of its internal dimension although potentially their investors could be concerned indirectly, e.g. when making use of an intra-EU BIT through subsidiaries.

Existing BITs Between EU Member States and Third States

The existence of a plethora of BITs between EU Member States and third countries is probably of more direct relevance to the EU's external relations and the discussion of the EU competence in third countries. Already under the old treaty provisions the European Commission had started to show its interest in the issue and challenged the existing BITs of some Member States with third states under the provisions on capital movements. The Commission had argued that the Member States concerned should at least renegotiate their existing agreements (or even terminate them) in order to avoid any discrimination. The European Court of Justice upheld this position in its judgments against Austria, Sweden and Finland.[16] Similar proceedings against Denmark were terminated when Denmark agreed to terminate the respective agreement. Other Member States have also chosen to terminate certain agreements, e.g. Malta with regard to its 1965 Agreement with Switzerland—immediately before joining the EU.[17]

[13] See the « amicus curiae briefs » by the European Commission and the reaction of the arbitrators in the cases: SCC No. 088/2004, *Eastern Sugar v. Czech Republic* (Partial Award), ICSID Case No. ARB /07/22, *AES v. Hungary* (Award), ICSID Case No. ARB/07/19, *Electrabel v. Hungary* (Award n.y.p.), PCA Case No 2008-13, *Eureko v. Slovakia* (Award n.y.p.) – to mention but a few.

[14] See: « Italy, Slovenia and Malta concur with Czech Republic on lack of necessity for intra-EU BITs; Italy-Czech treaty has been terminated », Investment Arbitration Reporter, 6 August 2009.

[15] See de Mestral, Is a model EU BIT possible — or even desirable? Columbia FDI (2010) 21, available at: http://www.vcc.columbia.edu/, and especially the letter addressed by the Economic and Finance Committee to the Council of the EU of 2009 ('[m]ost member states did not share the Commission's concern regarding arbitration risks and discriminatory treatment of investors and a clear majority of member states preferred to maintain the existing agreements'). See also 'EU Member States Reject the Call to Terminate Intra-EU Bilateral Investment Treaties,' Investment Treaty News, 10 February 2009 and Antell / Carlson / Haworth McCandless , The European Commission and Investment Treaties, The European & Middle Eastern Arbitration Review 2010, online at: http://www.globalarbitrationreview.com.

[16] See, ECJ, Case C-205/06, *Commission v Austria,* [2009] ECR I, 1301, ECJ, Case C-249/06, *Commission v Sweden,* [2009] ECR I, 1335 and EJC, Case C-118/07 *Commission v Finland,* [2009] ECR I, 10889.

[17] The termination by Malta took effect on 23 February 2005, published in: Amtliche Sammlung des Bundesrechts der Schweiz (AS) 2005, 1163.

On the whole it seems understandable that those countries that in the past developed a broad network of BITs with the intention to protecting their investors abroad are rather reluctant to easily abandon these tools. They want to make sure that the EU itself is able and willing to provide an equally comprehensive network and level of protection. This is particularly true for BITs concluded with developing countries (including certain BRICs) while the problem is relevant with regard to OECD countries where normally no BITs exist (even if more recently this trend is no longer clear since certain BRIC countries have joined the OECD—like Korea or Mexico—and some developed states have decided to conclude investment rules, as e.g. in the FTA between Japan and Switzerland or, of course, earlier between Canada and the US through NAFTA). When it comes to negotiations with BRICs which seem particularly interesting for FTAs the question what can and shall be done in the area of investment in view of the existence of many BITs is particularly relevant. In its "Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries" of 7 July 2010 the Commission had made suggestions on how to deal with the existing BITs concluded by EU members. In a nutshell it was accepted that these could stay in force and even be negotiated as long as they did not jeopardize the EU's ability to negotiate its own rules. This left open the option, however, to force Member States to terminate existing agreements or at least to renegotiate them.[18] The question is, however, what impact this will have on future negotiations—so far it seems that EU Member State have been able to continue to negotiate BITs (such as Germany when it renegotiated its BIT with Pakistan in December 2009) and the EU has started to include more detailed provisions in its FTAs (such as in the FTA with Korea of 6 October 2010, Article 7.9 et seqq.)

Future BITs and Investment Chapters in FTAs with Third States

As explained in detail in this volume the exact scope of the EU's competence with regard to FDI remains somewhat unclear.[19] In the Agreement signed with Korea on 6 October 2010 the EU has continued to focus on so-called establishment rules—as it had been the tradition in the past—although in a somewhat more detailed manner (Art. 7.9 et. seqq.) and the existing investment rules between some of its members

[18] "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions towards a Comprehensive European International Investment Policy", 7 July 2010, final As well as "Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries", 7 July 2010, COM(2010)344 final.

[19] See de Mestral, The Lisbon Treaty and the expansion of EU competence over foreign direct investment and the implications for investor-state arbitration, in: Sauvant (ed.), Yearbook on International Investment Law & Policy 2009–2010, 2010, Ch. 10.

and Korea were declared to stay in force and take precedence over the new FTA (Art. 7.15 Letter b). The door is left open, however, for the future negotiation of a comprehensive BIT between the EU and Korea (Art. 7.16).

In its "Communication from the Commission towards a comprehensive European international investment Policy" published on 7 July 2010, the European Commission advertised its intention to soon start negotiations of comprehensive investment rules in FTAs, e.g. in the envisaged agreements with Canada, India and Mercosur. All these negotiations have been difficult however (not necessarily due to the envisaged investment rules) and thus no texts have been released so far. In the medium term the European Commission would also like to start negotiations of pure investment agreements with important partners such as China and Russia. So far the Commission has declared to want to achieve a high standard of protection—probably the only means to convince traditional capital exporting countries with an extensive network of agreements to accept their lead. It seems that this could include transfer clauses, the protection of IPR, MFN, "full protection and security" as well as "fair and equitable treatment", high levels of protection relating to expropriations and even so-called "umbrella clauses". Knowing all the problems that have arisen with regard even to previously accepted standards this seems already challenging at this point. On the other hand, the Commission has taken up current debates on the enhanced protection of states when it comes to their right to regulate and protection against frivolous claims by investors. Both areas will certainly be subject to considerable debate among the Member States as it is already clear from recent modifications (and the resulting controversies) of model BITs by other States such as the United States or Norway.

An idea of how difficult it can be to negotiate investment rules as a group can be obtained from the experience of the EFTA countries in the past.[20] As Switzerland and Norway were normally not able to overcome their differences regarding the desirable standards to be included in agreements with third States, they were only once able to include a more detailed chapter on investment in such an agreement, namely with Singapore.[21] In all other cases these provisions had to remain very basic (e.g. with Mexico)[22] or the investment rules had to be negotiated in separate bilateral agreements by certain EFTA States and the respective third country

[20] Of particular relevance will certainly be the inclusion of the public interest, namely democracy, human rights, rule of law, the environment in BITs; see, for example, Maes, Reclaiming the public interest in Europe's international investment policy: Will the future EU BITs be any better than the 1'200 existing BITs of EU member states? Investment Treaty News, September 23, 2010, available at: http://www.iisd.org. The new role of the European Parliament in the area of the common commercial policy will enhance this debate, see Kerremans / Orbie, The Social Dimension of European Union Trade Policies, European Foreign Affairs Review 14 (2009) 5, p. 629.

[21] Agreement between the EFTA States and Singapore of 26 June 2002, Articles 37-49. See Ziegler, Dispute Settlement in Bilateral Trade Agreements: the EFTA Experience, in: Bartels / Ortino (eds.), *Regional Trade Agreements and the WTO*, 2007, p. 407.

[22] Essentially using the model developed by the EU with this country, see above. See in general on the EFTA Third Country Agreements: Ziegler, *Wirtschaftsvölkerrecht der Schweiz – (eine Einführung unter Einschluss des Aussenwirtschaftsrechts)*, 2010.

(e.g. Korea).[23] It became normally clear that the absence of agreement between the EFTA States made it impossible to adopt a common negotiating position and to include common language applicable to all parties. It remains to be seen whether the EU Member States can overcome this challenge.

At the same time, the approach chosen by EFTA could show a way how despite the objective of negotiating common rules, separate rules may co-exist with the common agreement. The separate rules could be (renegotiated) BITs where they already exist or even additional BITs by EU Member States that do not yet have them in place with the third country concerned—although this may not be the declared goal of the Commission—at least not in the medium and long run.[24] It is clear that the European Commission must be able to negotiate the traditional investor-State dispute settlement mechanisms contained traditionally in most BITs, even if some states have become more cautious as to their scope. While the use of ad hoc proceedings using UNCITRAL Rules seems less problematic, the use of the ICSID mechanisms remains problematic in view of the fact that the EU is not (and cannot become for the time being) a member of the ICSID-Convention. The ICSID mechanism remains highly popular among certain investors and it would be difficult to convince EU investors that they should completely abandon it. Although there are difficult questions relating to some of its provision (like the definition of investment, the scope of annulment etc.) the fact that ICSID awards are not subject to domestic appeals and are automatically enforceable in ICSID Member States are interesting features. Open questions remain also regarding the payment of damages resulting from an award against the EU due to the behavior of a specific Member State.

BITs as an Instrument to Enhance Competitiveness

The many open questions relating to the exact content and form of future EU investment rules with third States as well as the unclear relationship with the existing agreements of the Member States may lead to considerable uncertainty among investors. If one considers that BITs can increase investment flows and that they are tools that are important for investors when deciding where to invest and how to structure their investments this may have considerable implications for the attractiveness of the EU as a place from where to invest. Many EU companies have a major stake in infrastructure projects, especially in the growing markets in

[23] Free Trade Agreement between the EFTA States and the Republic of Korea of 15 December 2005, Article 1.4 Investment: « Regarding investment, reference is made to the agreement on investment separately concluded between Korea, on the one hand, and Iceland, Liechtenstein and Switzerland, on the other. This agreement shall for these Parties form part of the instruments establishing the free trade area ».

[24] See the Rules contained in the Agreements with Mexico as concluded by the EU and the EFTA-States (see above) and the parallel BITs of certain EFTA- and EU-States with Mexico.

emerging economies and developing countries (transport, energy, housing, telecommunication, production facilities etc.). Recent disputes have shown that the existence of BITs can be of high relevance when it comes to disputes relating to such projects. The existence of a BIT of a high quality can be of considerable importance when it comes to the decision from where the respective investment shall be made in order to benefit from the protection of such a treaty. When it comes to investments in countries such as Canada, Korea, China, India, Singapore or Brazil such agreements could be highly valued.

If the EU does not manage to quickly convince investors that either the existing BITs of its members or the new EU FTAs do provide a good protection, investors might prefer to use vehicles in countries that do satisfy their needs in a less ambiguous way. Although this sometimes labeled as "Treaty-" or "Forum-Shopping" it is acceptable up to a certain degree and especially common for MNEs of a certain size. Normally such a planification of investment flows has also certain tax effects—a topic particularly challenging in times of financial distress.[25]

[25] See the tensions that exist between Switzerland and the EU when it comes to the specific tax privileges for so-called holding companies; see "Antwort des schweizerischen Bundesrates vom 18.2.2009 auf die Interpellation Felix Müri (Steuerstreit. Haltung des Bundesrates)", available at: http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20083954.